

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 754

(Delegate Kipke, *et al.*)

Health and Government Operations

Finance

Health Insurance and Pharmacy Benefits Managers - Cost Pricing and
Reimbursement

This emergency bill prohibits a contract (or contract amendment) between a pharmacy benefits manager (PBM), a pharmacy services administration organization, or a group purchasing organization (GPO) and a pharmacy from becoming effective unless (1) the contract or amendment is filed with the Insurance Commissioner at least 30 days before it is to become effective and (2) the Commissioner does not disapprove the filing within 30 days after the contract or amendment is filed. The Commissioner must adopt specified regulations. The bill also specifies requirements relating to appeals and disputes regarding maximum allowable cost (MAC) and cost pricing and reimbursement. The bill repeals authorization for a PBM to retroactively deny or modify reimbursement to a pharmacy or pharmacist if the claim otherwise caused monetary loss to the PBM, provided that the PBM allowed the pharmacy a reasonable opportunity to remedy the cause of the monetary loss.

Fiscal Summary

State Effect: No likely effect in FY 2019; instead, special fund revenues for the Maryland Insurance Administration (MIA) increase minimally in FY 2020 only from the \$125 rate and form filing fee. MIA can handle the bill's requirements with existing budgeted resources. General fund revenues increase by an indeterminate amount likely beginning in FY 2020 to the extent the Commissioner imposes existing fines on PBMs, as discussed below. Any impact on the State Employee and Retiree Health and Welfare Benefits Program is indeterminate.

Local Effect: The bill likely does not materially affect local government finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: “Compensation program” means a program, policy, or process through which sources and pricing information are used by a PBM to determine the terms of payment as stated in a participating pharmacy contract.

For disputes regarding MAC pricing, each participating pharmacy contract must include a process to appeal, investigate, and resolve disputes regarding MAC pricing. A PBM must provide the mathematical calculation used to determine the MAC.

For disputes regarding cost pricing and reimbursement, each participating pharmacy contract must include a process to appeal, investigate, and resolve disputes regarding cost pricing and reimbursement. The process must include:

- a requirement that an appeal be filed no later than 21 days after the date a direct or indirect remuneration fee is charged or another date as determined by the Commissioner;
- a requirement that a PBM make available on its website specified information about the appeals process;
- a requirement that a PBM provide a reason for any appeal denial and the mathematical calculation used to determine reimbursement; and
- if an appeal is upheld, a requirement that a PBM (1) make adjustments as necessary to comply with the compensation program as stated in the participating pharmacy contract as of the date the appeal was determined and (2) provide notice to the pharmacy or the pharmacy’s contracted agent that an appeal has been upheld.

The bill harmonizes other PBM provisions related to cost pricing and reimbursement with existing provisions for MAC pricing, specifically regarding a prohibition against retaliation, a prohibition against charging a fee for the readjudication of claims, and a requirement that the Commissioner review the compensation program in response to a complaint and then take specified actions.

If a PBM denies an appeal regarding MAC pricing or cost pricing and reimbursement under a participating pharmacy contract, a contracted pharmacy *or the designee of the contracted pharmacy* may file a complaint with the Commissioner. On request, the PBM must provide the Commissioner all mathematical calculations, accounts, records, documents, files, logs, correspondence, or other information necessary to complete the Commissioner’s review. *All* information (not just pricing information) and data collected by the Commissioner during a review is confidential and proprietary and not subject to disclosure under the Public Information Act.

A PBM or a purchaser may not directly or indirectly charge a contracted pharmacy, or hold a contracted pharmacy responsible for, a fee or performance-based reimbursement related to the adjudication of a claim or an incentive program that is not (1) specifically enumerated by the PBM or purchaser at the time of claim processing or (2) reported on the initial remittance advice of an adjudicated claim. This provision applies to PBMs that contract with managed care organizations in the same manner as PBMs that contract with carriers.

The bill specifies that it is a violation of Title 15, Subtitle 16 of the Insurance Article for a PBM to (1) misrepresent pertinent facts or policy provisions that relate to a claim or the compensation program at issue in a complaint or an appeal of a decision regarding a complaint; (2) refuse to pay a claim for an arbitrary or capricious reason based on all available information; (3) fail to settle a claim or dispute promptly whenever liability is reasonably clear under one part of a policy or contract, in order to influence settlements under other parts of the policy or contract; or (4) fail to act in good faith.

Furthermore, it is a violation for a PBM, when committed at a frequency to indicate a general business practice, to (1) misrepresent pertinent facts or policy provisions that relate to a claim, the compensation program, or the coverage at issue in a complaint or an appeal of a decision regarding a complaint; (2) fail to make a prompt, fair, and equitable good-faith attempt to settle claims for which liability has become reasonably clear; (3) fail to settle a claim promptly whenever liability is reasonably clear under one part of a policy or contract, in order to influence settlements under other parts of the policy or contract; or (4) refuse to pay a claim for an arbitrary or capricious reason based on all available information.

Current Law:

Pharmacy Benefits Managers

A PBM is a business that administers and manages prescription drug benefit plans for purchasers. A PBM must register with MIA prior to providing pharmacy benefits management services. The Insurance Commissioner is authorized to examine the affairs, transactions, accounts, and records of a registered PBM at the PBM's expense.

Appeals Related to Maximum Allowable Cost Pricing

Each contract between a PBM and a contracted pharmacy must include a process to appeal, investigate, and resolve disputes regarding MAC pricing. This process must meet several requirements. An appeal must be filed by the contract pharmacy no later than 21 days after the date of the initial adjudicated claim. Within 21 days after the date the appeal is filed, the PBM must investigate and resolve the appeal and report to the contracted pharmacy on the PBM's determination. A PBM must make available on its website specified information about the appeals process. A PBM must provide, in addition to a reason for any appeal

denial, the national drug code of a drug and the name of the wholesale distributor from which the drug was available on the date the claim was adjudicated at a price at or below the MAC determined by the PBM. If an appeal is upheld, a PBM must, for the appealing pharmacy, adjust the MAC in a specified manner and provide specified reimbursement for claims and, for a similarly situated contracted pharmacy in the State, adjust the MAC in a specified manner and provide specified notice of the contracted pharmacy's right to reverse and rebill specified claims.

A PBM may not retaliate against a contracted pharmacy for exercising its right to appeal a MAC price or filing a complaint with the Commissioner. A PBM may not charge a contracted pharmacy a fee related to the readjudication of a claim or claims resulting from an appeal related to MAC pricing.

If a PBM denies an appeal and a contracted pharmacy files a complaint with the Commissioner, the Commissioner must (1) review the compensation program of the PBM to ensure that the reimbursement paid to the pharmacist or pharmacy complies with specified law and the terms of the contract and (2) based on this determination, dismiss the appeal or uphold the appeal and order the PBM to pay the claim or claims in accordance with the Commissioner's findings. All pricing information and data collected by the Commissioner during such a review is confidential and proprietary and not subject to disclosure under the Public Information Act.

Retroactive Denial or Modification of Claims

Except for an overpayment, if a claim has been approved by a PBM through adjudication, the PBM may not retroactively deny or modify reimbursement to a pharmacy or pharmacist for the approved claim unless (1) the claim was fraudulent; (2) the pharmacy or pharmacist had been reimbursed for the claim previously; (3) the services reimbursed were not rendered by the pharmacy or pharmacist; or (4) the claim otherwise caused monetary loss to the PBM, provided that the PBM allowed the pharmacy a reasonable opportunity to remedy the cause of the monetary loss.

Violations of Title 15, Subtitle 16 of the Insurance Article

If the Commissioner determines that a PBM has violated any provision of the subtitle (or any regulation adopted under the subtitle), the Commissioner may order a PBM to (1) cease and desist; (2) take specific affirmative corrective action; (3) make restitution of money, property, or assets; or (4) pay a fine in an amount determined by the Commissioner. In addition to any other enforcement action taken by the Commissioner, the Commissioner may impose a civil penalty of up to \$10,000 for each violation of the subtitle.

State Revenues: General fund revenues increase by an indeterminate amount likely beginning in fiscal 2020 to the extent the Commissioner exercises the authority to impose a fine (in an amount determined by the Commissioner) on a PBM if the Commissioner determines that a PBM has violated any provision of law or regulations.

Small Business Effect: Small business pharmacies that contract with PBMs, pharmacy services administration organizations, or GPOs gain additional protections under the bill.

Additional Information

Prior Introductions: HB 1290 of 2018, a similar bill, was withdrawn. Its cross file, SB 1074, was withdrawn. HB 1103 of 2017, a similar bill, received a hearing in the House Health and Government Operations Committee but was withdrawn. Its cross file, SB 1055, was withdrawn.

Cross File: None.

Information Source(s): Department of Budget and Management; Maryland Department of Health; Maryland Health Benefit Exchange; Maryland Insurance Administration; Department of Legislative Services

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