New Federal Laws Banning “Gag Clauses” in the Pharmacy

Friday, October 19, 2018

On October 10, 2018, President Donald Trump signed into law the “Know the Lowest Price Act” and the “Patients’ Right to Know Drug Prices Act,” which aim to improve consumer access to drug price information by banning gag clauses. The Trump administration previously announced its intention to enact this legislation in its May 2018 Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs and will likely point to these new federal laws as affirmation of its commitment to drug pricing reform that favors patients and consumers.

These bills—one of which applies to Medicare and the other to commercial insurance plans—ban “gag order” clauses in contracts between pharmacies and pharmacy benefit managers (“PBMs”) that are designed to prevent pharmacists from disclosing to a patient at the pharmacy point of sale whether or not a drug’s cash price would be lower than the patient’s cost-sharing burden under his or her insurance plan. Pharmacies that had violated contractual gag orders have traditionally risked losing their network contracts with PBMs or faced other sanctions. Under these new federal laws, pharmacists are not required to disclose information about lower costs but cannot be contractually obligated to keep quiet regarding possible patient cost savings. The bill affecting Medicare beneficiaries will go into effect on January 1, 2020, while the bill banning “gag order” clauses for commercial insurance contracts took effect immediately upon signing by President Trump.

These new federal bans on pharmacy gag clauses represent a significant reform at the federal level and a victory for pharmacy interests, which have long decried these clauses as unfairly intruding into pharmacy practice. This federal reform has broad bipartisan support, as reflected by the Senate’s passage of the bills by a resounding vote of 98-2. Thus, in contrast to some of the other proposed reforms in the Trump administration’s Blueprint, including PBM fiduciary duties and restrictions on manufacturer rebates, the gag clause issue represents “low-hanging fruit” for the administration’s efforts at drug pricing reform.

While these new federal laws will ensure and promote transparency between pharmacists and patients and the potentially improved disclosure of pricing information, it is unclear whether these new federal laws will dramatically reduce costs for consumers. Some industry observers have questioned whether PBMs still routinely impose “gag order” clauses in pharmacy agreements and the extent to which they are actually enforced by the PBM and adhered to by a pharmacy. In a statement to CNN,[1] Mark Merritt, president and CEO of the Pharmaceutical Care Management Association, said that “gag order” clauses are “very much an outlier.” Likewise, a spokesman for Express Scripts, the nation’s largest PBM, expressed support for the ban and noted that Express Scripts does not engage in this “anti-consumer practice.”[2] Additionally, many states already had passed their own laws banning “gag order” clauses in the past two years, meaning that many PBMs operating across state lines already had begun to reduce their use of gag orders in order to comply with these state laws.[3] Further, the legislation does not directly regulate the actual pricing of prescription drugs.
These new federal laws will provide the Trump administration and members of Congress with an important talking point during these 2018 midterm elections. In the meantime, industry observers are closely monitoring other developments relating to the Blueprint and whether additional, and perhaps more controversial, reforms will be implemented in the near future.


©2019 Epstein Becker & Green, P.C. All rights reserved.