PBM Regulatory Roundup (Summer 2022): States Continue PBM Oversight Activities

Article By

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Louisiana's Complaint Against UnitedHealthcare and OptumRx

In April 2022, the Louisiana Attorney General (AG) filed suit against United Healthcare of Louisiana (UHC) and Optum Rx, Inc. (Optum), alleging that UHC and Optum engaged in business practices that increased drug prices and Louisiana's Medicaid program costs over time.

The AG outlined a series of background facts indicating that a perceived lack of transparency from UHC was the driving force behind Louisiana's complaint. The AG alleged that UHC and Optum used deceptive practices to misrepresent the cost of pharmacy services, causing Louisiana to make inflated payments to UHC. The AG claimed that both parties created opaque contracts to conceal payments and services. Further, the AG alleged that the parties failed to comply with state agency requests for records and state Medicaid rebate and reimbursement terms.

The AG argued that these activities violate a number of laws, including violations of contractual obligations, State Medicaid regulations, the Louisiana Unfair Trade Practices Act, and the Louisiana Medical Assistance Program Integrity Law.

UHC and Optum responded and argued that the AG has no right of action to bring its breach of contract claims, as it is not a party to either contract, and further, that there is no cause of action for any of the AG's claims. UHC and Optum set forth that the AG's complaint is premature and unsupported, as it did not meaningfully engage with UHC or Optum during its request for information. We will continue to monitor this case and provide updates.

State Legislative Update

States continue to enact legislation aimed at (1) increasing pharmacy price transparency, (2) regulating pharmacy reimbursement amounts, and (3) setting parameters for contracts between PBMs and plans or pharmacies. Since our last update, more than 14 states have introduced or enacted legislation in this area. Here is a sampling of newly enacted state legislation:

<table>
<thead>
<tr>
<th>State</th>
<th>Measure</th>
<th>Status</th>
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<td></td>
<td>HB 1370: (1) prohibits PBMs from modifying a current prescription drug</td>
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<tr>
<td>State</td>
<td>Legislation/Description</td>
<td>Signed into law</td>
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<td>Colorado</td>
<td>(1) Requires health plans and their PBMs to use 100% of estimated rebates received to reduce policyholder costs; and (2) Sets forth standards and criteria for the licensure and regulation of PBMs operating in the state.</td>
<td>Signed into law on May 18, 2022.</td>
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<td>Florida</td>
<td>(1) Revises and clarifies requirements and restrictions that apply to health plans and PBMs that audit pharmacy records; and (2) Imposes a $10,000 per violation penalty for not registering as a PBM.</td>
<td>Signed into law on June 20, 2022.</td>
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<td>Nebraska</td>
<td>(1) Requires health plans and their PBMs to use 100% of estimated rebates received to reduce policyholder costs; and (2) Sets forth standards and criteria for the licensure and regulation of PBMs operating in the state.</td>
<td>Signed into law on March 16, 2022.</td>
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<tr>
<td>Legislation</td>
<td>Description</td>
<td>Effective Dates</td>
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<td>SB 737</td>
<td>amends certain existing state statutes to (1) prohibit PBMs from using spread pricing; (2) restrict fees that PBMs can charge to pharmacists or pharmacies; and (3) impose new reporting requirements on PBMs, which require disclosures to both PBM clients and the Oklahoma Insurance Commissioner.</td>
<td>Signed into law on April 21, 2022. Effective April 21, 2022.</td>
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<td>HB 2661</td>
<td>prohibits PBMs from reimbursing their contracted pharmacies for any amounts less than the actual cost of the drug to the applicable contracted pharmacy; (2) mandates that PBMs operating</td>
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in the state establish reimbursement appeals processes that meet certain requirements and be approved by the state’s commissioner of commerce and insurance; (3) prohibits PBMs from interfering with a patient’s right to choose a contracted pharmacy or provider; and (4) sets forth additional requirements and restrictions that apply to PBMs establishing pharmacy networks.

HB 353: (1) establishes that PBMs owe a fiduciary duty to their health insurer clients and prohibits certain provisions in contracts between PBMs and health insurers; (2) expands prohibitions on “gag clauses” in PBM contracts with pharmacies and pharmacists; (3) mandates that PBMs allow
Vermont

HB 4112: imposes new state

pharmacies certain appeal rights and provides additional rights to pharmacies during a PBM audit; (4) prohibits PBMs from reimbursing pharmacies in state less than they would reimburse their affiliates for the same services; (5) prohibits PBMs from interfering with a patient’s right to choose a pharmacy of their choice (e.g., PBM’s attempt to require use of mail-order or affiliate pharmacy is prohibited); and (6) prohibits PBMs from having network requirements that are more restrictive than or inconsistent with state or federal law or that would prohibit a pharmacy or pharmacist from dispensing or prescribing certain drugs.

Signed into law on May 24, 2022. Effective January 1, 2023 (with certain sections applicable to state Department of Financial Regulation effective 5/24/2022)
West Virginia requirements on PBMs, including, among other things, (1) licensure of PBMs, (2) prohibition on PBMs from penalizing for providing information related to lower cost alternatives and cost share, (3) a prohibition on PBMs from reimbursing pharmacies or pharmacists in an amount less than the amount they would reimburse themselves or an affiliate, and (4) a maximum allowable cost methodology reporting requirement, which must be submitted in connection with a PBM’s initial application for licensure.


*Derek Flynn, Shaina Sikka also contributed to this article*

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