

LEGISLATURE OF NEBRASKA
ONE HUNDRED SEVENTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 375

Introduced by Kolterman, 24.

Read first time January 13, 2021

Committee: Banking, Commerce and Insurance

- 1 A BILL FOR AN ACT relating to pharmacy benefit managers; to amend section
- 2 71-2484, Revised Statutes Cumulative Supplement, 2020; to adopt the
- 3 Pharmacy Benefit Manager Regulation and Transparency Act; to change
- 4 provisions relating to pharmacy benefit managers; to harmonize
- 5 provisions; and to repeal the original section.
- 6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 12 of this act shall be known and may be
2 cited as the Pharmacy Benefit Manager Regulation and Transparency Act.

3 Sec. 2. Section 71-2484, Revised Statutes Cumulative Supplement,
4 2020, is amended to read:

5 ~~71-2484 (1)~~ For purposes of the Pharmacy Benefit Manager Regulation
6 and Transparency Act ~~this section~~:

7 (1) ~~(a)~~ Contracted pharmacy means a pharmacy located in this state
8 that participates either in the network of a pharmacy benefit manager or
9 in a health care or pharmacy benefits management plan through a direct
10 contract or through a contract with a pharmacy services administration
11 organization, a group purchasing organization, or another contracting
12 agent;

13 (2) ~~(b)~~ Covered entity means (a) ~~(i)~~ a nonprofit hospital or medical
14 services corporation, an insurer, a third-party payor, a managed care
15 company, or a health maintenance organization, (b) ~~(ii)~~ a health program
16 administered by the state in the capacity of provider of health insurance
17 coverage, or (c) ~~(iii)~~ an employer, a labor union, or any other group of
18 persons organized in the state that provides health insurance coverage;

19 (3) ~~(c)~~ Covered individual means a member, participant, enrollee,
20 contract holder, policyholder, or beneficiary of a covered entity who is
21 provided health insurance coverage by the covered entity and includes a
22 dependent or other person provided health insurance coverage through a
23 policy, contract, or plan for a covered individual;

24 (4) Department means the Department of Insurance;

25 (5) Director means the Director of Insurance;

26 (6) Generically equivalent drug means a drug that is
27 pharmaceutically and therapeutically equivalent to the drug prescribed;

28 (7)(a) ~~(d)(i)~~ Insurer means any person providing life insurance,
29 sickness and accident insurance, workers' compensation insurance, or
30 annuities in this state; and -

31 (b) (ii) Insurer includes an authorized insurance company, a prepaid

1 hospital or medical care plan, a managed care plan, a health maintenance
2 organization, any other person providing a plan of insurance subject to
3 state insurance regulation, and an employer who is approved by the
4 Nebraska Workers' Compensation Court as a self-covered entity;

5 (8) Pharmaceutical wholesaler means a person or entity that sells
6 and distributes prescription pharmaceutical products, including, but not
7 limited to, a full line of brand name, generic, and over-the-counter
8 pharmaceuticals, and that offers regular and private delivery to a
9 pharmacy;

10 (9) ~~(e)~~ Pharmacist has the same meaning as in section 38-2832;

11 (10) Pharmacist services means products, goods, and services, or any
12 combination of products, goods, and services, provided as a part of the
13 practice of pharmacy;

14 (11) ~~(f)~~ Pharmacy has the same meaning as in section 71-425;

15 (12) Pharmacy acquisition cost means the amount that a
16 pharmaceutical wholesaler charges for a pharmaceutical product as listed
17 on the pharmacy's billing invoice;

18 (13) Pharmacy benefit management means the administration or
19 management of prescription drug benefits provided by a covered entity
20 under the terms and conditions of the contract between the pharmacy
21 benefit manager and the covered entity;

22 (14)(a) ~~(g)~~ Pharmacy benefit manager means a person or an entity
23 that performs pharmacy benefits management services for a covered entity
24 and includes any other person or entity acting on behalf of a pharmacy
25 benefit manager pursuant to a contractual or employment relationship; and

26 (b) Pharmacy benefit manager does not include (i) a health insurer
27 licensed in the state if the health insurer or its subsidiary is
28 providing pharmacy benefit management services exclusively to its own
29 insureds or (ii) a public self-funded pool or a private single-employer
30 self-funded plan that provides pharmacy benefit management services
31 directly to its beneficiaries;

1 (15) Pharmacy benefit manager affiliate means a pharmacy or
2 pharmacist that directly or indirectly, through one or more
3 intermediaries, owns or controls, is owned or controlled by, or is under
4 common ownership or control with a pharmacy benefit manager; and

5 ~~(h) Pharmacy benefits management means the administration or~~
6 ~~management of prescription drug benefits provided by a covered entity~~
7 ~~under the terms and conditions of the contract between the pharmacy~~
8 ~~benefit manager and the covered entity; and~~

9 (16) (i) Prescription drug means a prescription drug or device or
10 legend drug or device as defined in section 38-2841.

11 ~~(2) A pharmacist or contracted pharmacy shall not be prohibited from~~
12 ~~or subject to penalties or removal from a network or plan for sharing~~
13 ~~information regarding the cost, price, or copayment of a prescription~~
14 ~~drug with a covered individual or a covered individual's caregiver. A~~
15 ~~pharmacy benefit manager shall not prohibit or inhibit a pharmacist or~~
16 ~~contracted pharmacy from discussing any such information or selling a~~
17 ~~more affordable alternative to a covered individual or a covered~~
18 ~~individual's caregiver.~~

19 ~~(3) An insurer that offers a health plan which covers prescription~~
20 ~~drugs shall not require a covered individual to make a payment for a~~
21 ~~prescription drug at the point of sale in an amount that exceeds the~~
22 ~~lesser of:~~

23 ~~(a) The covered individual's copayment, deductible, or coinsurance~~
24 ~~for such prescription drug; or~~

25 ~~(b) The amount any individual would pay for such prescription drug~~
26 ~~if that individual paid in cash.~~

27 Sec. 3. (1) A pharmacy benefit manager doing business in this state
28 shall obtain a certificate of authority as a third-party administrator
29 under the Third-Party Administrator Act and shall be subject to both the
30 Third-Party Administrator Act and the Pharmacy Benefit Manager Regulation
31 and Transparency Act.

1 (2) In addition to the fees required under the Third-Party
2 Administrator Act, a pharmacy benefit manager shall pay to the director a
3 certification fee established by the director. The certification fee
4 shall be set to allow the oversight activities required under the
5 Pharmacy Benefit Manager Regulation and Transparency Act to be self-
6 supporting, but such fee shall not exceed five thousand dollars.

7 (3) The director shall enforce the Pharmacy Benefit Manager
8 Regulation and Transparency Act. After notice and hearing, the director
9 may suspend or revoke a pharmacy benefit manager's certificate of
10 authority as a third-party administrator upon finding that the pharmacy
11 benefit manager violated any of the requirements of the Third-Party
12 Administrator Act or the Pharmacy Benefit Manager Regulation and
13 Transparency Act.

14 (4) In addition to other remedies and penalties available under the
15 law of this state, each violation of the Pharmacy Benefit Manager
16 Regulation and Transparency Act shall be an unfair trade practice in the
17 business of insurance subject to the Unfair Insurance Trade Practices
18 Act.

19 (5) The director may examine the financial condition, affairs, and
20 management of any pharmacy benefit manager pursuant to the Insurers
21 Examination Act.

22 Sec. 4. A pharmacy benefit manager shall exercise good faith and
23 fair dealing in performing its duties under a contract with a covered
24 entity or a contracted pharmacy.

25 Sec. 5. (1) A pharmacy benefit manager shall be prohibited from
26 charging or collecting from a covered individual a copayment for a
27 prescription or pharmacy service that exceeds the amount retained by the
28 network pharmacy from all payment sources for filling the prescription or
29 providing the service. Any amount paid by a covered individual pursuant
30 to this section shall be applied toward any deductible the covered
31 individual has under such individual's health plan.

1 (2) A pharmacy benefit manager shall not exclude a Nebraska pharmacy
2 from participation in its specialty pharmacy network as long as the
3 pharmacy is willing to accept the terms of the pharmacy benefit manager's
4 agreement with its specialty pharmacies. A licensed pharmacy or a
5 licensed pharmacist may dispense prescription drugs that are allowed
6 pursuant to the license.

7 (3) A pharmacy benefit manager shall not prohibit a pharmacist or
8 contracted pharmacy from mailing a prescription drug to a covered
9 individual at any location requested by the covered individual.

10 (4) A pharmacy benefit manager shall not mandate accreditation for a
11 contracted pharmacy as a prerequisite to (a) mailing a prescription drug
12 to a covered individual or reimbursing the contracted pharmacy for such
13 drug or (b) participating in a network or plan.

14 Sec. 6. If a covered individual or pharmacist receives incorrect,
15 misleading, or inaccurate information from a pharmacy benefit manager or
16 a vendor or agent of the pharmacy benefit manager, the covered individual
17 or pharmacist may contact the department and request corrective actions
18 or sanctions from the director against the pharmacy benefit manager or
19 the vendor or agent. The cost of the corrective actions or sanctions
20 shall be the responsibility of the pharmacy benefit manager.

21 Sec. 7. (1) A pharmacy benefit manager shall not mandate to
22 contracted pharmacies basic record keeping that is more stringent than
23 that required by state or federal law or regulation.

24 (2) Within seven days after a price increase or decrease
25 notification by a manufacturer, supplier, or nationally recognized
26 source, a pharmacy benefit manager shall adjust its payment to the
27 contracted pharmacy consistent with the price increase or decrease.

28 (3) A pharmacy benefit manager shall accept into its network any
29 pharmacy or pharmacist if the pharmacy or pharmacist is licensed in good
30 standing with the State of Nebraska. The pharmacy benefit manager shall
31 not discriminate against the pharmacy or pharmacist with terms and

1 conditions with regard to the class of trade.

2 Sec. 8. A pharmacist or contracted pharmacy shall not be prohibited
3 from or subject to penalties or removal from a network or plan for
4 sharing information regarding the cost, price, or copayment of a
5 prescription drug with a covered individual or a covered individual's
6 caregiver. A pharmacy benefit manager shall not prohibit or inhibit a
7 pharmacist or contracted pharmacy from discussing any such information or
8 selling a more affordable alternative to a covered individual or a
9 covered individual's caregiver.

10 Sec. 9. An insurer that offers a health plan which covers
11 prescription drugs shall not require a covered individual to make a
12 payment for a prescription drug at the point of sale in an amount that
13 exceeds the lesser of:

14 (1) The covered individual's copayment, deductible, or coinsurance
15 for such prescription drug; or

16 (2) The amount any individual would pay for such prescription drug
17 if that individual paid in cash.

18 Sec. 10. (1) An audit of a contracted pharmacy's records by a
19 pharmacy benefit manager shall be conducted in accordance with the
20 following:

21 (a) The pharmacy benefit manager conducting the initial onsite audit
22 or the entity conducting such audit on the pharmacy benefit manager's
23 behalf shall provide the contracted pharmacy written notice at least two
24 weeks prior to conducting the audit. The notice shall be on the official
25 letterhead of the auditing entity and shall include the auditing entity's
26 address and the name, signature, and phone number of the individual in
27 charge of the audit process;

28 (b) Any audit which involves clinical or professional judgment shall
29 be conducted by or in consultation with a pharmacist employed by the
30 pharmacy benefit manager;

31 (c) If a pharmacy benefit manager alleges an overpayment has been

1 made to a contracted pharmacy or pharmacist, the pharmacy benefit manager
2 shall provide the contracted pharmacy or pharmacist sufficient
3 documentation to determine the specific claims included in the alleged
4 overpayment;

5 (d) A contracted pharmacy may use the records of a hospital,
6 physician, or other licensed health care practitioner, written or
7 transmitted by any means of communication, for purposes of validating the
8 contracted pharmacy record with respect to medical orders or refills of a
9 prescription drug;

10 (e) Each contracted pharmacy shall be audited under the same
11 standards and parameters as other similarly situated pharmacies audited
12 by the pharmacy benefit manager;

13 (f) The period covered by an audit shall not exceed two years from
14 the date on which the claim was submitted to or adjudicated by a managed
15 care company, an insurance company, a third-party payor, or any pharmacy
16 benefit manager that represents such company or third-party payor;

17 (g) Unless otherwise consented to by the contracted pharmacy, an
18 audit shall not be initiated or scheduled during the first seven calendar
19 days of any month due to the high volume of prescriptions filled during
20 that time;

21 (h) If a pharmacy benefit manager alleges an overpayment has been
22 made to a contracted pharmacy, the alleged overpayment does not prohibit
23 the contracted pharmacy from billing the covered individual for the drugs
24 and services received. This subdivision does not apply if the drugs or
25 services were never provided, were provided inappropriately, or were
26 provided in violation of state law;

27 (i) The preliminary audit report shall be delivered to the
28 contracted pharmacy within one hundred twenty days after conclusion of
29 the audit. A final written audit report shall be delivered to the
30 contracted pharmacy within six months after the preliminary audit report
31 or final appeal, whichever is later; and

1 (j) A contracted pharmacy shall be allowed at least thirty days
2 following receipt of the preliminary audit report in which to produce
3 documentation to address any discrepancy found during an audit.

4 (2) Notwithstanding any other provision in this section, the entity
5 conducting the audit shall not use the accounting practice of
6 extrapolation in calculating the recuperation of contractual penalties
7 for audits.

8 (3) Recuperation of any disputed funds shall occur only after final
9 disposition of the audit, including the appeals process set forth in
10 subsection (4) of this section.

11 (4) Each pharmacy benefit manager conducting an audit shall
12 establish an appeals process under which a contracted pharmacy may appeal
13 an unfavorable preliminary audit report to the pharmacy benefit manager.
14 If, following the appeal, the pharmacy benefit manager finds that an
15 unfavorable audit report or any portion thereof is unsubstantiated, the
16 pharmacy benefit manager shall dismiss the audit report or the
17 unsubstantiated portion without the necessity of any further proceedings.
18 If, following the appeal, the pharmacy benefit manager finds that an
19 unfavorable audit report or any portion thereof is substantiated, the
20 pharmacy benefit manager shall have in place a process for an independent
21 third-party review of the final audit findings. The pharmacy benefit
22 manager shall notify the contracted pharmacy in writing of its right to
23 request such third-party review and the process the contracted pharmacy
24 should follow to do so.

25 (5) The pharmacy benefit manager or the entity conducting the audit
26 on its behalf shall not receive payment based on a percentage of the
27 amount recovered. The auditing entity may charge the responsible party,
28 directly or indirectly, based on amounts recouped if the covered entity
29 and the entity conducting the audit have a contract and the commission to
30 an agent or employee is based on amounts recouped.

31 (6) A clerical or record-keeping error in a submitted claim shall

1 not be recorded as fraud. The error shall be subject to recoupment of
2 dispensing fees but not the cost of the prescription drug. Errors that
3 have no financial harm to a covered individual or plan shall not result
4 in pharmacy benefit manager chargebacks.

5 (7) Interest shall not accrue during the audit period beginning with
6 the day the audit began and ending with the day the final written audit
7 report is delivered.

8 (8) This section shall not apply to any investigative audit that
9 involves fraud, willful misrepresentation, or abuse or to any other
10 statutory provision which authorizes investigations relating to, but not
11 limited to, insurance fraud.

12 Sec. 11. (1) Before a pharmacy benefit manager places or continues
13 a particular drug on a maximum allowable cost list, the drug:

14 (a) If the drug is a generically equivalent drug, shall be listed as
15 therapeutically equivalent and pharmaceutically equivalent "A" or "B"
16 rated in the United States Food and Drug Administration's most recent
17 version of the Orange Book or Green Book or have an "NR" or "NA" rating
18 by Medi-Span or Gold Standard or a similar rating by a nationally
19 recognized reference;

20 (b) Shall be available for purchase by each pharmacy in the state
21 from national or regional wholesalers operating in Nebraska; and

22 (c) Shall not be obsolete.

23 (2) A pharmacy benefit manager shall:

24 (a) Provide access to its maximum allowable cost list to each
25 pharmacy subject to such list;

26 (b) Update its maximum allowable cost list on a timely basis, but in
27 no event longer than seven calendar days from an increase of ten percent
28 or more in the pharmacy acquisition cost from sixty percent or more of
29 the pharmaceutical wholesalers doing business in the state or a change in
30 the methodology on which the maximum allowable cost list is based or in
31 the value of a variable involved in the methodology;

1 (c) Provide a process for each pharmacy subject to the maximum
2 allowable cost list to receive prompt notification of an update to the
3 list; and

4 (d)(i) Provide a reasonable administrative appeal procedure to allow
5 pharmacies to challenge the maximum allowable cost list and
6 reimbursements made under the maximum allowable cost list for a specific
7 drug or drugs as:

8 (A) Not meeting the requirements of this section; or

9 (B) Being below the pharmacy acquisition cost.

10 (ii) The reasonable administrative appeal procedure shall include
11 the following:

12 (A) A dedicated telephone number, email address, and web site for
13 the purpose of submitting administrative appeals;

14 (B) The ability to submit an administrative appeal directly to the
15 pharmacy benefit manager regarding the pharmacy benefit plan or program
16 or through a pharmacy service administrative organization; and

17 (C) No less than thirty business days to file an administrative
18 appeal.

19 (3) If a challenge is made under subdivision (2)(d)(i) of this
20 section, the pharmacy benefit manager shall within thirty business days
21 after receipt of the challenge either:

22 (a) If the appeal is upheld:

23 (i) Make the change in the maximum allowable cost list payment to at
24 least the pharmacy acquisition cost;

25 (ii) Permit the challenging pharmacy or pharmacist to reverse and
26 rebill the claim in question;

27 (iii) Provide the National Drug Code that the increase or change is
28 based on to the pharmacy or pharmacist; and

29 (iv) Make the change under subdivision (3)(a)(i) of this section
30 effective for each similarly situated pharmacy as defined by the payor
31 subject to the maximum allowable cost list;

1 (b) If the appeal is denied, provide the challenging pharmacy or
2 pharmacist the National Drug Code and the name of the national or
3 regional pharmaceutical wholesalers operating in Nebraska that have the
4 drug currently in stock at a price below the maximum allowable cost as
5 listed on the maximum allowable cost list. If the National Drug Code
6 provided by the pharmacy benefit manager is not available below the
7 pharmacy acquisition cost from the pharmaceutical wholesaler from whom
8 the pharmacy or pharmacist purchases the majority of prescription drugs
9 for resale, then the pharmacy benefit manager shall adjust the maximum
10 allowable cost as listed on the maximum allowable cost list above the
11 challenging pharmacy's pharmacy acquisition cost and permit the pharmacy
12 to reverse and rebill each claim affected by the inability to procure the
13 drug at a cost that is equal to or less than the previously challenged
14 maximum allowable cost.

15 (4)(a) A pharmacy benefit manager shall not reimburse a pharmacy or
16 pharmacist in the state an amount less than the amount that the pharmacy
17 benefit manager reimburses a pharmacy benefit manager affiliate for
18 providing the same pharmacist services.

19 (b) The amount shall be calculated on a per-unit basis based on the
20 same generic product identifier or generic code number.

21 (5) A pharmacy or pharmacist may decline to provide the pharmacist
22 services to a covered individual or pharmacy benefit manager if, as a
23 result of a maximum allowable cost list, a pharmacy or pharmacist is to
24 be paid less than the pharmacy acquisition cost of the pharmacy providing
25 pharmacist services.

26 (6) For purposes of this section:

27 (a) Green Book means the list of approved animal drug products
28 published by the United States Food and Drug Administration;

29 (b) National Drug Code means the National Drug Code published by the
30 United States Food and Drug Administration; and

31 (c) Orange Book means the Approved Drug Products with Therapeutic

1 Equivalence, as published by the United States Food and Drug
2 Administration.

3 Sec. 12. The director may adopt and promulgate rules and
4 regulations to carry out the Pharmacy Benefit Manager Regulation and
5 Transparency Act.

6 Sec. 13. Original section 71-2484, Revised Statutes Cumulative
7 Supplement, 2020, is repealed.