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2023 State PBM Report Card

Medicaid & Commercial Plans: Transparency, Spread, Rebate Pass Through

Relevant Companies

Our Take & Next Up

Year to date ~25 states have passed approx 33 anti-pharmacy benefit managers (PBM) bills, with several impacting ERISA/commercial plans, but none are overly onerous. New York (NY) and Florida (FL) are states with legislation impacting commercial plans: FL regulations are still being drafted for clarity on insurance books impacted (*See our June 12 Florida law note*). We expect additional state-based anti-PBM bills to pass in 2024, as well as federal laws (this fall/winter) reining in middleman business practices. FTC is also studying the Top 6 PBMs, along with GPOs, for a report due in the next 1-2 years. We will watch for the *Mulready* (OK) case this fall, as PCMA challenges a District Court decision involving pre-emption.

Key Points

What is the overall impact? Minimal, for now. Unless there is strict commercial/ERISA plan spread and business practice ban (which is appearing to be unlikely, given recent lawsuits), PBM legislation at the state level is minimally disruptive, for now. PBMs are adept at modifying business practices to adjust to new business norms and regulations – think of the move to fee-based services as spread pricing has largely become a thing of the past in the states.

State bills have targeted the following PBM practices: so-called white-bagging, spread pricing, pharmacy clawbacks, patient steering, transparency, registration, pharmacy discrimination, and patient cost sharing (rebate pass-through). Spread pricing, cost sharing, transparency, and pharmacy discrimination reforms are expected to have a bigger (negative) financial impact on PBMs.

Start dates for new state laws are Fall 2023 into 2024-25. A majority of the new laws have started or will begin by Fall 2023. The others will start 2024-into-2025. Over 40 states pursued anti-PBM legislation this year, with 24 states passing new laws. The remaining bills will be held over to the 2024 legislative year as many legislatures have adjourned for the year. We expect that there will be another wave of state PBM bills considered & passed next year.

Fourteen (14) states are still in session, with 81 bills pending, so there is potential additional legislation to pass this summer/fall. Of the approximately 81 PBM bills pending. 75% are in larger states, such as Arizona, California, Ohio, New York, Massachusetts, and Pennsylvania.

A legal decision that could be game-changing is *Mulready* (Oklahoma) this fall (ERISA plan pre-emption). The *Pharmaceutical Care Management Association v. Mulready* lawsuit in Oklahoma was heard by an appellate panel in May. PCMA is looking to repeal Oklahoma's Patient's Right to Pharmacy Choice Act. PCMA claims the act surpases state jurisdiction regarding ERISA plans and targets multiple provisions including regulations on pharmacy contracts, preferred networks, and rebate pass throughs. The decision will set the boundaries for state regulation over PBMs. We are expecting the final decision to be released this fall. As a reminder, in December of 2022 the Supreme Court case, *Ruttledge v. PCMA*, ruled that ERISA does not preempt Arkansas law to regulate PBMs.

The bottom line: 24 states have passed approximately 33 anti-PBM bills into law, in 2023 year-to-date. The states include: AL, AZ, AR, CO, CT, FL, HI, IA, ID, IN, LA, MD, MT, ND, NM, NV, NY, OK, OR, SC, SD, TX, VA, and WY. For context, 24 bills passed in 15 different states in 2022. This is a significant uptick in state activity and reflects federal lawmaking sentiment, as well.

States are mainly attempting to regulate Medicaid and non-ERISA commercial. During earlier phases of PBM laws, states focused on Medicaid MCOs (managed care organization) and lowering state Medicaid costs. Today, 73% of state PBM bills target commercial drug costs and those that serve commercial plans. For context, in 2023 only ~3% of state legislation impacts Medicaid MCO only and ¼ impact both Medicaid and private insurance.

Rebate Pass-Through: 64% (21 of 33 state bills) require the sharing of rebates, profits, and payments from PBMs to pharmacies to patients. States targeting cost sharing typically require between 50% - 100% of the rebates be passed through to pharmacies and even require penalties for the PBMs that do not cooperate. The impact of this cost-sharing legislation is expected to be minimal, as PBMs are expected to move towards a service fee approach.

Pharmacy Discrimination: Almost half or 45% (15 of 33 bills) seek to prevent PBM pharmacy discrimination with narrower networks. States are banning affiliate-only networks to prevent the development of vertically integrated business practices and end the incentivization of affiliate pharmacies. CVS Caremark is an example of vertical integration in the healthcare system. Caremark (PBM) works directly with affiliated CVS pharmacies, Aetna insurance, as well as CVS sponsored provider networks. States are attempting to regulate pharmacy discrimination by prohibiting any kind of incentive, false information/advertising, and punishment over using one pharmacy to another. Undermining these pharmacy networks is the largest threat to PBMs.

Spread Pricing: 43% (14 of 33 state bills) target commercial & Medicaid spread pricing by PBMs. Spread pricing is when a PBM charges a price to a plan that is greater than pharmacy reimbursement. The difference between the two transactions, also known as "spread," is retained by the PBMs as profit. In 2018, an auditor's OH report found that PBMs were retaining $6.6 M on specialty drugs and $9.8 M on generic drugs through spread practices on managed care plans alone. The state has since banned Medicaid spread pricing. For PBMs, spread pricing accounts for a great portion of revenue and we are expecting PBM response to be changing methods in which they retain revenue.

Transparency: 21% (18 of 33 bills) require PBM cost & price transparency but do not require public website listing. Multiple states are requiring PBMs to disclose all cost and pricing information in a report submitted to the Commissioner of Insurance, state legislatures, specific companies, or an appointed supervisor. Reports include detailed analyses of all fees, payments, rebates, and reimbursements relating to the operations of the PBMs. Transparency measures will not only provide some public access to PBM financials but will also help to prevent PBMs from retaining costs, engaging in white bagging, collecting spread, and releasing clawbacks.

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