

LEGISLATURE OF NEBRASKA
ONE HUNDRED FIFTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 324

Introduced by Kolterman, 24.

Read first time January 12, 2017

Committee: Banking, Commerce and Insurance

- 1 A BILL FOR AN ACT relating to pharmacy; to adopt the Pharmacy Benefit
- 2 Fairness and Transparency Act.
- 3 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 15 of this act shall be known and may be
2 cited as the Pharmacy Benefit Fairness and Transparency Act.

3 Sec. 2. For purposes of the Pharmacy Benefit Fairness and
4 Transparency Act:

5 (1) Clean claim means a claim which is received by a pharmacy
6 benefit manager for adjudication and which requires no further
7 information, adjustment, or alteration by the contracted pharmacy or the
8 covered individual in order to be processed and paid by the pharmacy
9 benefit manager. A claim is a clean claim if it has no defect or
10 impropriety, including any lack of substantiating documentation, or no
11 particular circumstance requiring special treatment that prevents timely
12 payment from being made on the claim. A clean claim includes a
13 resubmitted claim with previously identified deficiencies corrected;

14 (2) Contracted pharmacy means a pharmacy located in this state that
15 participates either in the network of a pharmacy benefit manager or in a
16 health care or pharmacy benefits management plan through a direct
17 contract or through a contract with a pharmacy services organization, a
18 group purchasing organization, or another contracting agent;

19 (3)(a) Covered entity means a nonprofit hospital or medical services
20 corporation, health insurer, managed care company, or health maintenance
21 organization; a health program administered by the state in the capacity
22 of provider of health insurance coverage; or an employer, labor union, or
23 other group of persons organized in the state that provides health
24 insurance coverage.

25 (b) Covered entity does not include a self-funded health insurance
26 coverage plan that is exempt from state regulation pursuant to the
27 federal Employee Retirement Income Security Act of 1974, a plan issued
28 for health insurance coverage for federal employees, a health plan that
29 provides insurance coverage only for accidental injury, specified
30 disease, hospital indemnity, medicare supplemental, disability income, or
31 long-term care, or any other limited benefit health insurance policy or

1 contract;

2 (4) Covered individual means a member, participant, enrollee,
3 contract holder, policyholder, or beneficiary of a covered entity who is
4 provided health insurance coverage by the covered entity and includes a
5 dependent or other person provided health insurance coverage through a
6 policy, contract, or plan for a covered individual;

7 (5) Day means a calendar day unless otherwise defined or limited;

8 (6) Department means the Department of Insurance;

9 (7) Director means the Director of Insurance;

10 (8) Generic drug means a chemically equivalent copy of a brand-name
11 drug with an expired patent;

12 (9)(a) Insurer means any person providing life insurance, sickness
13 and accident insurance, workers' compensation insurance, or annuities in
14 this state.

15 (b) Insurer includes an authorized insurance company, a prepaid
16 hospital or medical care plan, a managed care plan, a health maintenance
17 organization, any other person providing a plan of insurance subject to
18 state insurance regulation, and an employer who is approved by the
19 Nebraska Workers' Compensation Court as a self-covered entity.

20 (c) Insurer does not include a bona fide employee benefit plan
21 established by an employer or an employee organization, or both, for
22 which the insurance laws of this state are preempted pursuant to the
23 federal Employee Retirement Income Security Act of 1974;

24 (10) Pharmacist has the same meaning as in section 38-2832;

25 (11) Pharmacy has the same meaning as in section 71-425;

26 (12)(a) Pharmacy benefit manager means a person or entity performing
27 pharmacy benefits management services for a covered entity and includes a
28 person acting on behalf of a pharmacy benefit manager pursuant to a
29 contractual or employment relationship.

30 (b) Pharmacy benefit manager does not include (i) a health insurer
31 licensed in the state if the health insurer or its subsidiary is

1 providing pharmacy benefits management services exclusively to its own
2 insureds or (ii) a public self-funded pool or a private single employer
3 self-funded plan that provides pharmacy benefits management services
4 directly to its beneficiaries;

5 (13) 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;

9 (14) Prescription has the same meaning as in section 38-2840;

10 (15) Prescription drug means a prescription drug or device or legend
11 drug or device as defined in section 38-2841; and

12 (16) Reimbursement amount means the amount that the contracted
13 pharmacy will receive for prescription drugs, including, but not limited
14 to, single-source and multiple-source prescription drugs and specialty
15 drugs.

16 Sec. 3. (1) A pharmacy benefit manager doing business in this state
17 shall obtain a certificate of authority as a third-party administrator
18 under the Third-Party Administrator Act and shall be subject to both the
19 Third-Party Administrator Act and the Pharmacy Benefit Fairness and
20 Transparency Act.

21 (2) In addition to the fees required under the Third-Party
22 Administrator Act, a pharmacy benefit manager shall pay to the director a
23 certification fee established by the director. The certification fee
24 shall be set to allow the oversight activities required under the
25 Pharmacy Benefit Fairness and Transparency Act to be self-supporting, but
26 such fee shall not exceed five thousand dollars.

27 (3) The director shall enforce the Pharmacy Benefit Fairness and
28 Transparency Act. After notice and hearing, the director may suspend or
29 revoke a pharmacy benefit manager's certificate of authority as a third-
30 party administrator upon finding that the pharmacy benefit manager
31 violated any of the requirements of the Third-Party Administrator Act or

1 the Pharmacy Benefit Fairness and Transparency Act.

2 (4) In addition to other remedies and penalties available under the
3 law of this state, each violation of the Pharmacy Benefit Fairness and
4 Transparency Act shall be an unfair trade practice in the business of
5 insurance subject to the Unfair Insurance Trade Practices Act.

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

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

12 Sec. 5. If a covered individual or pharmacist receives incorrect,
13 misleading, or inaccurate information from a pharmacy benefit manager or
14 a vendor or agent of the pharmacy benefit manager, the covered individual
15 or pharmacist may contact the department and request corrective actions
16 or sanctions from the director against the pharmacy benefit manager or
17 the vendor or agent. The cost of the corrective actions or sanctions
18 shall be the responsibility of the pharmacy benefit manager.

19 Sec. 6. (1) A pharmacy benefit manager shall not mandate to
20 contracted pharmacies basic record keeping that is more stringent than
21 that required by state or federal law or regulation.

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

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

31 (4) A pharmacy benefit manager shall not exclude a Nebraska pharmacy

1 from participation in its specialty pharmacy network as long as the
2 pharmacy is willing to accept the terms of the pharmacy benefit manager's
3 agreement with its specialty pharmacies.

4 (5) A pharmacy benefit manager shall not require a pharmacist or
5 pharmacy to participate in one contract with a pharmacy benefit manager
6 in order to participate in other contracts with the same pharmacy benefit
7 manager.

8 (6) Covered individuals who use a mail-order pharmacy shall not be
9 charged fees or higher copays to utilize a contracted pharmacy. A
10 pharmacy benefit manager shall not prohibit a pharmacist or contracted
11 pharmacy from mailing a prescription drug to a covered individual.

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

16 Sec. 7. (1) A pharmacy benefit manager shall make readily available
17 to the director and to each contracted pharmacy information related to
18 the pharmacy benefit manager's pricing methodology and reimbursement
19 amount for single-source and multiple-source prescription drugs and
20 compounds and specialty drugs.

21 (2) For purposes of the disclosure of pricing methodology,
22 reimbursement amounts shall be:

23 (a) Established for multiple-source prescription drugs prescribed
24 after the expiration of any generic drug exclusivity period;

25 (b) Established for any prescription drug with at least two or more
26 therapeutically equivalent, multiple-source prescription drugs; and

27 (c) Determined using comparable prescription drug prices obtained
28 from multiple nationally recognized comprehensive data sources, including
29 wholesalers, prescription drug file vendors, and pharmaceutical
30 manufacturers for prescription drugs that are nationally available and
31 available for purchase locally by multiple pharmacies in the state.

1 (3) For those prescription drugs to which reimbursement amount
2 pricing applies, a pharmacy benefit manager shall include in a contract
3 with a contracted pharmacy information regarding which of the national
4 compendia or other source is used to obtain pricing data used in the
5 calculation of the reimbursement amount pricing and shall provide a
6 process to allow a contracted pharmacy to comment on, contest, or appeal
7 the reimbursement amount rates or reimbursement amount list. The right to
8 comment on, contest, or appeal the reimbursement amount rates or
9 reimbursement amount list shall be limited in duration and allow for
10 retroactive payment if it is determined that reimbursement amount pricing
11 has been applied incorrectly. The reimbursement amount shall be updated
12 no less than every seven days by the pharmacy benefit manager.

13 Sec. 8. All financial benefits the pharmacy benefit manager
14 receives, including, but not limited to, all rebates, discounts, credits,
15 fees, grants, chargebacks, or other payments or financial benefits of any
16 kind, shall be disclosed to the covered entity with which the pharmacy
17 benefit manager contracts. The pharmacy benefit manager shall provide a
18 copy of the pharmacy benefit manager's annual financial statements to the
19 director each year on a date determined by the director.

20 Sec. 9. The pharmacy benefit manager shall disclose to the covered
21 entity and to the contracted pharmacy the method used to calculate total
22 dispensing fees, the cost of the prescription drug, administration fees,
23 and any other fee payment, including, but not limited to, direct and
24 indirect remuneration fees and fee recapture amounts. Fees and the
25 amounts of such fees shall be clearly stated in the agreement between the
26 contracted pharmacy and the pharmacy benefit manager. The pharmacy
27 benefit manager shall not charge contracted pharmacies transaction-based
28 or claims-processing fees.

29 Sec. 10. (1) All benefits payable under a pharmacy benefits
30 management plan shall be paid as soon as feasible but no later than
31 twenty days after receipt of a clean claim if the claim is submitted

1 electronically or thirty days after receipt of a clean claim if the claim
2 is submitted in paper format.

3 (2) Adjudication of a clean claim shall not be audited unless fraud
4 is suspected. Payments to the contracted pharmacy for clean claims are
5 considered to be overdue and not timely if not paid within the twenty-day
6 or thirty-day timeframe provided in subsection (1) of this section,
7 whichever is applicable. If any clean claim is not timely paid, the
8 pharmacy benefit manager shall pay the contracted pharmacy interest at
9 the rate of ten percent per annum commencing the day after any claim
10 payment or portion thereof was due until the claim is finally settled or
11 adjudicated in full.

12 (3) For purposes of this section, paid means the later of the day on
13 which the payment is mailed by the pharmacy benefit manager or the day on
14 which the electronic payment is processed by the pharmacy benefit
15 manager's bank.

16 (4) A pharmacy benefit manager may demonstrate the date a claim is
17 paid by a mail record or a bank statement.

18 Sec. 11. (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 as 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) Each pharmacy benefit manager conducting an audit shall, after
26 completion of any review process, provide a copy of the final audit
27 report to the plan sponsor.

28 (6) The pharmacy benefit manager or the entity conducting the audit
29 on its behalf shall not receive payment based on a percentage of the
30 amount recovered. The auditing entity may charge the responsible party,
31 directly or indirectly, based on amounts recouped if the covered entity

1 and the entity conducting the audit have a contract and the commission to
2 an agent or employee is based on amounts recouped.

3 (7) A clerical or record-keeping error in a submitted claim shall
4 not be recorded as fraud. The error shall be subject to recoupment of
5 dispensing fees but not the cost of the prescription drug. Errors that
6 have no financial harm to a covered individual or plan shall not result
7 in pharmacy benefit manager chargebacks.

8 (8) Interest shall not accrue during the audit period beginning with
9 the day the audit began and ending with the day the final written audit
10 report is delivered.

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

15 Sec. 12. A pharmacy benefit manager shall mail an explanation of
16 benefits to the covered individual for each of the covered individual's
17 pharmacy claims for a prescription drug that is covered or managed by the
18 pharmacy benefit manager. The explanation of benefits shall include the
19 cost of the prescription drug being charged to the covered entity, the
20 pharmacy benefit manager's payment, the copayment paid by the covered
21 individual, the fees and other charges deducted from the cost of the
22 drug, and the final payment to the pharmacy. The pharmacy benefit manager
23 shall not prohibit the pharmacist from disclosing the cost of the
24 prescription drug or what the contracted pharmacy was reimbursed to a
25 covered individual or a covered individual's caregiver.

26 Sec. 13. A pharmacist or contracted pharmacy shall not be
27 prohibited from or subject to penalties or removal from a network or plan
28 for sharing information regarding the cost, price, or copayment of a
29 prescription drug with a covered individual or a covered individual's
30 caregiver.

31 Sec. 14. A covered entity that contracts with a pharmacy benefit

1 manager to perform pharmacy benefits management services shall require
2 the pharmacy benefit manager to notify the department of any detection of
3 fraud, including, but not limited to, prescription drug diversion
4 activity.

5 Sec. 15. The director may adopt and promulgate rules and
6 regulations to carry out the Pharmacy Benefit Fairness and Transparency
7 Act.