

Employee Benefit News

May, 2004
Vol. 18 • No. 6
www.benefitnews.com

State lawmakers scrutinize PBM financial arrangements

By Karen Lee

Lawmakers' distrust of pharmacy benefit managers' business practices has led two states to enact laws requiring disclosure of PBM finances, including rebates, and interest in such measures is said to be growing.

While some PBMs support these "transparency laws," others maintain they are misguided and will prevent pharmacy benefit managers from negotiating the best prices for employers.

In March, the South Dakota legislature passed a law that forces PBMs to turn over to health insurers or plan sponsors, at their request, any information detailing the rebates and discounts worked out with drug manufacturers, plus all other revenue that comes from drug makers. What is more, health plans and employers also can have the PBMs' books and records audited annually.

Meanwhile, Maine officials are fighting to enforce their own PBM transparency bill. Last year, legislation was enacted that also would require disclosure of financial terms between the PBM and the drug manufacturer as a fiduciary duty to the employers for whom the PBM is supposed to be working. However, at the request of the PBMs' trade association, the Pharmaceutical Care Management Association (PCMA), a federal court has levied an injunction to block enforcement of the law, noting that ERISA preempts state law in this case, and PBMs are not subject to ERISA fiduciary concerns.

The transparency laws stem from policymakers' efforts to find solutions to the exponentially rising costs of prescription drugs, which are largely responsible for skyrocketing health care expenses. The National Legislative Association on Prescription Drug Prices, which includes representatives from nine states and the District of Columbia, even has gone

so far as to create a nonprofit PBM to compete with the for-profit ventures. But PBMs, and even health insurers, are not taking this legislation well.

Open secrets

PBM executives believe the required amount of disclosure is excessive and impedes the sensitive negotiating process with manufacturers by revealing what are considered to be trade secrets. They explain that, because sensitive information would be revealed, the laws will create a price floor, thereby wiping out any incentive manufacturers have to provide significant discounts on their products.

"This is not an open and public process," insists Vernon Rowan, Express Scripts' senior director of state affairs. "The lack of transparency allows us to negotiate the best price. If we are transparent, manufacturers don't have to compete as aggressively. ... This will potentially increase drug costs because it will erode our ability to negotiate."

Medco and Caremark referred questions to PCMA. Association spokesman Phil Blando predicts the regulations will force PBMs to leave the states where they are in force.

Indeed, Rowan notes that Express Scripts, one of the nation's largest PBMs, has stopped writing new business in South Dakota and Maine.

State legislators do not seem too upset. In fact, South Dakota State Sen. Jean Hunhoff believes her state's law actually has opened up competition among other, smaller PBMs. At least one, she says, has offered a bid that is \$300,000 less than others.

Health insurers, though, also oppose the legislation. Last summer, Karen Ignani, president of the American Association of Health Plans (now called America's Health Insurance Plans), wrote Maine Gov. John E. Baldacci to urge

him to veto the bill then wending its way through the legislature.

“Unfortunately, the onerous and unnecessary provisions ... will significantly drive up the cost of pharmacy benefits for consumers who receive coverage through employer plans,” Ignani stated. “This bill is an example of good intentions with unintended consequences. It will have exactly the opposite impact than what is intended.”

State regulation

Over the last two years, a number of state legislative bodies have introduced some sort of bill that would regulate PBMs. According to the National Council of State Legislators (NCSL), eight bills were proposed in 2002, and 22 were filed last year. Most of these were devoted to questions of licensure and financial viability. A few, though, delved into questions of just how much fiduciary responsibility PBMs should have toward their clients.

In 2003, at least nine states introduced bills that went beyond licensing issues. Most died before the legislative sessions were over, although a bill in California is said to be pending. But Dick Cauchi, program director of NCSL’s health care program, believes this is still indicative of a “rapid increase in interest in the area.

“The issue of regulating PBMs has emerged pretty quickly and pretty recently,” Cauchi continues. “This developed in part out of the increased role the companies have played in the active management of health benefits. They have an increased role in public programs such as Medicaid and Medicare and a growing participation in state pharmaceutical and benefit plans.”

Indeed, South Dakota’s law stems from frustration over the rising cost of prescription drugs to state employees. Hunhoff, a registered nurse who helped lead the charge, explains that while PBMs do help decrease drug costs for employers — a General Accounting Office report determined that PBMs lowered costs by about 18% — there is no way to know what kind of deal you are getting.

“We saw an opportunity to get information that would assist us in the process of negotiations,” Hunhoff says. “We’re not trying to set rates. We’re just saying we should know what we are getting.”

Shroud of mystery

Which leads to another complaint many have about the way PBMs do business. There has been a “shroud of mystery,” as John Malley, director of PricewaterhouseCoopers’ pharmacy benefit practice, calls it, around the companies’ dealings, and legislation is only the latest attempt to remove it.

Over the past few years, several lawsuits were filed against the nation’s largest PBMs — Express Scripts, Medco Health, AdvancePCS and Caremark Rx — accusing them of secret and unethical dealings with drug manufacturers for bigger rebates, violating ERISA provisions that mandate they keep plan members’ best interests in mind. Merck & Co., Medco’s parent company, paid \$42.5 million in settlements, while a federal court dismissed a class action suit against Express Scripts.

Maine Senate Majority Leader Sharon Anglin Treat believes there is a conflict of interest that arises from the relationships PBMs have with pharmaceutical companies. Sometimes, she says, they steer plan members toward certain drugs that promise larger rebates.

“[Consumers] are paying for a very large fee hidden in a side

agreement with the manufacturer,” says Treat. “Some outside agreements have been to [facilitate] marketing of certain drugs. These are significant conflicts of interest, and they lead to higher drug prices overall. ... These are actions that are taken in conflict with what a PBM is supposed to be doing.”

The court injunction on Maine’s law does not necessarily mean the last word on PBM transparency. Treat thinks that with some tweaking and additional language, a revised statute could pass muster in an appeal. Moreover, she says, “I think we will end up with much broader and stricter regulations.”

Certainly, consultants say, corporate clients are looking for price transparency. Rich Ostuw, a Towers Perrin principal and senior consultant in its health and welfare practice, comments that employers view the current arrangements as a “black box” that keeps them in the dark about PBMs’ negotiations with drug manufacturers.

“Employers are saying, ‘That’s our money,’” Ostuw says. “They want to know how it’s spent. They want to see all the moving pieces.”

Defining transparency

Ostuw observes that transparency is in the eye of the beholder: “What’s transparent to you and I might be very different from what a PBM defines as transparency.”

Indeed, Express Scripts’ Rowan says he supports an appropriate level of disclosure, and he believes his company is transparent enough as it is. The PBM, he explains, tells its clients where exactly the revenue comes from as it relates to the individual contract, and allows employers to conduct annual audits.

“We’re showing clients what they bargained for, but we don’t have to violate confidentiality and trade secrets,” Rowan says.

Measures like Express Scripts’ could be an answer to the charges levied in the lawsuits. Malley thinks transparency could help PBMs be more vigilant about their business practices.

“They might pay closer attention to the amount of money reimbursed,” Malley says. “They don’t want to look like they’re gouging clients. There are a variety of different lawsuits out there that address the issue of transparency, and I think PBMs are starting to respond to that.”

Some smaller, upstart PBMs actually see price transparency as good business, a value proposition that gives them traction with potential clients. Innoviant is one of those pharmacy managers.

“These laws play right into how we work with customers,” says Innoviant CFO Cullen Sloan. “We let them come in and review the contracts. ... A PBM may maximize rebates even if they’re not in the best interests of the plan. The focus should be on plans’ goals and incentives, not in keeping the manufacturers happy.”

“I think we will see more and more transparent pricing. It’s straightforward, common sense that lets the plan know what they are paying us to administer the benefit.” — K.L.



Innoviant CFO Cullen Sloan believes more price transparency on the part of PBMs is the right way to go.