

SUBJECT: Regulating the contractual relationship between pharmacists and PBMs

COMMITTEE: Insurance — favorable, without amendment

VOTE: 8 ayes — Oliverson, Vo, J. González, Hull, Israel, Middleton, Romero, Sanford

0 nays

1 absent — Paul

WITNESSES: For — Debra Patt, Texas Oncology, The US Oncology Network, Texas Medical Association; Miguel Rodriguez, Texas Pharmacy Business Council; John Hickman; Steve Hoffart; (*Registered, but did not testify*: Michael Wright, American Pharmacies; Jim Pitts, Baylor Scott White; Kyle Mauro, Legacy Community Health; Annalee Gulley, Mental Health America of Greater Houston; John McCord, NFIB; Clayton Stewart, Texas Medical Association; Jill Sutton, Texas Osteopathic Medical Association; David Balat, Texas Public Policy Foundation)

Against — Melodie Shrader, Pharmaceutical Care Management Association; (*Registered, but did not testify*: Billy Phenix, America’s Health Insurance Plans; Patricia Kolodzey, Blue Cross Blue Shield of Texas; Jamie Dudensing, Texas Association of Health Plans; Bill Hammond, Texas Employers for Insurance Reform)

On — J.D. Fain, Texas Pharmacy Association; (*Registered, but did not testify*: Nicole Kralj, National Association of Chain Drugstores; Jenny Blakey, Office of the Public Insurance Counsel; Michael Nored, Texas Department of Insurance)

DIGEST: HB 1763 would regulate contracts between health benefit plans or pharmacy benefit managers (PBMs) and pharmacists or pharmacies by prohibiting certain claim reductions, unequal reimbursements, and certain accreditation standards.

Applicability. The bill would apply to certain health benefit plans, including a plan issued by a health maintenance organization, a small employer health plan subject to the Health Insurance Portability and Availability Act, and a consumer choice of benefits plan, among other specified health plans.

The bill would not apply to a PBM under a workers' compensation policy.

Claim reduction. The bill would prohibit a health plan and PBM from reducing a claim payment to a pharmacist or pharmacy after adjudication of the claim except in accordance with an audit performed as described in the statutory audit process, or under certain mutual agreements. The bill would not prohibit a health plan or PBM from increasing a claim payment amount after adjudication.

Drug delivery. Except in certain cases of credible allegations of fraud, a contract between a health plan or PBM and a pharmacy or pharmacist could not prohibit the pharmacy or pharmacist from lawfully mailing a drug to a patient upon the patient's request or charging certain shipping and handling fees. A pharmacist or pharmacy would not be permitted to charge a health plan or PBM for delivery of a prescription drug unless the charge was specifically agreed to by the plan issuer or PBM.

A health plan or PBM could include in the contract a provision prohibiting a pharmacist or pharmacy from mailing drugs for more than 25 percent of the pharmacist or pharmacy's claims during a year.

Network contract fee schedule. A pharmacy benefit network contract would have to establish a separate fee schedule and provide a copy of that schedule to each contracted pharmacist and pharmacy. The fee schedule would need to describe:

- services or procedures that the pharmacist or pharmacy could deliver and the corresponding payment amount;
- a methodology for calculating payment based on a published fee schedule; or

- any other reasonable manner that provided an ascertainable amount for payment for services.

Reimbursement. The bill would prohibit a PBM from providing larger reimbursements to affiliated pharmacies or pharmacists than those provided to unaffiliated pharmacists or pharmacies for the same service.

Accreditation standards. A contract could not require accreditation standards or recertification requirements other than what is required by law or manufacturers.

A contract between a health plan or PBM and a specialty pharmacy could require the specialty pharmacy to obtain accreditation from up to two independent accrediting organizations as specified in the bill.

Pharmacy services administrative organization. The bill would define "pharmacy services administrative organization" (PSAO) as an entity that contracted to conduct a pharmacist's or pharmacy's business with a third party payor, including a pharmacy benefit manager, in connection with pharmacy benefits and to provide administrative services, including negotiating, executing, and administering a contract with a third-party payor.

A member of a pharmacy services administrative organization that entered into a contract with a health plan or PBM would be entitled to receive a copy of the contract provisions applicable to the pharmacist or pharmacy.

Other provisions. A PBM would be prohibited from retaliating because a pharmacist or pharmacy exercised a right provided by this bill. Prohibited retaliation would include:

- terminating or refusing to renew a contract with the pharmacist or pharmacy;
- subjecting the pharmacist or pharmacy to increased audits; or
- failing to promptly pay the pharmacist or pharmacy any money owed by the PBM to the pharmacist or pharmacy.

Certain actions taken by a PBM would not be considered retaliation against a pharmacist or pharmacy if the PBM:

- took an action in response to a credible allegation of fraud against the pharmacist or pharmacy; and
- provided reasonable notice of the alleged fraud to the pharmacist or pharmacy before taking the action.

The bill's provisions could not be waived, voided, or nullified by contract.

The bill would take effect September 1, 2021, and would apply to a contract entered into or renewed on or after the effective date.

**SUPPORTERS
SAY:**

HB 1763 would prohibit certain unfair contract provisions that are presented to independent pharmacists by pharmacy benefit managers (PBMs) as take-it-or-leave-it conditions for access to the market.

Independent pharmacists have fewer resources available to them, making it difficult for them to compete with PBM-affiliated pharmacists and leaving them in a weaker negotiating position for contracts.

The bill would improve transparency and predictability in a pharmacy and pharmacist's reimbursement rates. Currently, PBMs apply retroactive fees against certain pharmacies and also may forbid their network pharmacies from providing mail-order or delivery services to patients. This bill would prohibit PBMs from assessing retroactive fees or payment reductions against a pharmacy based on performance standards, generic effective rate, or other factors, but still would allow PBMs to reduce payments retroactively as a legitimate audit outcome.

Pharmacy benefit managers would remain free to negotiate positive, award-based incentives, although the bill would address certain contractual mechanisms that PBMs can abuse. Prohibiting PBMs from contractually requiring certain accreditations over and beyond state licensing or manufacturer-required trainings would expand the drugs independent pharmacists could provide without sacrificing patient safety.

CRITICS
SAY:

HB 1763 could interfere with private contract negotiation. The limitations on contractual provisions could prohibit arrangements that have been found to improve patient outcomes.

While providing pharmacies the flexibility to deliver drugs via mail is important, allowing a maximum of 25 percent of a pharmacist's or pharmacy's annual claims to be for mailing drugs could be too high. More discussion is needed to determine what the appropriate maximum percentage for mailing drugs of annual claims should be.

OTHER
CRITICS
SAY:

HB 1763 should not allow pharmacy benefit managers (PBM) to require specialty pharmacies to obtain up to two accreditations in order to dispense specialty medications. By not clearly defining a specialty pharmacy, a PBM could determine which pharmacies had to seek additional accreditation, potentially increasing a pharmacy's costs. Acquiring and maintaining accreditations is time-consuming and expensive and does not necessarily protect patient safety. Decisions on accreditation requirements should be left up to the Texas State Board of Pharmacy, rather than a health insurance plan or PBM.