TENNESSEE GENERAL ASSEMBLY
FISCAL REVIEW COMMITTEE

FISCAL NOTE

SB 650 – HB 786

March 2, 2019

SUMMARY OF BILL: Establishes that clerical or recordkeeping errors, including an omission, identified during an audit of records of a pharmacist or pharmacy are not evidence of fraud or intentional misrepresentation. Prohibits those errors identified in an audit from being the basis of a recoupment unless it results in an overpayment to the pharmacy or the wrong medication being dispensed to the patient.

Authorizes a pharmacy to submit amended claims within 30 days of the discovery of a clerical or recordkeeping error if the prescription was dispensed according to the requirements of state and federal law.

Establishes that any recoupment related to clerical or recordkeeping errors does not include the cost of the drug or dispensed product, except in cases of fraud or other intentional and willful misrepresentation, dispensing in excess of the pharmacy benefits contract established by the plan sponsor; or prescriptions not filled in accordance with the prescriber's order.

Prohibits pharmacy benefits managers (PBMs) from charging a pharmacist or pharmacy fees that are not apparent or added after a claim is adjudicated. Prohibits PBMs from including any term or condition in their contract with a pharmacy that requires a pharmacist to dispense a drug or other product to a patient. Prohibits PBMs from notifying a member that a pharmacy has been removed from the PBM's network until the after the PBM has notified the pharmacy.

Requires 30 days' notice from a PBM regarding any change to the PBM's pharmacy contract that affects the terms of reimbursement, the process for verifying benefits and eligibility, the dispute resolution procedure, the formulary drug verification procedure, and the procedure for contract termination.

Requires mutual agreement between PBMs and pharmacies on every contract. Prohibits PBMs from causing or permitting the use of untrue, deceptive or misleading marketing materials.

Requires PBMs pay a pharmacy for services rendered in the event that a PBM drops the pharmacy from the PBM's network. Requires PBMs pay all pharmacies in their network at least as much as they pay themselves or their own affiliated pharmacies for the same drug, dispensed product, or service. Prohibits PBMs from designating a drug or dispensed product as a "specialty drug" solely due to the cost of the drug.

Requires the Comptroller of the Treasury (COT) to perform an annual audit of all PBM's providing services funded by this state. Requires the audit to address, at minimum: (1) wholesale acquisition costs of pharmaceuticals; (2) rebates obtained by the health insurance issuer or their contracted pharmacy benefits manager from pharmaceutical manufacturers; (3) any fees or payments made to the health insurance issuer or their contracted pharmacy benefits manager by this state; (4) payments to pharmacies, including any differential in payments to contracted pharmacies based on volume of prescriptions dispensed, ownership, or ownership interest by the pharmacy benefits manager; and (5) arrangements between pharmaceutical manufacturers and health insurance issuers or their contracted pharmacy benefits managers.

Requires, by April 1 of each year, the COT to provide a report containing the audit findings to the Speaker of the House of Representatives, the Speaker of the Senate, and the Chairs of the Senate Commerce and Labor Committee, Senate Health and Welfare Committee, Health Committee of the House of Representatives, and Insurance Committee of the House of Representatives.

ESTIMATED FISCAL IMPACT:

Increase State Expenditures – $550,000/One-Time
$711,800/Recurring

Other Fiscal Impact – To the extent a pharmacy benefits manager chooses to reimburse a competing pharmacy at the lower rate than it reimbursed itself, the decrease in state expenditures is estimated to be $9,500,000. However, to the extent a pharmacy benefits manager chooses to reimburse the competing pharmacies at the higher rate than it reimburses itself, the increase in state expenditures is estimated to be $2,900,000.

If pharmaceutical manufacturers were to withdraw from participating in the supplemental rebate program, or if a pharmacist or a pharmacy is no longer contractually required to follow the Division of TennCare's formulary management guidelines, there would be a potential recurring increase in state expenditures of $21,931,600 and recurring federal expenditures of $41,408,800.

Assumptions:

Recoupments

- Pursuant to Tenn. Code Ann. § 56-7-3103(a)(3), any clerical or recordkeeping error, such as a typographical error, scrivener's error, or computer error, regarding a required document or record may not, in and of itself, constitute fraud; however, the claims may be subject to recoupment.
- Passage of the proposed legislation would prohibit those errors identified in an audit from being the basis of a recoupment.
- Based on information provided by The Department of Finance and Administration Benefits Administration (Benefits Administration), the total amount of audit recoupments returned to the state in FY18-19 was $942,906.

- Of the $942,906, Benefits Administration identified $137,261 attributed to clerical or recordkeeping errors that did not also result in an actual overpayment to the pharmacy or in the wrong medication being dispensed.
- The recurring increase in state expenditures associated with the change in recoupments is estimated to be less than $137,261.

Pharmacy Reimbursements

- The proposed legislation requires PBMs pay all pharmacies in their network at least as much as they pay themselves or their own affiliated pharmacies for the same drug, dispensed product, or service.
- Benefits Administration identified 19,361 distinct drug/dosage combinations filled in FY18-19.
- Of those 19,361, it was found that 5,012 distinct drug/dosage combinations were reimbursed at higher rates at a competing pharmacy.
- Benefits Administration does not dictate reimbursement rates of individual pharmacies to the carrier. The Department of Finance and Administration does audit, via the Department's contracted actuary, to ensure that the PBM reimburses pharmacies appropriately in accordance with Tenn. Code Ann. § 4-3-1021. Outside of those provisions, pharmacy reimbursement is a business decision for the PBM.
- If the PBM chose to reimburse the competing pharmacies at the lower rate than it reimbursed itself, the decrease in state expenditures is estimated to be $9,500,000.
- Reductions in reimbursement to rural pharmacies, that are sometimes paid higher rates to encourage participation in the network to meet access requirements, may put the network at risk.
- If the PBM chose to reimburse the competing pharmacies at the higher rate than it reimburses itself, the increase in state expenditures is estimated to be $2,900,000.

Comptroller of the Treasury Audit

- Based on information provided by the Comptroller of the Treasury (COT), the proposed legislation cannot be accommodated within existing resources.
- The COT will require one Audit Manager position and four Auditor positions to perform the audit as required by the proposed legislation.
- Audit staff would need to perform audit procedures to gain an understanding of each PBM claims process and document controls for this process to determine data reliability.
- The recurring increase in state expenditures associated with the Audit Manager position is estimated to be $131,916 ($107,504 salary + $24,412 benefits).
- The recurring increase in state expenditures associated with the four Auditor positions is estimated to be $442,636 [($89,274 salary + $21,385 benefits) x 4].
- The total recurring increase in state expenditures associated with the five additional positions is estimated to be $574,552 ($131,916 + $442,636).

- The COT does not have the capacity with existing software and servers to analyze and store the amount of PBM transaction data and would need to upgrade current equipment.
- The one-time increase in state expenditures associated with the equipment and software upgrade is estimated to be $550,000 ($350,000 equipment + $200,000 software).

Supplemental Rebates

- The proposed legislation prohibits PBMs from including any term or condition in their contract with a pharmacy that requires a pharmacist to dispense a drug or other product to a patient.
- Passage of this legislation would authorize providers to refuse to dispense certain drugs for any reason, including on the basis of reimbursement. Further, a provider could base drug selection on the most favorable product to promote pharmacy profit margins resulting in a decrease of revenue from supplemental rebate collection.
- Pursuant to § 71-5-197(b)-(c), the Division of TennCare (TennCare) is authorized to implement supplemental rebates when a drug is given preferred drug list (PDL) status.
- TennCare has an individual rate review and adjustment process and conducts semi-annual reimbursement rate studies to address pharmacy cost experiences for when drug procurement costs have risen for pharmacies.
- Pursuant to Tenn. Code Ann. §§ 71-5-142(a) and 71-5-197(d)-(e), supplemental rebate information is confidential and protected from disclosure.
- Pursuant to 42 U.S.C. 1396r–8(b)(3)(D) of the Social Security Act, rebate agreement information for the Medicaid Drug Rebate Program is confidential.
- To the extent the proposed annual audit of PBMs by the COT and the subsequent report discloses confidential supplemental rebate information, pharmaceutical manufacturers would likely withdrawal from participating in TennCare's supplemental rebate program.
- TennCare collected an estimated $63,340,381 in supplemental rebates in FY17-18.
- If pharmaceutical manufacturers were to withdraw from participating in the supplemental rebate program, there would be a potential recurring increase in state expenditures of $21,931,607 ($63,340,381 x 34.625%) and $41,408,774 ($63,340,381 x 65.375%) in federal expenditures.
- Based on information provided by TennCare, providers are contracted to provide pharmaceutical services to all TennCare enrollees unless the provider determines in their professional judgment that the service should not be provided.
- TennCare is required by federal law to provide pharmaceutical services to enrollees in sufficient amount, duration, and scope as well as to provide an adequate network for pharmaceutical services.
- If a pharmacist or pharmacy refuses to dispense individual drugs without recourse, TennCare and its PBM may be forced to create networks for any individual drug or risk being deemed noncompliant with its federal obligations to provide these services.
- If a pharmacist or a pharmacy is no longer contractually required to follow TennCare formulary management guidelines, there would be a potential recurring increase in state expenditures of $21,931,607 ($63,340,381 x 34.625%) and $41,408,774 ($63,340,381 x 65.375%) in federal expenditures.

- Based on information provided by the Department of Commerce and Insurance (DCI), the DCI will ensure regulatory compliance within existing resources without an increased appropriation or reduced reversion.

Total Impact Assumptions:

- The total one-time increase in state expenditures is estimated to be $550,000.
- The total recurring increase in state expenditures is estimated to be $711,813 ($137,261 + $574,552).

IMPACT TO COMMERCE:

Increase Business Revenue – $550,000/One-Time

Assumptions:

- The COT will purchase hardware and software from a private business, resulting in a one-time increase in business revenue of $550,000.
- If a PBM chose to reimburse the competing pharmacies at the lower rate than it reimbursed itself, the decrease in business revenue to the competing pharmacies is estimated to be $9,500,000; however, the increase in revenue to the PBM would be the same amount.
- If the PBM chose to reimburse the competing pharmacies at the higher rate that it reimburses its itself, the increase in business revenue to the competing pharmacies is estimated to be $2,900,000; however, the PBM would experience a decrease in revenue of the same amount.
- Any net impact to commerce is estimated to be not significant.
- Any impact on private sector jobs in Tennessee is estimated to be not significant.

CERTIFICATION:

The information contained herein is true and correct to the best of my knowledge.

Krista Lee Carsner

Krista Lee Carsner, Executive Director

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