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RxLegal: Pharmacist Gag Clauses

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Abstract

Much publicity has surrounded the use of gag clauses in contracts between insurance companies or their pharmacy benefit managers (PBMs) and pharmacies. These clauses prohibit pharmacists from voluntarily informing patients that their prescription medication may cost less if paid for directly by them instead of through their insurance. By concealing the least expensive way to purchase a medication, critics state that gag clauses reduce transparency and medication affordability for patients and appear to be counterintuitive to one of the major activities of a PBM—negotiation of drug pricing. Due to the uproar surrounding these clauses, the bipartisan Patient Right to Know Drug Prices Act was recently introduced in Congress to effectively ban the practice.

Keywords

ethics, legal aspects, dispensing

Recently, there has been much publicity surrounding the use of gag clauses in contracts between insurance companies or their pharmacy benefit managers (PBMs) and pharmacies.[1,2] These contractual clauses prohibit pharmacists from voluntarily informing patients that their prescription medication may cost less if paid for directly by them (i.e., as a "cash" transaction) instead of their insurance. How often an insurance copayment exceeds the cash price for a prescription is not definitively known; however, Van Nuys and colleagues reported that such overpayments affected 2.2 million (23%) of 9.5 million prescription insurance claims from a single large insurer.[3] Additionally, in a 2016 survey involving over 600 pharmacies, approximately 39% of respondents stated that a gag clause prevented them from informing patients about other payment options between 10 and 50 times in the last month.[4] Greater than 19% stated that these clauses prevented them from informing patients of a lower price over 50 times in the preceding month.

Commercial contracts between pharmacies and PBMs are commonplace in the drug distribution chain of today's healthcare market.[5] These contracts allow pharmacies to participate in, and receive the benefits of, a PBM's network, but may also contain various terms and conditions including gag clauses.[5,6] By forcing pharmacists to remain silent regarding available alternative pricing for medications through the use of these clauses, PBMs may "clawback" much of the monetary difference between the insurance copay and the lower cash price of the medication.[1,5] By concealing the cheapest way to purchase a prescription medication, critics state that gag clauses reduce transparency and the affordability of essential treatments for patients.[2,5] Additionally, critics note that one of the purported goals of an insurance company's PBM is to negotiate favorable drug prices. The fact that these same companies may then negotiate a price for a medication that is higher than what a consumer would pay out of pocket seems counterintuitive.

In response to the uproar surrounding this issue, Senator Susan Collins of Maine introduced the bipartisan Patient Right to Know Drug Prices Act in March 2018.[7] This bill amends the Public Health Service Act to state that a group health plan or a health insurance issuer

> shall not restrict, directly or indirectly, any pharmacy that dispenses a prescription drug to an enrollee in the plan or coverage from informing an enrollee of any differential between the enrollee's out of pocket cost under the plan or coverage with respect to acquisition of the drug and the amount an individual would pay for acquisition of the drug without using any health plan or health insurance coverage.

The Act then goes on to extend this same wording to "any entity that provides PBM services under a contract with any health plan or health insurance coverage." This legislation was recently unanimously approved by the Senate Committee on Health, Education, Labor, and Pensions on July 25, 2018, and continues to wind its way through Congress.[2]

For their part, the Pharmaceutical Care Management Association (PCMA), the national association that represents

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PBMs, described the use of gag clauses as an "outlier practice."[1]In addition, PCMA released a statement strongly supporting the Patient Right to Know Drug Prices Act, expressing that PBMs will "ensure America's patients always pay the lowest cost for their medications at the pharmacy counter, whether it's the cash price or the copay."[8] With this response from PCMA, in tandem with the proposed federal legislation in Congress, there may soon be an end to gag clauses and pharmacists will be able to openly advise patients on the least expensive method to pay for their prescription medications.

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