

CMS Removes Gag From Mouths of Pharmacists, as Ohio and Other States Follow Suit.

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Gag Clauses

Appropriately named, gag clauses prohibit pharmacies from letting customers know when a drug would be less expensive to purchase outside of their insurance plan. Essentially, when the cash price of a drug is cheaper than the insurance copay, the pharmacy is not allowed to pass this information along to the customer. Unsurprisingly, many customers end up paying more by using their insurance as opposed to what they would have paid if they did not have insurance.

Gag clauses typically appear in (1) contracts between insurance companies and pharmacies and (2) contracts between pharmacy benefit managers and pharmacies. Pharmacy benefit managers are third parties employed by health care providers to manage the prescription drug plans on behalf of customers.

Local Trend

In true state-experimental fashion, the trend toward health care transparency and the removal of gag clauses did not start with the federal government. Many states have recently passed or introduced legislation which makes it unlawful for insurance companies or pharmacy benefit managers to include gag clauses in their contracts with pharmacies.

Over the past 2 years, 40 state legislatures have considered making "gag clauses" illegal. In 2017, Connecticut (SB 445), Georgia (HB 276 and SB 103), Maine (LD 6), and North Carolina (H 466 and S 384) all passed laws banning gag clauses. In 2018, Kentucky (HB 463) and a handful of other states have enacted legislation prohibiting gag clauses. At least 10 other states, including New York (A 8781 and SB 7191) and South Carolina (S 0815), have introduced legislation to do the same.

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Ohio's Approach to Gag Clauses

Effective April 3, 2018, Ohio Department of Insurance Director, Jillian Froment, issued a bulletin requiring insurers and pharmacy benefit managers to remove gag clauses from their contracts with pharmacies. In this bulletin, Froment addresses how gag clauses violate 3 sections of the Ohio Revised Code as the basis of the prohibition. The first section is O.R.C. 3959.12(A)(5), which states that health care plan administrator's (including pharmacy benefit managers and health insurance companies) can have their license suspended if they are found using "fraudulent, coercive, or dishonest practices." The second section supporting the ban on gag clauses is O.R.C. 3923.02, which forbids insurers from including "ambiguous, misleading, or deceptive" provisions from sickness and accident insurance policies. Finally, the last section cited in the bulletin is O.R.C. 3923.021, which states that premium rates will be disapproved if they are "unreasonable in relation to the premium charged." Proposed legislation in Ohio (HB 479) has taken the issue a step further, making it illegal for insurance companies and pharmacy benefit managers to collect a copay for a drug that is greater than the cost of the drug without health insurance coverage. This bill was passed by the House on June 27, 2018 and is waiting to be introduced to the Senate.

Conclusion

As a pharmacy benefit manager or a health care provider sponsoring Medicare Prescription Drug Plan (Part D), it is essential that you check your contracts with pharmacies to ensure no gag clause exists. Failure to remove the clause could result in compliance actions from the CMS. Even if you, as a pharmacy benefit manager or health care provider, do not sponsor Medicare Prescription Drug Plan (Part D), you may be subject to state action for including a gag clause in contracts with pharmacies. It is imperative that you check the law in your state to see what, if any, laws have been passed prohibiting gag clauses. If your state has yet to enact such a law, this does not mean you are in the clear. With the current trend in state legislation, it is vital that you monitor legislation being introduced in your state and their status.

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FBT Gibbons has a team of health care attorneys with knowledge of the pharmaceutical industry to abide by CMS and state law.

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