PBM Fiduciary Mandates Would Increase Costs in Vermont

Vermont policymakers should carefully weigh the potential unintended cost impact of any state mandate to designate pharmacy benefit managers (PBMs) as fiduciaries for their health plan/employer clients. According to the Department of Labor (DOL) and federal courts, PBMs are not fiduciaries. Imposing fiduciary duties on PBMs would raise drug benefit costs by increasing their legal liability and undermining their ability to effectively implement cost management tools for their clients.

Vermont Impact:

- **If Vermont implements a PBM fiduciary mandate, projected drug costs for fully insured employers and commercial health plans would increase by $87 million in the state over the next ten years.[1]**
- **A fiduciary mandate would impact employers and health plans that now cover some 111,000 beneficiaries in Vermont.[2]**
- **As PBM fiduciary mandates increased costs, the ability of Vermont employers to offer health insurance—and jobs—would be diminished.**

PBMs Are Not Fiduciaries According to DOL: According to DOL, Third Party Administrators (TPAs), such as PBMs "who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform [certain] administrative functions for an employee benefit plan…are not fiduciaries of the plan."[3]

Federal Courts Have Struck Down PBM Fiduciary Mandates: Federal courts have struck down state PBM fiduciary mandates as being preempted by the Employee Retirement Income Security Act (ERISA).[4]

Fiduciary Status Would Create Conflicting Obligations for PBMs: Imposition of a fiduciary mandate would create a conflict between PBMs' contractual obligations to their clients and a fiduciary duty to act "solely in the interest of plan participants." For example, a PBM's contract may call for the use of PBM tools such as prior authorization (PA) and step therapy (ST) that are designed to reduce costs for ALL participants, but which may result in higher costs or less access to a given drug for a particular group of participants. In this case, implementing the contract would conflict with a fiduciary duty.

Legal Liabilities and Costs Would Increase under Fiduciary Mandates: Fiduciary mandates would subject PBMs to broader legal liabilities than under current law because it would transform arms' length contractual relationships into those where PBMs are responsible for the assets of their clients.

Fiduciary Mandates Would Decrease the Use of PBM Tools: Increased legal liability and conflicting obligations between fiduciary duties and client contracts could result in PBMs adopting defensive business strategies to mitigate the risk of lawsuits. This could lead to PBMs decreasing their use of formulary compliance and drug UM tools such as PA, ST, and quantity limits.

Performance-Based Contracting Would Be Undermined by Fiduciary Mandates: DOL has indicated that certain performance fee arrangements may not be appropriate for fiduciaries. Likewise, creating fiduciary responsibilities for PBMs could limit how they structure manufacturer rebate and pharmacy network contract agreements and negatively impact their bargaining leverage.

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[1] "Increased Costs Associated With Proposed State Legislation Impacting PBM Tools," Visante, April, 2020
[2] Ibid.
[3] 29 CFR 2509.75-8 - Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974.
[4] Pharm. Care Mgt Ass'n v. District of Columbia, 613 F.3d 179 (D.C. Cir. 2010).