A QUICK LOOK INTO IMPORTANT ISSUES OF THE DAY

State Remedies For Costly Prescription Drugs

BY RICHARD CAUCHI

Physicians and other prescribers write at least 4.45 billion prescriptions per year in the United States. While these medications improve patients’ quality of life and even save them, some policymakers are concerned about the costs of certain drugs.

State Action

As states have tackled the cost of and access to prescription drugs during the past 18 months, two goals are clear: 1) help the patient’s pocketbook at the retail counter and 2) open the books on how states spend their health budgets. The result is a rapidly growing stack of new laws that take a variety of approaches to address rising or prohibitive prescription drug costs.

Prohibiting “gag clauses.” State legislators were among the first to spot a limiting feature in some commercial contracts used by pharmacy benefit managers (PBMs). These “gag clauses” can prevent pharmacists from informing customers about lower, alternative costs. State legislatures acted to discourage or ban such clauses, allowing patients to learn they may be able to pay, for example, $8 out of pocket instead of $20 for an insurance co-payment. New state laws typically give a pharmacy or pharmacist “the right” to provide information about the insured’s cost share or the lower-cost options available. However, several states banned the clauses in 2017, and an updated NCSL report shows that 25 states prohibited the practice as of mid-2018.

Enhancing drug price transparency. Legislators in a half-dozen states passed laws requiring manufacturers to disclose additional cost and price information for more expensive medicines with unexplained prices or price increases.

Vermont’s 2016 law (S 216), expanded in 2018 (S 92), requires the state to identify up to 10 state-purchased prescription drugs annually “where the state spends significant health care dollars and for which wholesale acquisition cost (WAC) increased by 50 percent or more over the past five years.” A 2018 report by the Vermont attorney general makes public the manufacturer’s “justification for the increase in the cost of the drug” and reveals cost strains for both Medicaid and the private insurance market.

California’s 2017 law (SB 17) applies to all brand-name and generic drugs with a WAC of at least $40 whenever those prices increase more than...
16 percent annually. It requires 90-day advance notification of price increases for these prescription drugs, including detailed information justifying such increases. It also requires drug makers to justify initial prices for new drugs. Health insurers also must report specific cost information and disclose how much of the insurance premium pays for prescription drugs. The law includes policies sold by California’s Health Benefit Exchange.

A 2018 Connecticut law (H 5384) requires the state to annually list the top 10 drugs that represent substantial state spending, priced at $60 a month or more and with an annual cost increase of 20 percent or more. Manufacturers of those products must release cost details and justify specified price increases. Most manufacturers must notify the state about final applications for new drug approvals by the Food and Drug Administration.

Similarly, a 2018 Oregon law (H 4005) requires prescription drug manufacturers to report annually on the prices of prescription drugs and costs associated with developing and marketing them. The requirement applies to drugs priced at $100 or more a month and have a net price increase of 10 percent or more. Insurers must detail the effect of these costs on insurance premium rates.

Maine (LD 1406/SP484) requires the state’s Health Data Organization to report on the 25 most frequently prescribed drugs and the 25 with highest cost and largest price increases. It requires a yearly drug price report starting in 2019.

Nevada’s 2017 law (S 539) focuses on diabetes drugs, requiring the state to post a list of all essential diabetes medicines. Drug makers must report prices, increases, and the costs of manufacturing and marketing each product.

Louisiana (H 436) now requires drug manufacturers to provide transparency regarding prescription drug prices from anyone “who engages in any form of prescription drug marketing” to a physician or prescriber. They must provide the current wholesale acquisition cost of each of the drugs marketed in the state.

The industry trade group PhRMA (Pharmaceutical Research and Manufacturers of America) argues that the mandatory transparency bills don’t fully consider the costs of drug development and post-market surveillance, and the value and savings drugs bring to society. These bills do not address affordability for patients, according to the group.

Prohibiting drug price gouging. Maryland (HB 631) in 2017 became the first state to prohibit makers of generic and off-patent drugs designated as “essential medicines” from raising prices to “unconscionable” levels. The law authorizes the state attorney general to gather facts. If that office cannot obtain an adequate explanation for the price increase, the issue can be referred to the state court, which can decide if a remedy should be imposed. The law stipulates three specific remedies: manufacturers can reduce the price to an earlier, lower level; compensate Maryland purchasers and insurance companies that paid the “unconscionable” price for the drugs; or incur penalties of up to $10,000 for each violation. A federal district court gave the law an adverse ruling, which was under review in July.

Promoting “free speech” in medicine. Using a free-market approach, both Arizona (H 2382) and Tennessee (H 2220) laws create a Free Speech in Medicine Act. These laws allow drug makers to promote and market drugs for treatments not approved by the FDA—that called “off-label” use—when the information consists of “truthful promotion.” Both laws prohibit the state or any medical board from enforcing any federal or state restriction on manufacturers, health care institutions or a physician from such “truthful promotion.” The measures do not require insurers or other payers to cover costs for any off-label use. The laws conflict with a current federal law that restricts drug manufacturers from promoting off-label uses.

Federal Action

The Trump administration announced in May a “Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs.” The plan includes more than 25 strategies in four categories: improved competition, better negotiation, incentives to lower list prices and lower out-of-pocket costs. (Read NCSL’s analysis.) Federal action will affect Medicare transactions; however, state regulators have primary jurisdiction over commercial and private market coverage.

Laws Addressing Prescription Drug Prices

- Ban “gag clauses” thus allowing pharmacists to disclose price options
- Enhance transparency in drug pricing
- Allow drug makers to market “off-label” drugs for treatments not approved by the FDA

Source: NCSL, 2018

Additional Resources
- NCSL report, “Recent Approaches and Innovations in State Prescription Drug Laws”
- NCSL Prescription Drug Resource Center
- President Donald J. Trump’s Blueprint To Lower Drug Prices

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