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SENATE BILL 394

54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019

INTRODUCED BY

Clemente Sanchez

AN ACT

RELATING TO PHARMACIES; PROVIDING FOR CHANGES TO THE PHARMACY
AUDIT PROCESS; EXCEPTING CERTAIN AUDIT FINDINGS FROM FORMING
THE BASIS FOR RECOUPMENT; ADDING A PHARMACY BENEFITS MANAGER OR
ITS SUBCONTRACTOR AS AN AUDITING ENTITY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 61-11-18.2 NMSA 1978 (being Laws 2007,
Chapter 15, Section 1) is amended to read:

"61-11-18.2. AUDIT OF PHARMACY RECORDS.--

~~[A. As used in this section, "entity" means a
managed care company, insurance company, third-party payor or
the representative of the managed care company, insurance
company or third-party payor.~~

~~B.]~~ A. An audit of the records of a pharmacy by an
entity shall be conducted in accordance with the following

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1 criteria:

2 (1) the entity conducting the initial on-site
3 audit shall give the pharmacy notice at least two weeks prior
4 to conducting the initial on-site audit for each audit cycle;

5 (2) an audit that involves clinical or
6 professional judgment shall be conducted by or in consultation
7 with a pharmacist;

8 (3) a clerical or ~~[record-keeping]~~
9 recordkeeping error, regarding a required document or record,
10 shall not necessarily constitute fraud, ~~[but such a claim]~~ and
11 that error:

12 (a) ~~[may be subject to recoupment]~~ shall
13 not be the basis for recoupment unless the error results in
14 demonstrable financial harm; and

15 (b) shall not be subject to criminal
16 penalties without proof of intent to commit fraud;

17 (4) a pharmacy may use the records of a
18 hospital, physician or other authorized practitioner of the
19 healing arts for drugs or medicinal supplies written or
20 transmitted by any means of communication for purposes of
21 validating the pharmacy record with respect to orders or
22 refills of a dangerous drug or controlled substance;

23 (5) a finding of an overpayment or
24 underpayment shall ~~[not be a projection based on the number of~~
25 ~~patients served having a similar diagnosis or on the number of~~

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1 ~~similar orders or refills for similar drugs and recoupment of~~
2 ~~claims shall]~~ be based on the actual overpayment or
3 underpayment [~~unless the entity demonstrates a statistically~~
4 ~~justifiable method of projection or the projection for~~
5 ~~overpayment or underpayment is part of a settlement as agreed~~
6 ~~to by the pharmacy]~~ of a specific individual claim;

7 (6) each pharmacy shall be audited under the
8 same standards and parameters as other similarly situated
9 pharmacies audited by the entity;

10 (7) a pharmacy shall be allowed at least
11 twenty-one business days, with reasonable extensions allowed,
12 following receipt of the preliminary audit report in which to
13 produce documentation to address any discrepancy found during
14 an audit;

15 (8) the period covered by an audit shall not
16 exceed [~~two years, unless otherwise provided by contractual~~
17 ~~agreement]~~ one year from the date the claim was submitted to or
18 adjudicated by an entity or unless it conflicts with state or
19 federal law;

20 (9) an audit shall not be initiated or
21 scheduled during the first five calendar days of a month [~~due~~
22 ~~to the high volume of prescriptions filled during that time~~
23 ~~unless otherwise consented to by the pharmacy];~~

24 (10) the preliminary audit report shall be
25 delivered to the pharmacy within one hundred twenty days, with

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1 reasonable extensions allowed, after conclusion of the audit,
2 and the final report shall be delivered to the pharmacy within
3 six months after receipt of the preliminary audit report or
4 final appeal, as provided for in Subsection [G] B of this
5 section, whichever is later;

6 ~~[(11) the audit criteria set forth in this~~
7 ~~subsection shall apply only to audits of claims submitted for~~
8 ~~payment after July 1, 2007; and~~

9 ~~(12)]~~ (11) notwithstanding any other provision
10 in this ~~[subsection]~~ section, the entity conducting the audit
11 shall not use the accounting practice of extrapolation in
12 calculating recoupments or penalties for audits;

13 (12) a person performing an on-site audit or a
14 desk audit shall not directly or indirectly receive
15 compensation based on the result of the audit;

16 (13) an entity shall not charge a fee for
17 conducting an on-site or a desk audit unless there is a finding
18 of actual fraud;

19 (14) after an audit is initiated, a pharmacist
20 or pharmacy may resubmit a claim to correct clerical or
21 recordkeeping errors;

22 (15) requirements for a valid prescription or
23 a pharmacy's operational standards shall not be more stringent
24 than federal or state requirements;

25 (16) a pharmacy or pharmacist may satisfy

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1 state and federal requirements for a valid prescription by
2 affixing or writing additional information on the front or back
3 of a prescription or if the required information is
4 electronically recorded on a patient's profile and is readily
5 retrievable;

6 (17) the days' supply for unit-of-use items,
7 such as topicals, drops, vials and inhalants, shall not be
8 limited beyond manufacturer recommendations;

9 (18) if the only commercially available
10 package size exceeds an entity's maximum days' supply, the
11 dispensing of such package size must be accepted by the entity
12 and shall not be the basis for recoupment;

13 (19) if the only commercially available
14 package size exceeds an entity's maximum days' supply and the
15 entity accepts the refill of such prescription, the entity
16 shall not recoup such claim as an early refill; and

17 (20) the failure of a pharmacy to collect a
18 copayment shall not be the basis for recoupment if the pharmacy
19 provides documentation of billing of the claim and an attempt
20 to collect the copayment.

21 ~~[G.]~~ B. Recoupment of any disputed funds shall
22 occur after final internal disposition of the audit, including
23 the appeals process set forth in Subsection ~~[D]~~ C of this
24 section. Should the identified discrepancy for an individual
25 audit exceed twenty-five thousand dollars (\$25,000), future

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1 payments to the pharmacy may be withheld pending finalization
2 of the audit.

3 ~~[D.]~~ C. Each entity conducting an audit shall
4 establish an appeals process under which a pharmacy may appeal
5 an unfavorable preliminary audit report to the entity. If,
6 following the appeal, the entity finds that an unfavorable
7 audit report or any portion of the audit is unsubstantiated,
8 the entity shall dismiss the audit report or the
9 unsubstantiated portion of the report of the audit without the
10 necessity of any further proceedings.

11 ~~[E. This section does not apply to any~~
12 ~~investigative audit that involves probable or potential fraud,~~
13 ~~willful misrepresentation.]~~

14 D. In a wholesale invoice audit conducted by an
15 entity:

16 (1) an entity shall not audit the claims of
17 another entity;

18 (2) the following shall not form the basis for
19 recoupment:

20 (a) the national drug code for the
21 dispensed drug is in a quantity that is a sub-unit or multiple
22 of the purchased drug as reflected on a supporting wholesale
23 invoice;

24 (b) the correct quantity dispensed is
25 reflected on the audited pharmacy claim;

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1 (c) the drug dispensed by the pharmacy
2 on an audited pharmacy claim is identical to the strength and
3 dosage form of the drug purchased; or

4 (d) discrepancies in wholesale invoice
5 purchasing where the audited claims are otherwise supported by
6 records of receipt by the patient or patient's agent of the
7 dispensed drug underlying the audited claim;

8 (3) the entity shall accept as evidence:

9 (a) supplier invoices issued prior to
10 the date of dispensing the drug underlying the audited claim;

11 (b) invoices from any supplier
12 authorized by law to transfer ownership of the drug acquired by
13 the audited pharmacy;

14 (c) copies of supplier invoices in the
15 possession of the audited pharmacy; and

16 (d) reports required by any state board
17 or agency; and

18 (4) within five business days of request by
19 the audited pharmacy, the entity shall provide supporting
20 documentation provided to the entity by the audited pharmacy's
21 suppliers.

22 E. The provisions of this section may not be
23 waived, voided or nullified by contract.

24 F. As used in this section:

25 (1) "entity" means a managed care company,

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1 insurance company or third-party payor, or representative of a
2 managed care company, insurance company or third-party payor,
3 or a pharmacy benefits manager or a subcontractor of a pharmacy
4 benefits manager; and

5 (2) "extrapolation" means a mathematical
6 process or technique used to estimate audit results or findings
7 for a larger batch or group of claims not reviewed."