SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR SENATE BILL 394

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

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

underscored material = new
[~~bracketed material~~] = delete

criteria:

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

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

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

(a) [~~may be subject to recoupment~~] shall not be the basis for recoupment unless the error results in overpayment to the pharmacy, and any amount to be charged back or recouped due to overpayment shall not exceed the amount the pharmacy was overpaid; and

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

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

(5) a finding of an overpayment or

underscored material = new
[~~bracketed material~~] = delete

underpayment shall [~~not be a projection based on the number of patients served having a similar diagnosis or on the number of similar orders or refills for similar drugs and recoupment of claims shall~~] be based on the actual overpayment or underpayment [~~unless the entity demonstrates a statistically justifiable method of projection or the projection for overpayment or underpayment is part of a settlement as agreed to by the pharmacy~~] of a specific individual claim;

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

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

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

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

underscored material = new
[~~bracketed material~~] = delete

(10) the preliminary audit report shall be delivered to the pharmacy within one hundred twenty days, with reasonable extensions allowed, after conclusion of the audit, and the final report shall be delivered to the pharmacy within six months after receipt of the preliminary audit report or final appeal, as provided for in Subsection [~~C~~] B of this section, whichever is later;

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

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

(12) the auditing entity conducting a pharmacy audit shall not compensate an employee or contractor with which an auditing entity contracts to conduct a pharmacy audit based on the amount claimed or the actual amount recouped from the pharmacy being audited;

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

(14) as a result of an audit finding, a pharmacist or pharmacy may resubmit a claim to correct clerical or recordkeeping errors;

underscored material = new
[~~bracketed material~~] = delete

(15) the requirements for a valid prescription or a pharmacy benefits manager's required operational standards for pharmacies shall not be more stringent than federal or state requirements;

(16) with notice to the prescriber, a pharmacy or pharmacist may satisfy state and federal requirements for a valid prescription by affixing or writing additional information on the front or back of a prescription or if the required information is electronically recorded on a patient's profile and is readily retrievable;

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

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

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

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

underscored material = new
[bracketed material] = delete

[~~C.~~] B. Recoupment of any disputed funds shall occur after final internal disposition of the audit, including the appeals process set forth in Subsection [~~D~~] C of this section. Should the identified discrepancy for an individual audit exceed twenty-five thousand dollars ($25,000), future payments to the pharmacy may be withheld pending finalization of the audit.

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

[~~E.~~] D. This section does not apply to any investigative audit that involves probable or potential fraud, waste, abuse or willful misrepresentation.

E. In a wholesale invoice audit conducted by an entity:

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

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

(a) the national drug code for the

underscored material = new
[~~bracketed material~~] = delete

dispensed drug is in a quantity that is a sub-unit or multiple of the purchased drug as reflected on a supporting wholesale invoice;

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

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

(3) the entity shall accept as evidence:

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

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

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

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

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

F. The provisions of this section shall not be waived, voided or nullified by contract.

G. As used in this section:

underscored material = new
[bracketed material] = delete

(1) "entity" means a managed care company, insurance company or third-party payor, or representative of a managed care company, insurance company or third-party payor, or a pharmacy benefits manager or a subcontractor of a pharmacy benefits manager; and

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

underscored material = new
[bracketed material] = delete