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DEPARTMENT

**BULLETIN NO: 18-2023**

**TO: PHARMACY BENEFITS MANAGERS, HEALTH INSURERS, HEALTH MAINTENANCE ORGANIZATIONS, HOSPITAL PUBLIC SERVICE CORPORATIONS, HEALTHCARE PAYORS, AND OTHER INTERESTED PARTIES**

**FROM: ARKANSAS INSURANCE DEPARTMENT**

**SUBJECT: FAILURE TO ADHERE TO ANTI-CLAWBACK LAW AND FAILURE TO LAWFULLY ADJUST PRICING IN COMPLIANCE WITH MAC AND NADAC LAWS**

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The Arkansas Insurance Commissioner issues this Bulletin to all licensed pharmacy benefits managers (“PBMs”) transacting business in this state and any other PBMs transacting business in this state subject to Arkansas’ Maximum Allowable Cost (“MAC”) Law Ark. Code Ann. § 17-92-507, the Department has received several complaints relating to prohibited practices by PBMs.

### **Failure to Comply with Prohibition Against Clawbacks**

The “Patient Rights Regarding Payment for Pharmacists Service Act,” codified at Ark. Code Ann. § 4-88-1001 et seq., prohibits PBMs from engaging in a practice known as “clawback.” A clawback occurs when a PBM charges an insured a higher copay or coinsurance amount than what the PBM will ultimately pay to the pharmacy filling the prescription. Although the pharmacy collects the higher copay or coinsurance charged by the PBM, the PBM will reduce future payments to the pharmacy to take back the difference in price from the pharmacy.

Pursuant to Ark. Code Ann. § 4-88-1004, “[a]n individual shall not be required to make a payment for pharmacists services in an amount greater than the pharmacist or pharmacy providing the pharmacists services may retain from all payment sources.”

Lately, the Department has seen many examples of an insured’s copay exceeding the total reimbursement a pharmacy filling the prescription is allowed to keep. PBMs are advised this practice was prohibited by Arkansas law in 2015, remains illegal today, and is subject to enforcement by the Department.

**Pricing Adjustments by PBMs that Effectively Create Negative Remits in Violation of MAC and NADAC Law**

Several pharmacists have complained to the Department about PBM reimbursement processes that fail to comply with Arkansas law. The Department does not consider a PBM to be in compliance with Arkansas’s Maximum Allowable Cost (“MAC”) Law, Ark. Code Ann. § 17-92-507, or National Average Drug Acquisition Cost (“NADAC”) Law, Ark. Code Ann. § 23-92-506(b)(5), when a pharmacy successfully appeals a MAC or NADAC price, and the pharmacy is told that it will need to collect the difference in price from an insured.

The Department understands that when some PBMs adjust claims following a successful drug pricing appeal by a pharmacy, the software used by the PBM is set to increase an insured’s share of the drug price, resulting in a higher amount of coinsurance that the PBM tells the pharmacy to obtain from the insured to make up for the difference in the paid price and the successfully appealed price.

Regardless of the agreements between, or plan design approved by an insurer or payor and PBM, a PBM cannot avoid its duty to properly reimburse a pharmacy by requiring the pharmacy to collect funds from an insured. It is the PBM’s responsibility to make sure that its processes are compliant with Arkansas law, and when such processes fail to comply, it is equally important that the PBM’s processes do not place additional burdens upon the pharmacy.

The Department does not consider a PBM that responds to an adjusted claim by instructing a pharmacy to collect additional funds from an insured to be compliant with Arkansas MAC or NADAC Laws. The Department also considers this process to result in failure to provide a reasonable MAC appeal process.

Finally, the Commissioner advises all PBMs servicing plans within the Department’s jurisdiction of new penalties for violation of MAC and NADAC Laws that became effective August 1, 2023.

If you have any questions or concerns, please feel free to email the following [aid.pbmlicensing@arkansas.gov](mailto:aid.pbmlicensing@arkansas.gov).

  
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ALAN MCCLAIN  
ARKANSAS INSURANCE COMMISSIONER

11-7-23  
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