HB 1180

Department of Legislative Services

Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

House Bill 1180 (Delegate Montgomery, *et al.*)
Health and Government Operations

Prescription Confidentiality Act

This bill prohibits a pharmacy benefits manager, "carrier," "electronic health network," pharmacy, or authorized prescriber from licensing, transferring, using, or selling for any commercial purpose patient-identifiable or prescriber-identifiable information derived from or relating to a prescription.

Fiscal Summary

State Effect: Potential minimal increase in general fund expenditures beginning in FY 2011 for the Department of Health and Mental Hygiene (DHMH) to enforce the bill. Potential minimal increase in fine revenues and incarceration expenditures due to the application of existing penalty provisions.

Local Effect: Potential minimal increase in fine revenues and incarceration expenditures due to the application of existing penalty provisions.

Small Business Effect: None.

Analysis

Bill Summary: "Carrier" includes an insurer, nonprofit health service plan, health maintenance organization, dental plan organization, third-party administrator, or any other person that provides State-regulated health benefit plans.

"Electronic health network" means an entity or worldwide network of computers that provides the infrastructure that connects the computer systems or other electronic devices used by prescribers, pharmacies, health care facilities, pharmacy benefits managers, and

carriers, or agents and contractors of prescribers, pharmacies, health care facilities, pharmacy benefits managers, and carriers, to facilitate the secure transmission of an individual's prescription drug order, refill, authorization request, claim, payment, or any other health care transaction.

The bill's prohibition does not apply to pharmacy reimbursement, formulary compliance, utilization review, or health care research approved by an institutional review board under a federalwide assurance for the protection of human subjects; nor does it apply if the information is not patient-identifiable or prescriber-identifiable and is aggregated by zip code, other geographic region, or medical specialty. The bill does not prohibit authorized dispensing of prescription drugs, transmission of prescription information between a prescriber and pharmacy, transfer of prescription information between pharmacies, or transfer of prescription records in the event a pharmacy ownership is changed. Violations of the bill are subject to current penalties under the Maryland Food, Drug, and Cosmetic Act.

Current Law: A violation of the Maryland Food, Drug, and Cosmetic Act is a misdemeanor subject to a fine of up to $10,000 and/or imprisonment for up to one year. Subsequent violations are subject to a fine of up to $25,000 and/or imprisonment for up to three years. Additional civil penalties may apply.

Under the federal Health Insurance Portability and Accountability Act Privacy Rule "covered entities," including carriers, health care clearinghouses, and health care providers, may not use or disclose protected health information, except either as the privacy rule permits or as an individual authorizes in writing. Covered entities may disclose protected health information, without an individual's authorization for such purposes as treatment, payment, health care operations, and public interest activities. Not all entities that receive protected health information secondary or "downstream" to covered entities are subject to the privacy rule.

Maryland's Confidentiality of Medical Records Act requires health care providers and facilities to keep the medical record of a patient confidential and obtain written consent for disclosure. Generally, a person to whom a medical record is disclosed may not redisclose the medical record unless authorized by the person in interest. Exceptions are made for such purposes as provision of health care services, billing, utilization review, and legal claims.

An insurer is generally prohibited from disclosing an insured's medical records without written authorization. Exceptions include legal proceedings, coordination of benefits, reinsurance, renewal of insurance, and claims administration.

Background: In recent years, corporate data mining of personal health information has increased. Mined prescription drug information is used to determine offers of insurance and insurance rates, as well as to detail health care practitioners' prescribing patterns. Insurance carriers can purchase pharmacy history information on prospective clients through services. With authorization from the prospective client, prescription information including drug, dosage, fill dates, pharmacy, and prescriber are electronically transmitted to insurance company underwriters along with possible diagnoses and predictive risk assessments. Health care providers' prescribing practices can also be analyzed in great detail, most commonly for use in physician-directed marketing by pharmaceutical companies. These uses prompt concerns regarding patient privacy and the exertion of undue influence over providers.

Three states regulate the use of prescription drug information for commercial purposes. In 2006, New Hampshire became the first state to prohibit the sale or redistribution of prescription sales record information that identified patients or prescribers. Maine and Vermont enacted similar laws in 2007. Vermont requires physicians to opt-in if they wish their data to be shared with pharmaceutical companies, whereas in Maine, physicians must opt-out to prevent their data from being used for marketing purposes.

The data mining and pharmaceutical industries have sued these states on the basis that limiting the use of identifying information in prescription records restricts commercial speech rights protected by the First Amendment. In November 2008, the First Circuit Court of Appeals upheld the constitutionality of New Hampshire's law.

State Expenditures: Potential minimal increase in general fund expenditures beginning in fiscal 2011 for DHMH to enforce the bill. This estimate assumes that enforcement by DHMH is based on complaints only and that the number of complaints is minimal.

The Maryland Insurance Administration (MIA) advises that it will likely handle complaints regarding carrier violations, thereby further reducing the enforcement burden on DHMH. MIA advises that it can handle such complaints with existing resources.

Additional Information

Prior Introductions: HB 1155 of 2009, a similar bill, was withdrawn after a hearing in the House Health and Government Operations Committee. Its cross file, SB 417, received a hearing in the Senate Finance Committee, but no further action was taken.

Cross File: SB 1040 (Senator Lenett) - Rules.

Information Source(s): CareFirst Blue Cross/Blue Shield, Department of Budget and Management, Maryland Health Insurance Plan, Maryland Insurance Administration, University of Maryland Medical System, Department of Legislative Services

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