

States Poised to Continue Banning Co-Pay Accumulators in 2023

BY MATT DEVINO, MPH



The last several years have seen a marked increase in state and federal policy seeking to address the cost and affordability of prescription drugs. One area of particular interest to state legislatures in 2021, 2022, and again in 2023 are co-pay accumulators.

A co-pay accumulator—or co-pay accumulator adjustment program—is a strategy used by health plans and pharmacy benefit managers (PBMs) that prevents manufacturer-based co-pay assistance programs and cards from counting toward two patient costs: their deductible and maximum out-of-pocket amount. Although pharmaceutical manufacturers attempt to create programs to subsidize out-of-pocket prescription drug costs for patients, health plans reduce the value of these programs by exhausting such funds, while also requiring patients to pay their full deductible and coinsurance (up to their out-of-pocket maximum) in order to obtain their medication(s).

Co-pay accumulator adjustment programs, in effect, extend the amount of time it takes for a patient to reach their deductible and/or out-of-pocket maximum, thereby reducing the plan sponsor's coverage until such cost-sharing is met. The only party that benefits from the co-pay accumulator model is the health plan, as they can collect both the manufacturer-provided co-pay assistance and the patients' full deductible or out-of-pocket limit. Patients, on the other hand, who manufacturers intend to provide benefit to from their co-pay assistance programs, instead see no savings at the pharmacy counter.

What are States Doing About Co-Pay Accumulators?

Following two significant policy changes at the federal level, state governments are empowered to start challenging state-regulated health plans and banning co-pay accumulator adjustment programs. The first of these changes was a Centers for Medicare & Medicaid Services (CMS) final rule, issued in May 2020, that expressly allowed the use of co-pay accumulator programs. The 2021 Notice of Benefit and Payment Parameters final rule established that health plans and PBMs need not count toward a patient's annual deductible or cost-sharing limit “for specific prescription brand drugs that have an available and medically appropriate generic equivalent” to the extent consistent with applicable state laws.¹

Later in December 2020, the United States Supreme Court ruled in *Rutledge v. Pharmaceutical Care Management Association (PCMA)* that the Employee Retirement Income Security Act (ERISA) did not preempt Arkansas state law regulating PBMs and prohibiting the use of co-pay accumulator adjustment programs.² This decision had an immediate impact on states' ability to regulate health plan benefits and PBMs specifically, therefore, increasing the amount of power states have to impact drug costs.

As a result of this activity in 2020, many states have endeavored to pass legislation banning co-pay accumulators in state-regulated health plans and PBMs, ensuring that manufacturer-based co-pay assistance is counted toward patients' cost-sharing limits. As of January 2023, 16 states and

Puerto Rico have passed legislation banning state-regulated payer and PBM use of co-pay accumulator adjustment programs, including Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maine, New York, North Carolina, Oklahoma, Tennessee, Virginia, Washington, and West Virginia.

According to Avalere, at least 13 percent of Americans enrolled in the U.S. commercial insurance market will belong to a health plan that must count co-pay assistance toward patient cost sharing by 2024.³ Similar legislation banning co-pay accumulator programs has been introduced in a large number of other states, including Florida, Massachusetts, Michigan, Mississippi, New Mexico, Ohio, Oregon, Pennsylvania, Utah, Texas, Wisconsin, and D.C., and efforts to pass these laws will likely continue in 2023.

What is the Federal Government Doing About Co-Pay Accumulators?


The federal government has been slower in rolling back its 2020 decision to permit the use of co-pay accumulators. However, over the course of 2022, as drug pricing and the regulation of PBMs gained national attention, several policy proposals were announced by federal agencies and members of Congress.

In February 2022, the Federal Trade Commission (FTC) announced a request for information, soliciting public comments on PBM business practices that affect drug affordability and access, including contract terms, rebates, fees, pricing policies, steering

methods, conflicts of interest, and consolidation.⁴ In response to more than 24,000 public comments received, the FTC voted unanimously in June to launch an inquiry into the PBM industry and send compulsory orders to six of the largest PBMs in the country: CVS Caremark, Express Scripts, OptumRx, Humana, Prime Therapeutics, and MedImpact Healthcare Systems.⁵

At the same time, Senators Chuck Grassley (R-IA) and Maria Cantwell (D-WA) introduced legislation in May 2022 to empower the FTC to increase drug pricing transparency and hold PBMs accountable for unfair and deceptive practices that drive up the costs of prescription drugs at the expense of consumers.⁶ While this legislation was favorably advanced by the Senate Committee on Commerce with a full Senate vote, it ultimately did not pass in the 2022 legislative session.

An additional piece of legislation was introduced in November 2021 by U.S. Representatives Rodney Davis (R-IL) and Donald McEachin (D-VA) to explicitly regulate the use of co-pay accumulators at the national level. The Help Ensure Lower Patient (HELP) Copays Act would require health plans to apply certain payments made by, or on behalf of, a plan enrollee toward a plan's cost-sharing requirements, thereby nullifying the impact of co-pay accumulator adjustment programs.⁷ While this bill gained bipartisan support and endorsement by many provider and patient advocacy organizations, including ACCC, it also did not pass during the 2022 legislative session.

Sadly, bill sponsor Rep. McEachin passed away in late November 2022, following his own courageous battle with cancer. However, his former colleagues have taken up this issue, as a new co-pay accumulator bill has now been introduced in the 118th Congress. The new bill, which is again a bipartisan effort called the: [Help Ensure Lower Patient \(HELP\) Copays Act](#) (H.R. 830), was introduced by Representatives Earl L. "Buddy" Carter (R-GA), Nanette Barragán (D-CA), Mariannette Miller-Meeks (R-IA), and Diana DeGette (D-CO).⁸ 

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