

Legislative panel OK's updated rules despite revived federal lawsuit over PBM law

PUBLISHED JUNE 4, 2024 BY ANDY SHER

(Credits: Thirty MedPlus, McKee Foods)

Members of the Tennessee Legislature's Joint Government Operations Committee have approved revised rules to rein in what pharmacists argue are abusive practices by pharmacy benefit managers, or PBMs, that run prescription drug plans for health insurers and employers with an eye toward controlling costs.

Lawmakers previously passed a 2021 law and subsequent revisions seeking to rein in PBMs and employers. But the measure has a major problem moving forward: A three-judge panel of the 6th U.S. Circuit Court of Appeals in March breathed new life into a lawsuit filed by Collegedale-based McKee Foods challenging the state's new regulatory set up and the laws that put it in place.

McKee, a commercial baker that employs some 3,500 people, is best known as the maker of Little Debbie snacks. The dispute is anything but sweet. It arose as a result of efforts by BFP Inc., which does business as Thrifty Med Plus Pharmacy, after the pharmacy was removed from McKee's Prescription Drug Program in 2021.

Thrifty Med later embarked on a multi-pronged effort to get reinstated in the network, filing administrative complaints against McKee and actively lobbying to change Tennessee pharmacy laws in its favor, according to the unpublished opinion by the appellate panel comprised of Judges David McKeague of Michigan, Chad Readler of Ohio and Stephanie Dawkins Davis of Ohio.

The appeals judges agreed with arguments made by McKee Foods that Tennessee's "any willing pharmacy" laws are preempted by the federal Employee Retirement Income Security Act (ERISA). And the judges agreed the state's "any willing pharmacy" law does not require it to include Thrifty Med in the company's approved network and thus were not rendered moot under 2022 changes in the law and other developments.

McKee initially lost its case before U.S. District Judge Charles Atchley in Chattanooga in February 2023. He dismissed the suit for lack of matter jurisdiction, holding that McKee's claims were rendered moot following an update to the state law. The company appealed to the 6th Circuit, which reversed and remanded the case back to the district court judge for further proceedings. The case has now been scheduled for trial in Chattanooga federal court on Dec. 17.

Sexton priority

The PBM overhaul has been a major priority for House Speaker Cameron Sexton, R-Crossville. Senate Speaker Randy McNally of Oak Ridge and

fellow Republican Sens. Ferrell Haile of Gallatin and Shane Reeves of Murfreesboro also backed the changes. All three are pharmacists.

The 2021 PBM bill was one of several flashpoints between businesses and their traditional Republican allies in the General Assembly that year. The Tennessee Business Roundtable called the measure “a government mandate” that restricts employers’ ability to manage healthcare costs. Sexton dismissed the concerns, calling the initiative a “good government bill ... that will not drive up healthcare costs.”

During a Government Operations meeting last month, Scott McAnally, the director of insurance for the Department of Commerce and Insurance noted PBMs play a major role in the provision of pharmacy benefits. They act as intermediaries between pharmacists, insurance companies and employers, pharmaceutical manufacturers and drug wholesalers, he said. They also design drug formularies, manage utilization, negotiate prices, engage in pharmacy network formation and mail order services.

McAnally and aides went on to outline new provisions in the rules that include requiring statutory compliance audits for PBMs, companies and other entities along with enhanced licensure requirements.

Critics like Thrifty Med Plus complain there is a lack of competition and a lack of transparency. Thrifty, which had previously been able to dispense drugs under McKee’s pharmacy program, asserts it was later frozen out under the PBM.

‘Be reasonable’

William Pickering, an attorney representing McKee, noted the new regulations and law have caused angst not only with McKee but with other employers across the state.

“We’re just one of the employers in the state that have some major, major concerns, both about the PBM legislation but more specifically about the rules,” he said.

PBMs have become an “easy target” for state regulation, Pickering said, also acknowledging “they’re not perfect.”

“Some [changes] are probably justified,” he said. “But we think the legislation in Tennessee and the rules go too far.”

The combination has a “huge negative impact” for employers that pay for

self-insured plans for workers, Pickering said, adding that he believes Tennessee is one of the first states to undertake audits. Pickering asked Government Operations Committee members to “be reasonable”. With Tennessee among the first — “if not the first” — state to pursue this path, the rules should be made less burdensome, he said.

“These rules and the legislation behind the rules have a huge negative impact for employers that pay for self-insured plans for their employees,” Pickering said.

Rep. John Ragan, R-Oak Ridge, speaks about his bill to ban local governments from considering reparations for slavery during a House floor session on April 24, 2024. (Credit: Erik Schelzig)

Pie in the sky?

Rep. Sabi Kumar, a retired physician, asked Pickering whether he agreed “it’s unfair to pay pharmacies below its cost.”

Replied Pickering: “I think that’s a matter between the PBM and the pharmacy. Most pharmacies do more than dispense drugs. That’s really not a matter for an employer like McKee to answer.”

Calling it a net cost to the pharmacies, Kumar said, “certainly McKee could just say don’t do that or not steer away.”

Pickering noted that McKee has an onsite pharmacy for its workers. It’s “totally voluntary,” he said. “Those who choose can benefit from a lower copay.”

The attorney also said McKee seeks to pare down costs, pointing out that some advanced drugs can cost hundreds of thousands of dollars.

Costs of compliance with the new rules are “going to be very costly” with “burdensome” regulations, Pickering said. PBMs won’t “eat” the additional costs and that will be passed along to employers or increases premium costs and co-pays to employees.

House Government Operations Committee Chair John Ragan, R-Oak Ridge, was less than impressed, saying McKee was making assumptions about increased costs.

“Excuse my reluctance to accept such pie in the sky,” Ragan said.

Curcio returns

Among attendees at the hearing was Michael Curcio, a former Republican lawmaker from Dickson. Noting their former colleague was present, committee members invited him to speak.

Curcio currently works as a benefits broker who helps clients source various benefit plans to serve them. He is also board chairman of the Tennessee Employer Benefits Alliance, which includes McKee Foods as a member.

The former lawmaker said PBMs have become a favorite target and that

he understands that — “I fight with PBMs as much as anybody else in this conversations does.”

But Curcio said if the effort was intended to target PBMs, “they completely miss the mark.” It’s hitting employees and employers, he said. One unnamed East Tennessee member of the association employs some 6,000 workers. A problem for them is the dispensing fee in the legislation and rules, Curcio said.

“This is a new tax on Tennessee employees and not a punishment to PBMs and this tax is already having a huge impact,” he said.

The manufacturer has incurred \$680,000 so far this year, Curcio said. That includes a \$70,000 increase in dispensing fees for low-volume pharmacies. There’s another \$190,000 in expenses for restrictions on specialty pharmacy network design and more than \$300,000 in restrictions on incentivizing utilization of lower cost dispensing channels.

Another \$116,000 touches “directly” onto employees due to elimination of the lower cost share of the company’s in-house pharmacy.

“Those costs are shouldered by the families who come there every day and punch a clock,” Curcio said.