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MEMORANDUM

TO: David Silverstein and Andrew Graham
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: January 24, 2018
SUBJECT: Proposed initiative measure 2017-2018 #123, concerning Transparency in Healthcare Billing

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Earlier versions of this proposed initiative, proposed initiatives 2017-2018 #85 and 2017-2018 #118 to #122, were the subject of memoranda dated December 19, 2017, and January 23, 2018, and were discussed at public meetings on December 21, 2017, and January 25, 2018. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To require health care providers maintaining a physical presence to receive and treat patients, including individual providers in private practice settings and health care facilities such as hospitals and community clinics, to publish, in a public, easy-to-find, and easy-to-access location, their fee schedules or other lists of gross billed charges the providers bill for specific health care services before applying any discounts, rebates, or other charge adjustment mechanisms;
2. To specify that publishing requires, at a minimum, that the provider make the fee schedule available in printed form, upon request, for use while an individual is present at the provider's location, and in commonly used downloadable formats on the provider's website, and as specified by the executive director of the Colorado Department of Public Health and Environment;
3. To specify that if the provider does not maintain a website, the provider is required to provide the fee schedule in printed or electronic format upon request of an individual;
4. To require a provider that does not maintain its own physical presence and instead delivers health care services at a health care facility to provide the provider's list of gross billed charges to the facility, and to require the facility to post the provider's charges list as specified by the executive director of the Colorado Department of Public Health and Environment;
5. To specify the minimum information providers must include in the fee schedule and allow the executive director of the Colorado Department of Public Health and Environment to further specify the information required to be included;
6. To except a provider from the requirement to post its entire fee schedule if the provider's entire fee schedule is based on a percentage of the CMS fee schedule; require a provider to publish any portion of the fee schedule that is not based on the CMS fee schedule; and require a provider that bases a portion of its fee schedule on a percentage of the CMS fee schedule to

- publish information specified by the executive director of the Colorado Department of Public Health and Environment, which must include, at a minimum, the date of the CMS schedule the provider used, the percentage amount that is the basis of the charges in the provider's fee schedule, and any other information necessary to determine charges;
7. To require a provider to include information about its billing policies and practices with the published fee schedule;
 8. To require a provider to publish a list of all health care professionals or professional practice groups that provide health care services and include information about the nature of the relationship between the professional or practice group and the provider, and any other information specified by the executive director of the Colorado Department of Public Health and Environment;
 9. To require a provider to update its published fee schedules promptly upon any change in the information and maintain records of all changes to charges listed in its published fee schedule;
 10. To prohibit a provider from billing a patient or third-party payer for health care services rendered to the patient if the provider has failed to publish its fee schedule as required by the proposed measure but allow the noncomplying provider to bill the insurance carrier as long as the patient is held harmless for any balance not paid by the insurance carrier;
 11. To require a provider to include in every bill sent to a patient an itemized detail of each health care service provided, the charge for the service, and how any payment or adjustment by the patient's health insurer was applied to each line item in the bill;
 12. In situations where an individual provides health insurance information to the provider, to require the health care provider to disclose whether the provider participates in the individual's health insurance plan; whether the services the provider will render will be covered as an in-network or out-of-network benefit; and whether the individual will receive a service for an out-of-network provider at an in-network facility;
 13. To require health insurers to post on their websites and provide, in writing upon request from a covered person:

- a. The specific basis for determining the payment or reimbursement amount the insurer provides to a health care provider rendering health care services to a person covered under a plan issued by the insurer;
 - b. Items that appear as charges on an explanation of benefits or provider billing statement that the carrier does not pay;
 - c. Detailed coverage and negotiated payment information by plan type and participating provider; and
 - d. Prescription drug prices in a form and manner determined by the commissioner.
14. To require health insurers to annually, or more frequently if required by the commissioner of insurance, publish detailed information, in a form and manner determined by the commissioner of insurance, regarding rebates or other forms of incentive received as the result of paying for health care services or purchasing prescription drugs or medical devices;
 15. To require the commissioner of insurance, on or before April 30, 2019, to adopt rules necessary to implement, administer, and enforce the requirements imposed on health insurers and to thereafter revise the rules as necessary;
 16. To require every pharmacy to publish, in a public, easy-to-find, and easy-to-access location and in a form and manner determined by the Colorado State Pharmacy Board, to promptly update as specified by the pharmacy board, and to maintain records of changes to, as specified by the pharmacy board, its retail drug prices, which are the prices the pharmacy charges to an insured or uninsured person for prescription drugs it administers or dispenses, before any rebates, discounts, or other price adjustment mechanisms are applied;
 17. To specify that publishing requires, at a minimum, that the pharmacy make its retail drug prices available in printed form, upon request, while the requesting individual is present at the pharmacy, and in commonly used downloadable formats on the pharmacy's website;
 18. To specify that if the pharmacy does not maintain a website, the pharmacy is required to provide its retail drug prices in an electronic format upon request of an individual;

19. To require the pharmacy board, on or before April 30, 2019, to adopt rules necessary to implement, administer, and enforce the requirements imposed on pharmacies and to thereafter revise the rules as necessary;
20. To repeal article 49 of title 25 of the Colorado Revised Statutes, which is the "Transparency in Health Care Prices Act."
21. To prohibit any contract between a health insurer and health care provider issued, amended, or renewed on or after April 30, 2019, from including any provision that restricts the ability of a provider or health insurer to provide patients with the health care service charge information required to be published by the proposal and to specify any such provision is void and unenforceable;
22. To require the executive director of the Colorado Department of Public Health and Environment, on or before April 30, 2019, to adopt any rules necessary to implement, administer, and enforce the measure;
23. To defined terms used in the measure; and
24. To specify that the measure takes effect on April 30, 2019.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. The term "healthcare" is used throughout the proposed initiative. However, throughout the Colorado Revised Statutes, the term is spelled "health care." Consider changing all instances of "healthcare" to "health care."
2. Sections 1, 4, 6, and 7 of the proposed initiative each add a new part 1 to article 20 of title 6. Because the entire part 1 is being repealed and reenacted in section 2 of the proposed initiative, the language in sections 1, 4, 6, and 7 should be moved to and combined with section 2 under a single amending clause, with the new sections 6-20-100, 6-20-106, 6-20-107, and 6-20-108 included under the single amending clause.
3. Citations to sections in the Colorado Revised Statutes should have a space between the section number and the subsection number. For example, the citation in 6-20-102 (12) should be "10-16-102 (34)" instead of "10-16-102(34)."
4. A reference to a subsection of the Colorado Revised Statutes should indicate every element of the subsection referenced as well as the section in which that subsection can be found. For example, the reference in 6-20-102 (14)(f) should, presumably, be "To the extent not covered by subsections (14)(a) through (14)(e) of this section..."
5. The word "section" or "subsection," as appropriate, should precede a citation to the Colorado Revised Statutes. For example, the reference in 6-20-106 in section 7 of the measure should be written "...except for section 6-20-106 ..."
6. The word "shall" means "has a duty." Because the subject before "shall" in 6-20-103 (5) is an object ("The list") and can't have a duty, the word "shall" should be changed to "must."
7. There is no need for a colon in 6-20-103 (5). The language that follows the colon consists of a single element the executive director must include in the list, therefore it can simply follow the words "at a minimum."
8. Because the language that begins section 6-20-105 is an introductory portion leading to other subsections, it must begin with a (1), and subsections (1), (2), and (3) that follow should be relabeled as (a), (b), and (c). Additionally, because the current subsections (1), (2), and (3) are elements of a list that are only one sentence long, they should each end with a semi-colon instead of a period. The end of subsection (2) should end with either an "and" or an "or" after the semi-colon, depending on the meaning the proponents wish to convey.

9. Statutory text should immediately follow each headnote. For example, the text in subsection (1) of section 10-16-147 should be moved to follow "**rules.**" instead of appearing on the next line.
10. The end of 10-16-147 (2)(a)(II) should end with a semi-colon instead of a period to denote that the list of which it is a part continues in the next subsection, (2)(b).
11. The terms as defined in the proposed measure in section 6-20-102 apply only to those terms as they appear in part 1 of article 20 of title 6 and do not apply to the terms as used in the proposed section 10-16-147, which is located in a different area of statute. So, for example, the term "prescription drug price" is defined in section 6-20-102 (13), and that definition applies as the term is used in part 1 of article 20 of title 6. That term, however, is not otherwise used in part 1 of article 20 of title 6, so the term should not be included in the definitions section 6-20-102. The term **is** used in section 10-16-147, but the defined term in section 6-20-102 (13) does not apply to section 10-16-147, and the term is not included in the definitions section that applies to section 10-16-147. Proponents should move the defined term to section 10-16-147 or add it to the list of defined terms in section 10-16-102, which applies to all of article 16 of title 10.
12. The first word following a new subsection should be capitalized, even if it is the continuation of a sentence that begins in a previous subsection. For example, the first word in 10-16-147 (2)(d), "prescription," should be capitalized.