

By: Senator Caldwell

SENATE RESOLUTION

TO AUTHORIZE THE INTRODUCTION OF A NONAPPROPRIATION
BILL CONCERNING THE REGULATION AND LICENSURE OF
PHARMACY BENEFITS MANAGERS.

Subtitle

TO AUTHORIZE THE INTRODUCTION OF A
NONAPPROPRIATION BILL CONCERNING THE
REGULATION AND LICENSURE OF PHARMACY
BENEFITS MANAGERS.

BE IT RESOLVED BY THE SENATE OF THE NINETY-FIRST GENERAL ASSEMBLY OF THE
STATE OF ARKANSAS:

THAT Senator Caldwell is authorized to introduce a bill which, as introduced,
will read substantially as follows:

"For An Act To Be Entitled

AN ACT TO CREATE THE ARKANSAS PHARMACY BENEFITS MANAGER LICENSURE ACT; TO
REGULATE AND LICENSE PHARMACY BENEFITS MANAGERS; TO AUTHORIZE CERTAIN STATE
AGENCIES TO PRESCRIBE PENALTIES AND FINES REGARDING THE REGULATION AND
LICENSURE OF PHARMACY BENEFITS MANAGERS; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE THE ARKANSAS PHARMACY BENEFITS MANAGER LICENSURE ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:



SECTION 1. Arkansas Code Title 23, Chapter 92, is amended to add an additional subchapter to read as follows:

Subchapter 5 – Arkansas Pharmacy Benefits Manager Licensure Act

23-92-501. Title.

This subchapter shall be known and may be cited as the "Arkansas Pharmacy Benefits Manager Licensure Act".

23-92-502. Purpose.

(a) This subchapter establishes the standards and criteria for the regulation and licensure of pharmacy benefits managers.

(b) The purpose of this subchapter is to:

(1) Promote, preserve, and protect the public health, safety, and welfare through effective regulation and licensure of pharmacy benefits managers;

(2) Provide for powers and duties of certain state agencies and officers; and

(3) Prescribe penalties and fines for violations of this subchapter.

23-92-503. Definitions.

As used in this subchapter:

(1) "Average gross margin" means the anticipated average gross margin per prescription for a pharmacy benefits manager network for the top two hundred (200) brand and generic drugs using the National Average Drug Acquisition Cost as the ingredient cost in computing average gross margin;

(2) "Cease and desist order" means an order of the Insurance Commissioner prohibiting a pharmacy benefits manager, person, or entity from continuing a particular course of conduct that violates this subchapter or rules adopted under this subchapter;

(3) "Claims processing services" means the administrative services performed in connection with the processing and adjudicating of claims relating to pharmacist services that include:

(A) Receiving payments for pharmacist services;

(B) Making payments to pharmacists or pharmacies for pharmacist services; or

(C) Both subdivisions (3)(A) and (B) of this section;

(4) "Other prescription drug or device services" means services other than claims processing services, provided directly or indirectly, whether in connection with or separate from claims processing services, including without limitation:

(A) Negotiating rebates, discounts, or other financial incentives and arrangements with drug companies;

(B) Disbursing or distributing rebates;

(C) Managing or participating in incentive programs or arrangements for pharmacist services;

(D) Negotiating or entering into contractual arrangements with pharmacists or pharmacies, or both;

(E) Developing formularies;

(F) Designing prescription benefit programs; or

(G) Advertising or promoting services;

(5) "Pharmacist" means an individual licensed as a pharmacist by the Arkansas State Board of Pharmacy;

(6) "Pharmacist services" means products, goods, and services, or any combination of products, goods, and services, provided as a part of the practice of pharmacy as defined in § 17-92-101;

(7) "Pharmacy" means the same as defined in § 17-92-101;

(8)(A) "Pharmacy benefits manager" means a person, business, or entity, including a wholly or partially owned or controlled subsidiary of a pharmacy benefits manager, that provides claims processing services or other prescription drug or device services, or both, to third parties.

(B) "Pharmacy benefits manager" does not include any:

(i) Healthcare facility licensed in Arkansas;

(ii) Healthcare professional licensed in Arkansas;

(iii) Pharmacy licensed in Arkansas;

(iv) Insurance company licensed in Arkansas to provide accident and health insurance as defined in § 23-62-103, or its subsidiary, to the extent that the insurance company or subsidiary provides claims processing services or other prescription drug or device services, or both, solely to the insurance company's policyholders or to the Arkansas Comprehensive Health Insurance Pool;

(v) Health maintenance organization licensed in

Arkansas to the extent that the health maintenance organization provides claims processing services or other prescription drug or device services, or both, solely to its enrollees;

(vi) Union, to the extent that the union provides claims processing services or other prescription drug or device services, or both, solely to its members; or

(vii) Consultant who only provides advice as to the selection or performance of a pharmacy benefits manager;

(9) "Pharmacy benefits manager affiliate" means a pharmacy or pharmacist that, directly or indirectly, through one (1) or more intermediaries owns or controls, is owned or controlled by, or shares common ownership or control with a pharmacy benefits manager;

(10) "Pharmacy benefits manager agreement" means an agreement or contract between a pharmacy benefits manager and a pharmacy or pharmacist to provide pharmacist services in Arkansas;

(11) "Pharmacy benefits manager network" means a network of pharmacists or pharmacies that are offered by a pharmacy benefits manager agreement or insurance contract to provide pharmacist services;

(12) "Rebate" means a financial arrangement or program relating to income or consideration received or negotiated, directly or indirectly, by or on behalf of a pharmacy benefits manager with a pharmaceutical company that relates to other prescription drug or device services, including without limitation incentives, rebates, discounts, and disbursements; and

(13) "Third party" means a person, business, or entity other than a pharmacy benefits manager.

23-92-504. License to do business.

(a)(1) A person or organization shall not establish or operate as a pharmacy benefits manager in Arkansas without obtaining a license from the Insurance Commissioner under this subchapter.

(2) A pharmacy benefits manager doing business in Arkansas before the effective date of this act shall obtain a license from the commissioner within sixty (60) days after the effective date of this act.

(b)(1) The commissioner shall prescribe the application for a license to operate in Arkansas as a pharmacy benefits manager.

(2) An officer or authorized representative of the pharmacy

benefits manager shall provide a signed affidavit regarding the accuracy of the information on the application.

(3) The application shall include without limitation:

(A) All organizational documents, including without limitation articles of incorporation, bylaws, and other similar documents and any amendments;

(B) The names, addresses, and titles of individuals responsible for the business and services provided, including without limitation all claims processing services and other prescription drug or device services;

(C) The names, addresses, titles, and qualifications of the members and officers of the board of directors, board of trustees, or other governing body or committee, or the partners or owners in case of a partnership, entity, or association;

(D) A detailed description of the claims processing services and other prescription drug or device services provided or to be provided;

(E) The name and address of the agent for service of process in Arkansas;

(F) Financial statements for the current and the preceding year, showing the assets, liabilities, direct or indirect income, and any other sources of financial support sufficient as determined by the commissioner to show financial stability and viability to meet the pharmacy benefits manager's full obligations to pharmacies and pharmacists;

(G) A bond in an amount determined by rule of the commissioner to ensure that funds received by the pharmacy benefits manager for pharmacist services are paid to appropriate pharmacies and pharmacists;

(H) Agreements to sell prescription drug data, including data concerning the prescribing practices of healthcare providers in the state; and

(I) Other information the commissioner may determine to be necessary.

(c) The commissioner shall not issue a pharmacy benefits manager license to a pharmacy benefits manager until the commissioner is satisfied that the pharmacy benefits manager:

(1) Pays all fees, taxes, and charges required by law;

(2) Files all documentation that the commissioner considers necessary to secure a full and accurate knowledge of the affairs and financial condition of the pharmacy benefits manager;

(3) Establishes solvency of the pharmacy benefits manager by thorough evidence of the financial condition, method of operation, and manner of doing business as a pharmacy benefits manager;

(4) Obtains a bond in an amount determined by rule of the commissioner;

(5) Is ready and able to arrange for pharmacist services in Arkansas;

(6) Meets the requirements set forth in this subchapter and in rules adopted under this subchapter; and

(7) Complies with all applicable state and federal laws, federal regulations, and state rules.

(d)(1) A nonrefundable license application fee of five hundred dollars (\$500) shall accompany each application for licensure.

(2) The commissioner shall collect and deposit the fees into the Arkansas Pharmacy Benefits Manager Licensure Trust Fund.

(e) The pharmacy benefits manager license shall be signed by the commissioner or a designated agent of the commissioner and shall expire one (1) year after the date the license becomes effective.

(f)(1) A pharmacy benefits manager shall annually apply for renewal of licensure by submitting an application for renewal and a fee as determined by the commissioner.

(2) If the commissioner finds that the pharmacy benefits manager has not satisfied all the conditions stated in this subchapter, the commissioner may:

(A) Refuse to renew the license of a pharmacy benefits manager; or

(B) Renew the license subject to restrictions considered appropriate by the commissioner.

(3)(A) Before denying renewal of a license, the commissioner shall provide the pharmacy benefits manager:

(i) At least thirty (30) days' advance notice of the denial; and

(ii) An opportunity to a formal or informal hearing.

(B) The commissioner and the pharmacy benefits manager may jointly waive the required notice under subdivision (f)(3)(A)(i) of this section.

23-92-505. Annual statement.

(a)(1) By March 1 of each year, a pharmacy benefits manager shall file a statement with the Insurance Commissioner that covers the preceding calendar year.

(2) At least two (2) principal officers of the pharmacy benefits manager shall provide a signed affidavit regarding the accuracy of the statement.

(b) The commissioner shall prescribe the form of the annual statement.

(c) The annual statement shall include:

(1) A financial statement of the pharmacy benefits manager, including the balance sheet and income statement of the pharmacy benefits manager for the preceding calendar year;

(2) The number and dollar value of claims for pharmacist services processed by the pharmacy benefits manager during the preceding calendar year with respect to patients who are residents of Arkansas;

(3) A listing by network for each pharmacy that the pharmacy benefits manager has contracted with to provide services to patients who are residents of Arkansas; and

(4) Other information relating to the operations of the pharmacy benefits manager required by the commissioner.

(d)(1) If a pharmacy benefits manager is audited by an independent certified public accountant, a copy of each certified audit report shall be filed with the commissioner within ninety (90) days.

(2) The commissioner may require that the financial statement required under this subchapter be audited.

(e)(1) The commissioner may extend the filing time period for a pharmacy benefits manager for filing an annual statement or other report or exhibit for good cause shown.

(2) However, the commissioner shall not extend the time period for filing an annual statement beyond sixty (60) days after the time prescribed under this section.

(3) Until the annual statement is filed, the commissioner may

revoke or suspend the license of a pharmacy benefits manager that fails to file an annual statement within the time prescribed under this section.

23-92-506. Assessment.

(a) The Insurance Commissioner may periodically assess the expense of administering this subchapter against all pharmacy benefits managers operating in Arkansas.

(b) An assessment shall be made by the commissioner based upon the estimated expenses of the State Insurance Department under this subchapter in proportion to the business done by pharmacy benefits managers in Arkansas.

(c)(1) The commissioner shall provide notice to a pharmacy benefits manager of an assessment, which shall be paid to the commissioner within sixty (60) days of the notice.

(2) A pharmacy benefits manager that fails to pay an assessment within sixty (60) days of the notice shall be subject to a penalty or fine imposed by the commissioner.

(3) The penalty or fine shall be ten percent (10%) of the assessment plus interest for the period between the due date and the date of full payment.

(4) If a payment is made in an amount later found to be in error, the commissioner shall:

(A) If an additional amount is due:

(i) Notify the pharmacy benefits manager of the additional amount due; and

(ii) Order the pharmacy benefits manager to pay the additional amount within fourteen (14) days of the date of the notice; or

(B) If a payment is made over the assessment amount or the penalty or fine amount, or both, order a refund to the pharmacy benefits manager.

(d)(1) If an assessment made under this subchapter is not paid to the commissioner by the prescribed date, the amount of the assessment plus any penalty or fine may be recovered from the pharmacy benefits manager on motion of the commissioner made in the name and for the use of the State of Arkansas in the Pulaski County Circuit Court, after ten (10) days' notice to the pharmacy benefits manager.

(2) The license of a pharmacy benefits manager may be revoked or

suspended by the commissioner until the pharmacy benefits manager has paid the assessment.

(e) Penalties or fines and fees assessed under this subchapter and paid to the commissioner shall be deposited into the Arkansas Pharmacy Benefits Manager Licensure Trust Fund.

(f) If a pharmacy benefits manager becomes insolvent or ceases to do business in Arkansas in any assessable or license year, the pharmacy benefits manager shall remain liable for the payment of an assessment for the period in which the pharmacy benefits manager operated in Arkansas.

23-92-507. Pharmacy benefits manager network adequacy.

(a) A pharmacy benefits manager shall provide a report on the pharmacy benefits manager network to the commissioner for approval.

(b) The commissioner shall review the following factors and only approve pharmacy benefits manager networks that:

(1) Provide:

(A) Convenient patient access to pharmacies within a reasonable distance from their residence; and

(B) A fair and sustainable reimbursement rate for pharmacist services; and

(2) Do not financially incentivize the patient to use one pharmacist or pharmacy over another.

23-92-508. Audits.

A pharmacy benefits manager that initiates an audit of a pharmacy or pharmacist under the pharmacy benefits manager agreement shall conduct the audit in compliance and otherwise comply with the Arkansas Pharmacy Audit Bill of Rights, § 17-92-1201 et seq.

23-92-509. Prohibited practices.

(a) A pharmacy benefits manager or representative of a pharmacy benefits manager shall not:

(1) Cause or knowingly permit the use of any advertisement, promotion, solicitation, representation, proposal, or offer that is untrue, deceptive, or misleading;

(2) Intervene in the delivery or transmission of prescriptions

from the prescriber to the pharmacist or pharmacy for the purpose of:

(A) Influencing the prescriber's choice of therapy;

(B) Influencing the patient's choice of pharmacist or pharmacy; or

(C) Altering the prescription information, including without limitation changing the prescribed drug without the written authorization of the prescriber;

(3) Engage in or interfere with the practice of medicine or intervene in the practice of medicine between prescribers and their patients;

(4) Engage in any activity that violates any requirement of § 17-92-101 et seq.;

(5) Avoid responsibility for compliance with any provision of this subchapter through the use of an agent, contractor, or administrator or through delegation to another person or entity;

(6) Charge a pharmacist or pharmacy a fee related to the adjudication of a claim, including without limitation:

(A) The receipt and processing of a pharmacy claim;

(B) The development or management of claim processing services in a pharmacy benefits manager network; or

(C) Participation in a pharmacy benefits manager network;

(7) Mandate basic recordkeeping by a pharmacy or pharmacist that is inconsistent with, more stringent than, or in addition to any requirements of the Arkansas State Board of Pharmacy;

(8) Require pharmacy accreditation standards or certification requirements inconsistent with, more stringent than, or in addition to requirements of the board;

(9) Discriminate between pharmacies or pharmacists on the basis of copayments or days of supply; or

(10) Any combination of the actions listed in subdivisions (a)(1)-(9) of this section.

(b) A claim for pharmacist services shall not be retroactively denied or reduced after adjudication of the claim, unless:

(1) The original claim was submitted fraudulently;

(2) The original claim payment was incorrect because the pharmacy or pharmacist had already been paid for the pharmacist services; or

(3) The pharmacist services were not rendered by the pharmacy or

pharmacist.

(c) Termination of a pharmacy or pharmacist from a pharmacy benefits manager network shall not release the pharmacy benefits manager from the obligation to make any payment due to the pharmacy or pharmacist for pharmacist services rendered.

23-92-510. Enforcement.

(a) The Insurance Commissioner and the State Insurance Department shall enforce this subchapter.

(b) The commissioner or his or her designee may:

(1) Audit a pharmacy benefits manager for cause and, to the extent the commissioner determines that a pharmacy benefits manager is not in compliance with the requirements of this subchapter, assess the costs of the audit against the pharmacy benefits manager; and

(2) Suspend or revoke a license issued to a pharmacy benefits manager under this subchapter, deny an application for a license to an applicant, or deny an application for renewal of a license if the commissioner finds that:

(A) The pharmacy benefits manager is operating materially in contravention of:

(i) The application of the pharmacy benefits manager or other information submitted as a part of the application for a license or renewal of license; or

(ii) Any condition imposed by the commissioner with regard to the issuance or renewal of a license;

(B) The pharmacy benefits manager has failed to continuously meet the requirements for issuance of a license under this subchapter or any rules adopted under this subchapter;

(C) The pharmacy benefits manager has otherwise failed to substantially comply with this subchapter or any rules adopted under this subchapter;

(D) The continued operation of the pharmacy benefits manager may be hazardous to patients; or

(E) The pharmacy benefits manager has failed to substantially comply with any applicable state or federal law, federal regulation, or state rule.

(c) The commissioner shall:

(1) Take action or impose appropriate penalties to bring a noncomplying pharmacy benefits manager into full compliance with this subchapter or terminate the pharmacy benefits manager's license; and

(2)(A) Adopt procedures for formal investigation of complaints concerning the failure of a pharmacy benefits manager to comply with this subchapter.

(B)(i) If after investigation the commissioner has reason to believe that there may have been a violation of this subchapter, the commissioner shall issue and serve upon the pharmacy benefits manager a statement of the violations and a notice of a hearing before the commissioner.

(ii) The hearing shall be held at a time and place fixed in the notice, and shall not be held less than thirty (30) days after the notice is served.

(iii) At the hearing, the pharmacy benefits manager shall have an opportunity to be heard and to show cause why the commissioner should not:

(a) Issue a cease and desist order against the pharmacy benefits manager; or

(b) Take any other necessary or appropriate action, including without limitation termination of the pharmacy benefits manager's license.

23-92-511. Rules.

(a) The Insurance Commissioner may adopt rules not inconsistent with this subchapter regulating pharmacy benefits managers.

(b) Rules adopted under this subchapter may set penalties or fines, including without limitation monetary fines for violations of this subchapter and rules adopted under this subchapter.

23-92-512. Applicability.

(a) A pharmacy benefits manager is subject to this subchapter if the pharmacy benefits manager provides claims processing services or other prescription drug or device services, or both, to patients who are residents of Arkansas.

(b) A pharmacy benefits manager shall not do business or provide services in Arkansas unless the pharmacy benefits manager is in full compliance with this subchapter.

(c) To avoid impairment of existing contracts, this subchapter applies only to contracts entered into or renewed after the effective date of this act.

23-92-513. Supplemental nature.

(a) This subchapter is supplemental to all other laws and repeals only those laws or parts of laws in direct conflict with it.

(b) This subchapter does not limit the power of the Arkansas State Board of Pharmacy to regulate the practice of pharmacy by any person, business, or other entity or the power of the Attorney General to regulate deceptive trade practices under the Deceptive Trade Practices Act, § 4-88-101 et seq.

SECTION 2. Arkansas Code § 4-88-803, concerning required practices under the Fair Disclosure of State Funded Payments for Pharmacists' Services Act, is amended to add a new subsection to read as follows:

(d)(1) A pharmacy benefits manager shall file monthly reports with the Insurance Commissioner reflecting the information required under subsection (a) of this section.

(2) A monthly report under subdivision (d)(1) of this section shall be in an electronic format and subject to the rulemaking authority of the commissioner.

(3) A monthly report shall be available upon request to the Attorney General and a health plan or program on whose behalf the pharmacy benefits manager is performing services.

SECTION 3. Arkansas Code § 17-92-507(g), concerning the maximum allowable cost lists, is amended to read as follows:

(g) A violation of this section is a deceptive and unconscionable trade practice under the Deceptive Trade Practices Act, § 4-88-101 et seq., and a prohibited practice under the Arkansas Pharmacy Benefits Manager Licensure Act, § 23-92-501 et seq.

SECTION 4. Arkansas Code Title 19, Chapter 5, Subchapter 11, is amended to add an additional section to read as follows:

19-5-1149. Arkansas Pharmacy Benefits Manager Licensure Trust Fund.

(a) There is created on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State a trust fund to be known as the "Arkansas Pharmacy Benefits Manager Licensure Trust Fund".

(b) The fund shall consist of:

(1) Moneys saved and accrued under the Arkansas Pharmacy Benefits Manager Licensure Act, § 23-92-501 et seq., including without limitation:

- (A) Application fees;
- (B) Renewal fees;
- (C) Assessment fees; and
- (D) Penalties or fines; and

(2) Other revenues and funds authorized by law.

(c) The State Insurance Department shall use the fund to pay for expenses associated with the Arkansas Pharmacy Benefits Manager Licensure Act, § 23-92-501 et seq.

SECTION 5. Arkansas Code § 23-92-206(e), concerning the collection of premiums relating to third-party administrators, is repealed.

~~(e) This section does not apply to a third party administrator as defined in § 23-92-201.~~

SECTION 6. Arkansas Code § 23-92-208 is amended to read as follows:
23-92-208. Compensation.

The compensation for an administrator may be based on:

- (1) A fee-for-service basis; or
- (2) Another form of pecuniary remuneration as approved by the

Insurance Commissioner, including without limitation:

- (A) Premiums or charges collected;
- ~~(2)(B)~~ The number of claims paid or processed; or
- ~~(3)(C)~~ Some other fair and equitable basis provided by the

contract."