

State of Arkansas
91st General Assembly
Second Extraordinary Session, 2018

A Bill

Call Item 5
SENATE BILL 2

By: Senators Caldwell, Rapert, Bledsoe, Bond, E. Cheatham, L. Chesterfield, A. Clark, Collins-Smith, J. Cooper, L. Eads, Elliott, J. English, Flippo, T. Garner, J. Hendren, Hickey, J. Hutchinson, K. Ingram, Irvin, B. Johnson, B. King, U. Lindsey, Maloch, Rice, B. Sample, D. Sanders, G. Stubblefield, Teague, D. Wallace

By: Representatives M. Gray, Wardlaw, Murdock, Gazaway, F. Allen, Baltz, Barker, Bentley, Blake, Boyd, Bragg, Brown, Capp, Cavanaugh, Coleman, Cozart, Dalby, Davis, Deffenbaugh, C. Douglas, D. Douglas, Drown, Eaves, Farrer, D. Ferguson, K. Ferguson, Fielding, C. Fite, L. Fite, V. Flowers, Fortner, Gates, Gillam, M.J. Gray, Hammer, Henderson, K. Hendren, Hillman, G. Hodges, M. Hodges, Holcomb, Hollowell, Jean, Jett, Leding, Lemons, Lowery, Lundstrum, Lynch, Maddox, Magie, A. Mayberry, McElroy, McNair, D. Meeks, S. Meeks, Miller, Nicks, Payton, Penzo, Petty, Pilkington, Richey, Richmond, Rushing, Rye, Sabin, B. Smith, Sorvillo, Speaks, Sturch, Sullivan, Tosh, Tucker, Vaught, Walker, Warren, Watson, D. Whitaker, Wing

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 PENALTIES
AND FINES REGARDING THE REGULATION AND LICENSURE OF
PHARMACY BENEFITS MANAGERS; TO DECLARE AN EMERGENCY;
AND FOR OTHER PURPOSES.

Subtitle

TO CREATE THE ARKANSAS PHARMACY BENEFITS
MANAGER LICENSURE ACT; AND TO DECLARE AN
EMERGENCY.

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 providing claims processing services or other prescription drug or device services for health benefit plans.

(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 the Insurance Commissioner, the State Insurance Department, and other 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) "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 (1)(A) and (B) of this section;

(2)(A) "Health benefit plan" means any individual, blanket, or group plan, policy, or contract for healthcare services issued or delivered by a healthcare insurer in this state.

(B) "Health benefit plan" does not include:

(i) Accidental-only plans;

(ii) Specified disease plans;

(iii) Disability income plans;

(iv) Plans that provide only for indemnity for hospital confinement;

(v) Long-term care only plans that do not include pharmacy benefits;

(vi) Other limited-benefit health insurance policies or plans; or

(vii) Health benefit plans provided under Arkansas Constitution, Article 5, § 32, the Workers' Compensation Law, § 11-9-101 et seq., and the Public Employee Workers' Compensation Act, § 21-5-601 et seq.;

(3) "Healthcare insurer" means an insurance company, a health maintenance organization, or a hospital and medical service corporation;

(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, for health benefit plans.

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

(i) Healthcare facility licensed in Arkansas;
(ii) Healthcare professional licensed in Arkansas;
(iii) Consultant who only provides advice as to the selection or performance of a pharmacy benefits manager; or
(iv) Entity that provides claims processing services or other prescription drug or device services for the fee-for-service Arkansas Medicaid Program only in that capacity;

(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 is under common ownership or control with a pharmacy benefits manager;

(10) "Pharmacy benefits manager network" means a network of pharmacists or pharmacies that are offered by an agreement or insurance contract to provide pharmacist services for health benefit plans;

(11) "Pharmacy benefits plan or program" means a plan or program that pays for, reimburses, covers the cost of, or otherwise provides for pharmacist services under a health benefit plan;

(12) "Pharmacy services administrative organization" means an organization that helps community pharmacies and pharmacy benefits managers or third party payers achieve administrative efficiencies, including contracting and payment efficiencies;

(13)(A) "Rebate" means a discount or other price concession based on utilization of a prescription drug that is paid by a manufacturer or third party, directly or indirectly, to a pharmacy benefits manager, pharmacy services administrative organization, or pharmacy after a claim has been processed and paid at a pharmacy.

(B) "Rebate" includes without limitation incentives, disbursements, and reasonable estimates of a volume-based discount; and

(14) "Third party" means a person, business, or entity other than a pharmacy benefits manager that is not an enrollee or insured in a health benefit plan.

23-92-504. License to do business – Annual statement – Assessment.

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

(2) The commissioner shall prescribe the application for a license to operate in Arkansas as a pharmacy benefits manager and may charge application fees and renewal fees as established by rule.

(b)(1) The commissioner shall issue rules establishing the licensing, fees, application, financial standards, and reporting requirements of pharmacy benefits managers under this subchapter.

(2)(A) When adopting the initial rules to implement this subchapter, the final rule shall be filed with the Secretary of State for adoption under § 25-15-204(f):

(i) On or before September 1, 2018; or

(ii) If approval under § 10-3-309 has not occurred by September 1, 2018, as soon as practicable after approval under § 10-3-309.

(B) The State Insurance Department shall file the proposed rule with the Legislative Council under § 10-3-309(c) sufficiently in advance of September 1, 2018, so that the Legislative Council may consider the rule for approval before September 1, 2018.

23-92-505. Pharmacy benefits manager network adequacy.

A pharmacy benefits manager shall provide:

(1)(A) A reasonably adequate and accessible pharmacy benefits manager network for the provision of prescription drugs for a health benefit plan that shall provide for convenient patient access to pharmacies within a reasonable distance from a patient's residence.

(B) A mail-order pharmacy shall not be included in the calculations determining pharmacy benefits manager network adequacy; and

(2) A pharmacy benefits manager network adequacy report describing the pharmacy benefits manager network and the pharmacy benefits manager network's accessibility in this state in the time and manner required by rule issued by the State Insurance Department.

23-92-506. Compensation – Prohibited practices.

(a)(1) The Insurance Commissioner may review and approve the compensation program of a pharmacy benefits manager with a health benefit plan to ensure that the reimbursement for pharmacist services paid to a pharmacist or pharmacy is fair and reasonable to provide an adequate pharmacy benefits manager network for a health benefit plan under the standards issued

by rule of the State Insurance Department.

(2) All information and data acquired during the review under subdivision (a)(1) of this section is:

(A) Considered proprietary and confidential under § 23-61-107(a)(4) and § 23-61-207; and

(B) Not subject to the Freedom of Information Act of 1967, § 25-19-101 et seq.

(b) 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) Unless reviewed and approved by the commissioner, charge a pharmacist or pharmacy a fee related to the adjudication of a claim, including without limitation a fee for:

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

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

(C) Participation in a pharmacy benefits manager network;

(3) Unless reviewed and approved by the commissioner in coordination with the Arkansas State Board of Pharmacy, require pharmacy accreditation standards or certification requirements inconsistent with, more stringent than, or in addition to requirements of the board;

(4)(A) Reimburse a pharmacy or pharmacist in the state an amount less than the amount that the pharmacy benefits manager reimburses a pharmacy benefits manager affiliate for providing the same pharmacist services.

(B) The amount shall be calculated on a per-unit basis using the same generic product identifier or generic code number; or

(5) Do any combination of the actions listed in subdivisions (b)(1)-(4) of this section.

(c) 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 properly rendered by the

pharmacy or pharmacist.

(d) 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 properly rendered.

(e) The commissioner may issue a rule establishing prohibited practices of pharmacy benefits managers providing claims processing services or other prescription drug or device services for health benefit plans.

23-92-507. Gag clauses prohibited.

(a) The prohibitions under § 23-99-407 apply to participation contracts between pharmacy benefits managers and pharmacists or pharmacies providing prescription drug coverage for health benefit plans.

(b) A pharmacy or pharmacist may provide to an insured information regarding the insured's total cost for pharmacist services for a prescription drug.

(c) A pharmacy or pharmacist shall not be proscribed by a pharmacy benefits manager from discussing information regarding the total cost for pharmacist services for a prescription drug or from selling a more affordable alternative to the insured if a more affordable alternative is available.

(d) A pharmacy benefits manager contract with a participating pharmacist or pharmacy shall not prohibit, restrict, or limit disclosure of information to the Insurance Commissioner, law enforcement, or state and federal governmental officials investigating or examining a complaint or conducting a review of a pharmacy benefits manager's compliance with the requirements under this subchapter.

23-92-508. Enforcement.

(a) The Insurance Commissioner shall enforce this subchapter.

(b)(1) The commissioner may examine or audit the books and records of a pharmacy benefits manager providing claims processing services or other prescription drug or device services for a health benefit plan to determine if the pharmacy benefits manager is in compliance with this subchapter.

(2) The information or data acquired during an examination under subdivision (b)(1) of this section is:

(A) Considered proprietary and confidential under § 23-61-

107(a)(4) and § 23-61-207; and

(B) Not subject to the Freedom of Information Act of 1967, § 25-19-101 et seq.

23-92-509. Rules.

(a)(1) The Insurance Commissioner may adopt rules regulating pharmacy benefits managers that are not inconsistent with this subchapter.

(2) Rules that the commissioner may adopt under this subchapter include without limitation rules relating to:

(A) Licensing;

(B) Application fees;

(C) Financial solvency requirements;

(D) Pharmacy benefits manager network adequacy;

(E) Prohibited market conduct practices;

(F) Data reporting requirements under § 4-88-803;

(G) Compliance and enforcement requirements under § 17-92-507 concerning Maximum Allowable Cost Lists;

(H) Rebates;

(I) Compensation; and

(J) Lists of health benefit plans administered by a pharmacy benefits manager in this state.

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

(c)(1) In addition to the filing requirements under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., and under § 10-3-309, the State Insurance Department shall file a proposed rule or a proposed amendment to an existing rule under this subchapter with the Senate Committee on Insurance and Commerce and the House Committee on Insurance and Commerce at least thirty (30) days before the expiration of the period for public comment under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(2) The Senate Committee on Insurance and Commerce and the House Committee on Insurance and Commerce shall review the proposed rule or proposed amendment to an existing rule within forty-five (45) days of the date the proposed rule or proposed amendment to an existing rule is filed

with the Senate Committee on Insurance and Commerce and the House Committee on Insurance and Commerce.

(3)(A) If the department adopts an emergency rule under this subchapter, in addition to the filing requirements under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., and under § 10-3-309, the department shall notify the following individuals of the emergency rule and provide each individual with a copy of the rule within five (5) business days of adopting the rule:

(i) The Speaker of the House of Representatives;

(ii) The President Pro Tempore of the Senate;

(iii) The Chair of the Senate Committee on Insurance and Commerce; and

(iv) The Chair of the House Committee on Insurance and Commerce.

(B) The Senate Committee on Insurance and Commerce and the House Committee on Insurance and Commerce shall review the emergency rule within forty-five (45) days of the date that the emergency rule is provided to the Chair of the Senate Committee on Insurance and Commerce and the Chair of the House Committee on Insurance and Commerce.

23-92-510. Applicability.

(a) This subchapter is applicable to a contract or health benefit plan issued, renewed, recredentialled, amended, or extended on and after September 1, 2018.

(b) A contract existing on the date of licensure of the pharmacy benefits manager shall comply with the requirements of this subchapter as a condition of licensure for the pharmacy benefits manager.

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) Unless otherwise required more frequently by the Insurance Commissioner, a pharmacy benefits manager shall file an annual report with the commissioner providing the information required under subsection (a) of this section pursuant to the timing, format, and requirements issued by rule of the State Insurance Department.

(2) The annual report is:

(A) Considered proprietary and confidential under § 23-61-107(a)(4) and § 23-61-207; and

(B) Not subject to the Freedom of Information Act of 1967, § 25-19-101 et seq.

(3) This section is not subject to § 4-88-113(f)(1)(B).

SECTION 3. Arkansas Code § 17-92-507(g), concerning the Maximum Allowable Cost Lists, is amended to read as follows:

(g)(1) 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., and the Trade Practices Act, § 23-66-201 et seq.

(2) This section is not subject to § 4-88-113(f)(1)(B).

SECTION 4. Effective on and after September 1, 2018, Arkansas Code § 23-92-201 is amended to read as follows:

23-92-201. ~~Definitions~~ Definition.

As used in this subchapter+, "third-party administrator":

~~(1) "Pharmacy benefits manager" means an entity that administers or manages a pharmacy benefits plan or program;~~

~~(2) "Pharmacy benefits plan or program" means a plan or program that pays for, reimburses, covers the cost of, or otherwise provides pharmacist services to individuals who reside in or are employed in this state; and~~

~~(3)(A)(1) "Third party administrator" means~~ Means a person, firm, or partnership that collects or charges premiums from or adjusts or settles claims on residents of this state in connection with life or accident and health coverage provided by a self-insured plan or a multiple employer trust or multiple employer welfare arrangement+;

~~(B)(2) "Third party administrator" includes+~~ Includes
~~(i) An an~~ an administrative-services-only contract offered by insurers and health maintenance organizations; and

~~(ii) A pharmacy benefits manager that administers or manages a pharmacy benefits plan or program that furnishes, covers the cost~~

~~of, or otherwise provides for the practice of pharmacy as defined in § 17-92-101 under any life and accident and health coverage provided in this state by a self-insured plan, a multiple employer trust, or a multiple employer-welfare arrangement.~~

~~(C)(3)~~ “Third party administrator” does Does not include:

- ~~(i)~~(A) An employer, for its employees or for the employees of a subsidiary or affiliated corporation of the employer;
- ~~(ii)~~(B) A union, for its members;
- ~~(iii)~~(C) An insurer or health maintenance organization licensed to do business in this state;
- ~~(iv)~~(D) A creditor, for its debtors, regarding insurance covering a debt between the creditor and its debtors;
- ~~(v)~~(E) A credit-card-issuing company that advances for, or collects premiums or charges from, its credit card holders, as long as that company does not adjust or settle claims;
- ~~(vi)~~(F) An individual who adjusts or settles claims in the normal course of his or her practice or employment and who does not collect charges or premiums in connection with life or accident and health coverage; or
- ~~(vii)~~(G) An agency licensed by the Insurance Commissioner and performing duties pursuant to an agency contract with an insurer authorized to do business in this state.

SECTION 5. DO NOT CODIFY. SEVERABILITY CLAUSE. If any provision of this act or the application of this act to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end, the provisions of this act are declared severable.

SECTION 6. EFFECTIVE DATE CLAUSE.

SECTION 4 of this act is effective on and after September 1, 2018.

SECTION 7. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that the unregulated behavior of pharmacy benefits managers is threatening the sustainability of pharmacies in

Arkansas; that regulation of pharmacy benefits managers by the State Insurance Department will stabilize the pharmacy industry in this state; and that Section 1, 2, 3, and 5 of this act are immediately necessary to ensure that Arkansas residents have continued access to pharmacy services across the state. Therefore, an emergency is declared to exist, and Sections 1, 2, 3, and 5 of this act, being immediately necessary for the preservation of the public peace, health, and safety, shall become effective on:

(1) The date of the act's approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.