

STATE OF OKLAHOMA

1st Session of the 58th Legislature (2021)

COMMITTEE SUBSTITUTE
FOR

SENATE BILL NO. 737

By: McCortney of the Senate

and

McEntire of the House

COMMITTEE SUBSTITUTE

An Act relating to the Patient's Right to Pharmacy Choice Act; amending Section 3, Chapter 426, O.S.L. 2019 (36 O.S. Supp. 2020, Section 6960), which relates to definitions; adding definitions; amending Section 5, Chapter 426, O.S.L. 2019 (36 O.S. Supp. 2020, Section 6962), which relates to compliance review; updating references; adding prohibited activity; amending Section 8, Chapter 426, O.S.L. 2019 (36 O.S. Supp. 2020, Section 6965), which relates to power to investigate; modifying timeframe of certain required response; amending Section 9, Chapter 426, O.S.L. 2019 (36 O.S. Supp. 2020, Section 6966), which relates to Patient's Right to Pharmacy Choice Advisory Committee; modifying powers of advisory committee; requiring committee make certain recommendation to Insurance Commissioner; modifying terms of persons nominated to committee; modifying procedures and requirements for hearings on violation of act; authorizing Commissioner to censure, suspend or revoke license of certain persons for violating act; specifying amount of certain civil fine; authorizing Commissioner to enforce provisions of act; providing that fees and costs of hearing examiner be assessed against respondent; authorizing right of appeal for certain pharmacy benefit managers; establishing standard of judicial review for appeal; authorizing Commissioner to require reports from certain pharmacy benefits managers;

1 providing for codification; and providing an
2 effective date.

3
4 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

5 SECTION 1. AMENDATORY Section 3, Chapter 426, O.S.L.
6 2019 (36 O.S. Supp. 2020, Section 6960), is amended to read as
7 follows:

8 Section 6960. For purposes of the Patient's Right to Pharmacy
9 Choice Act:

10 1. "Health insurer" means any corporation, association, benefit
11 society, exchange, partnership or individual licensed by the
12 Oklahoma Insurance Code;

13 2. "Mail-order pharmacy" means a pharmacy licensed by this
14 state that primarily dispenses and delivers covered drugs via common
15 carrier;

16 3. "Pharmacy benefits manager" or "PBM" means a person that
17 performs pharmacy benefits management and any other person acting
18 for such person under a contractual or employment relationship in
19 the performance of pharmacy benefits management for a managed-care
20 company, nonprofit hospital, medical service organization, insurance
21 company, third-party payor or a health program administered by a
22 department of this state;

1 4. "Pharmacy and therapeutics committee" or "P&T committee"
2 means a committee at a hospital or a health insurance plan that
3 decides which drugs will appear on that entity's drug formulary;

4 5. "Provider" means a pharmacy, as defined in Section 353.1 of
5 Title 59 of the Oklahoma Statutes, licensed by the State Board of
6 Pharmacy or an agent or representative of a pharmacy including but
7 not limited to the contracting agent of a pharmacy who dispenses
8 prescription drugs or devices to covered individuals;

9 6. "Retail pharmacy network" means retail pharmacy providers
10 contracted with a PBM in which the pharmacy primarily fills and
11 sells prescriptions via a retail, storefront location;

12 ~~6.~~ 7. "Rural service area" means a five-digit ZIP code in which
13 the population density is less than one thousand (1,000) individuals
14 per square mile;

15 8. "Spread pricing" shall mean the model of prescription drug
16 pricing in which the pharmacy benefit manager charges a health
17 benefit plan a contracted price for prescription drugs, and the
18 contracted price for the prescription drugs differs from the amount
19 the pharmacy benefit manager directly or indirectly pays the
20 pharmacy or pharmacist for providing pharmacy services;

21 ~~7.~~ 9. "Suburban service area" means a five-digit ZIP code in
22 which the population density is between one thousand (1,000) and
23 three thousand (3,000) individuals per square mile; and
24

1 ~~8.~~ 10. "Urban service area" means a five-digit ZIP code in
2 which the population density is greater than three thousand (3,000)
3 individuals per square mile.

4 SECTION 2. AMENDATORY Section 5, Chapter 426, O.S.L.
5 2019 (36 O.S. Supp. 2020, Section 6962), is amended to read as
6 follows:

7 Section 6962. A. The Oklahoma Insurance Department shall
8 review and approve retail pharmacy network access for all pharmacy
9 benefits managers (PBMs) to ensure compliance with Section ~~4 of this~~
10 ~~act~~ 6961 of this title.

11 B. A PBM, or an agent of a PBM, shall not:

12 1. Cause or knowingly permit the use of advertisement,
13 promotion, solicitation, representation, proposal or offer that is
14 untrue, deceptive or misleading;

15 2. Charge a pharmacist or pharmacy a fee related to the
16 adjudication of a claim~~7~~ including without limitation a fee for:

- 17 a. the submission of a claim,
- 18 b. enrollment or participation in a retail pharmacy
19 network, or
- 20 c. the development or management of claims processing
21 services or claims payment services related to
22 participation in a retail pharmacy network;

23 3. Reimburse a pharmacy or pharmacist in the state an amount
24 less than the amount that the PBM reimburses a pharmacy owned by or

1 under common ownership with a PBM for providing the same covered
2 services. The reimbursement amount paid to the pharmacy shall be
3 equal to the reimbursement amount calculated on a per-unit basis
4 using the same generic product identifier or generic code number
5 paid to the PBM-owned or PBM-affiliated pharmacy;

6 4. Deny a pharmacy the opportunity to participate in any
7 pharmacy network at preferred participation status if the pharmacy
8 is willing to accept the terms and conditions that the PBM has
9 established for other pharmacies as a condition of preferred network
10 participation status;

11 5. Deny, limit or terminate a pharmacy's contract based on
12 employment status of any employee who has an active license to
13 dispense, despite probation status, with the State Board of
14 Pharmacy;

15 6. Retroactively deny or reduce reimbursement for a covered
16 service claim after returning a paid claim response as part of the
17 adjudication of the claim, unless:

- 18 a. the original claim was submitted fraudulently, or
- 19 b. to correct errors identified in an audit, so long as
- 20 the audit was conducted in compliance with Sections
- 21 356.2 and 356.3 of Title 59 of the Oklahoma Statutes;

22 ~~or~~

1 7. Fail to make any payment due to a pharmacy or pharmacist for
2 covered services properly rendered in the event a PBM terminates a
3 pharmacy or pharmacist from a pharmacy benefits manager network; or

4 8. Conduct spread pricing, as defined in Section 6960 of this
5 title, in this state.

6 C. The prohibitions under this section shall apply to contracts
7 between pharmacy benefits managers and pharmacists or pharmacies for
8 participation in retail pharmacy networks.

9 1. A PBM contract shall:

10 a. not restrict, directly or indirectly, any pharmacy
11 that dispenses a prescription drug from informing, or
12 penalize such pharmacy for informing, an individual of
13 any differential between the individual's out-of-
14 pocket cost or coverage with respect to acquisition of
15 the drug and the amount an individual would pay to
16 purchase the drug directly, and

17 b. ensure that any entity that provides pharmacy benefits
18 management services under a contract with any such
19 health plan or health insurance coverage does not,
20 with respect to such plan or coverage, restrict,
21 directly or indirectly, a pharmacy that dispenses a
22 prescription drug from informing, or penalize such
23 pharmacy for informing, a covered individual of any
24 differential between the individual's out-of-pocket

1 cost under the plan or coverage with respect to
2 acquisition of the drug and the amount an individual
3 would pay for acquisition of the drug without using
4 any health plan or health insurance coverage.

5 2. A pharmacy benefits manager's contract with a participating
6 pharmacist or pharmacy shall not prohibit, restrict or limit
7 disclosure of information to the Insurance Commissioner, law
8 enforcement or state and federal governmental officials
9 investigating or examining a complaint or conducting a review of a
10 pharmacy benefits manager's compliance with the requirements under
11 the Patient's Right to Pharmacy Choice Act.

12 3. A pharmacy benefits manager shall establish and maintain an
13 electronic claim inquiry processing system using the National
14 Council for Prescription Drug Programs' current standards to
15 communicate information to pharmacies submitting claim inquiries.

16 SECTION 3. AMENDATORY Section 8, Chapter 426, O.S.L.
17 2019 (36 O.S. Supp. 2020, Section 6965), is amended to read as
18 follows:

19 Section 6965. A. The Insurance Commissioner shall have power
20 to examine and investigate into the affairs of every pharmacy
21 benefits manager (PBM) engaged in pharmacy benefits management in
22 this state in order to determine whether such entity is in
23 compliance with the Patient's Right to Pharmacy Choice Act.

1 B. All PBM files and records shall be subject to examination by
2 the Insurance Commissioner or by duly appointed designees. The
3 Insurance Commissioner, authorized employees and examiners shall
4 have access to any of a PBM's files and records that may relate to a
5 particular complaint under investigation or to an inquiry or
6 examination by the Insurance Department.

7 C. Every officer, director, employee or agent of the PBM, upon
8 receipt of any inquiry from the Commissioner shall, within ~~thirty~~
9 ~~(30)~~ twenty (20) days from the date the inquiry is sent, furnish the
10 Commissioner with an adequate response to the inquiry.

11 D. When making an examination under this section, the Insurance
12 Commissioner may retain subject matter experts, attorneys,
13 appraisers, independent actuaries, independent certified public
14 accountants or an accounting firm or individual holding a permit to
15 practice public accounting, certified financial examiners or other
16 professionals and specialists as examiners, the cost of which shall
17 be borne by the PBM which is the subject of the examination.

18 SECTION 4. AMENDATORY Section 9, Chapter 426, O.S.L.
19 2019 (36 O.S. Supp. 2020, Section 6966), is amended to read as
20 follows:

21 Section 6966. A. The Insurance Commissioner shall provide for
22 the receiving and processing of individual complaints alleging
23 violations of the provisions of the Patient's Right to Pharmacy
24 Choice Act.

1 B. The Commissioner shall establish a Patient's Right to
2 Pharmacy Choice Advisory Committee to advise the Commissioner and
3 serve at his or her discretion. The Advisory Committee shall review
4 ~~complaints, hold hearings, subpoena witnesses and records, initiate~~
5 ~~prosecution, reprimand, place on probation, suspend, revoke and/or~~
6 ~~levy fines not to exceed Ten Thousand Dollars (\$10,000.00) for each~~
7 ~~count for which~~ alleging any pharmacy benefits manager (PBM) has
8 violated a provision of ~~this act~~ the Patient's Right to Pharmacy
9 Choice Act. The Advisory Committee may impose as part of any
10 ~~disciplinary action the payment of costs expended by the Insurance~~
11 ~~Department for any legal fees and costs including, but not limited~~
12 ~~to, staff time, salary and travel expense, witness fees and attorney~~
13 ~~fees. The Advisory Committee may take such actions singly or in~~
14 ~~combination, as the nature of the violation requires~~ After review,
15 the Advisory Committee shall make a recommendation to the
16 Commissioner as to administrative action to be taken against the
17 pharmacy benefits manager pursuant to subsections B and C of Section
18 5 of this act.

19 C. The Advisory Committee shall consist of seven (7) persons
20 appointed as follows:

- 21 1. Two persons who shall be ~~nominated~~ appointed by the Oklahoma
22 Pharmacists Association;
- 23 2. Two consumer members not employed or related to insurance,
24 pharmacy or PBM ~~nominated~~ appointed by the Office of the Governor;

1 3. Two persons representing the PBM or insurance industry
2 ~~nominated~~ appointed by the Insurance Commissioner; and

3 4. One person representing the Office of the Attorney General
4 ~~nominated~~ appointed by the Attorney General.

5 D. Committee members shall be appointed for terms of five (5)
6 years; provided, that of the members first appointed, the two
7 members appointed by the Office of the Governor shall serve for one
8 (1) year, the two members appointed by the Oklahoma Pharmacists
9 Association shall serve for two (2) years, the two members appointed
10 by the Insurance Commissioner shall serve for three (3) years and
11 the one member appointed by the Attorney General shall serve for
12 four (4) years. The terms of the members of the Advisory Committee
13 shall expire on the thirtieth day of June of the year designated for
14 the expiration of the term for which appointed, but the member shall
15 serve until a qualified successor has been duly appointed. No
16 person shall be appointed to serve more than two consecutive terms.

17 ~~E. Hearings shall be held in the Insurance Commissioner's~~
18 ~~offices or at such other place as the Insurance Commissioner may~~
19 ~~deem convenient.~~

20 ~~F. The Insurance Commissioner shall issue and serve upon the~~
21 ~~PBM a statement of the charges and a notice of hearing in accordance~~
22 ~~with the Administrative Procedures Act, Sections 250 through 323 of~~
23 ~~Title 75 of the Oklahoma Statutes.~~
24

1 ~~G. At the time and place fixed for a hearing, the PBM shall~~
2 ~~have an opportunity to be heard and to show cause why the Insurance~~
3 ~~Commissioner or his or her duly appointed hearing examiner should~~
4 ~~not revoke or suspend the PBM's license and levy administrative~~
5 ~~finer for each violation. Upon good cause shown, the Commissioner~~
6 ~~shall permit any person to intervene, appear and be heard at the~~
7 ~~hearing by counsel or in person.~~

8 ~~H. All hearings will be public and held in accordance with, and~~
9 ~~governed by, Sections 250 through 323 of Title 75 of the Oklahoma~~
10 ~~Statutes.~~

11 ~~I. The Insurance Commissioner, upon written request reasonably~~
12 ~~made by the licensed PBM affected by the hearing and at such PBM's~~
13 ~~expense shall cause a full stenographic record of the proceedings to~~
14 ~~be made by a competent court reporter.~~

15 ~~J. If the Insurance Commissioner determines, based on an~~
16 ~~investigation of complaints, that a PBM has engaged in violations of~~
17 ~~this act with such frequency as to indicate a general business~~
18 ~~practice and that such PBM should be subjected to closer supervision~~
19 ~~with respect to such practices, the Insurance Commissioner may~~
20 ~~require the PBM to file a report at such periodic intervals as the~~
21 ~~Insurance Commissioner deems necessary.~~

22 SECTION 5. NEW LAW A new section of law to be codified
23 in the Oklahoma Statutes as Section 6966.1 of Title 36, unless there
24 is created a duplication in numbering, reads as follows:

1 A. The Insurance Commissioner may censure, suspend, revoke or
2 refuse to renew a license of or levy a civil penalty against any
3 person licensed under the insurance laws of this state for any
4 violation of the Patient's Right to Pharmacy Choice Act, Section
5 6958 et seq. of Title 36 of the Oklahoma Statutes.

6 B. The license of a pharmacy benefits manager may be censured,
7 suspended or revoked if the Commissioner finds, after notice and
8 opportunity for a hearing, that the pharmacy benefits manager
9 violated one or more provisions of the Patient's Right to Pharmacy
10 Choice Act.

11 C. In addition to or in lieu of any censure, suspension or
12 revocation of a license, a pharmacy benefits manager may, after
13 notice and opportunity for a hearing, be subject to a civil fine of
14 not less than One Hundred Dollars (\$100.00) and not greater than Ten
15 Thousand Dollars (\$10,000.00) for each violation. The penalty may
16 be enforced in the same manner in which civil judgments may be
17 enforced.

18 D. The Commissioner shall be authorized to enforce the
19 provisions of the Patient's Right to Pharmacy Choice Act and impose
20 any penalty or remedy authorized under the act against a pharmacy
21 benefits manager under investigation for or charged with a violation
22 of the act or any provision of Title 36 of the Oklahoma Statutes,
23 notwithstanding whether the license of the pharmacy benefits manager
24 has been surrendered or lapsed by operation of law.

1 E. 1. All hearings shall be public and held in accordance with
2 the Administrative Procedures Act.

3 2. Hearings shall be held at the office of the Insurance
4 Commissioner or at any other place as the Commissioner may deem
5 convenient.

6 3. The Commissioner, upon written request reasonably made by
7 the pharmacy benefits manager affected by the hearing, shall cause a
8 full stenographic record of the proceedings to be made by a
9 competent court reporter. This record shall be at the expense of
10 the pharmacy benefits manager.

11 4. The ordinary fees and costs of the hearing examiner
12 appointed pursuant to Section 319 of Title 36 of the Oklahoma
13 Statutes may be assessed by the hearing examiner against the
14 respondent unless the respondent is the prevailing party.

15 F. Any pharmacy benefits manager whose license has been
16 censured, suspended, revoked or denied renewal, or who has had a
17 fine levied against him or her, shall have the right of appeal from
18 the final order of the Commissioner, pursuant to Section 318 et seq.
19 of Title 75 of the Oklahoma Statutes.

20 G. If the Insurance Commissioner determines, based upon an
21 investigation of complaints, that a pharmacy benefits manager has
22 engaged in violations of the provisions of the Patient's Right to
23 Pharmacy Choice Act with such frequency as to indicate a general
24 business practice, and that the pharmacy benefits manager should be

1 subjected to closer supervision with respect to such practices, the
2 Commissioner may require the pharmacy benefits manager to file a
3 report at any periodic intervals the Commissioner deems necessary.

4 SECTION 6. This act shall become effective November 1, 2021.

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