

LEGISLATURE OF NEBRASKA
ONE HUNDRED SEVENTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 767

FINAL READING

Introduced by Kolterman, 24; Aguilar, 35; Bostar, 29; Flood, 19;
Lindstrom, 18; McCollister, 20; Morfeld, 46; Pahls, 31;
Stinner, 48; Wishart, 27.

Read first time January 05, 2022

Committee: Banking, Commerce and Insurance

- 1 A BILL FOR AN ACT relating to pharmacy benefit managers; to adopt the
- 2 Pharmacy Benefit Manager Licensure and Regulation Act; to eliminate
- 3 provisions relating to pharmacy benefit managers; to provide an
- 4 operative date; to provide severability; and to outright repeal
- 5 section 71-2484, Revised Statutes Cumulative Supplement, 2020.
- 6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 12 of this act shall be known and may be
2 cited as the Pharmacy Benefit Manager Licensure and Regulation Act.

3 Sec. 2. (1) The Pharmacy Benefit Manager Licensure and Regulation
4 Act establishes the standards and criteria for the licensure and
5 regulation of pharmacy benefit managers providing a claims processing
6 service or other prescription drug or device service for a health benefit
7 plan.

8 (2) The purposes of the act are to:

9 (a) Promote, preserve, and protect public health, safety, and
10 welfare through effective regulation and licensure of pharmacy benefit
11 managers;

12 (b) Promote the solvency of the commercial health insurance
13 industry, the regulation of which is reserved to the states by the
14 federal McCarran-Ferguson Act, 15 U.S.C. 1011 to 1015, as such act and
15 sections existed on January 1, 2022, as well as provide for consumer
16 savings and encourage fairness in prescription drug benefits;

17 (c) Provide for powers and duties of the director; and

18 (d) Prescribe monetary penalties for violations of the Pharmacy
19 Benefit Manager Licensure and Regulation Act.

20 Sec. 3. For purposes of the Pharmacy Benefit Manager Licensure and
21 Regulation Act:

22 (1) Auditing entity means a pharmacy benefit manager or any person
23 that represents a pharmacy benefit manager in conducting an audit for
24 compliance with a contract between the pharmacy benefit manager and a
25 pharmacy;

26 (2) Claims processing service means an administrative service
27 performed in connection with the processing and adjudicating of a claim
28 relating to a pharmacist service that includes:

29 (a) Receiving a payment for a pharmacist service; or

30 (b) Making a payment to a pharmacist or pharmacy for a pharmacist
31 service;

1 (3) Covered person means a member, policyholder, subscriber,
2 enrollee, beneficiary, dependent, or other individual participating in a
3 health benefit plan;

4 (4) Director means the Director of Insurance;

5 (5) Health benefit plan means a policy, contract, certificate, or
6 agreement entered into, offered, or issued by a health carrier to
7 provide, deliver, arrange for, pay for, or reimburse any of the costs of
8 a physical, mental, or behavioral health care service;

9 (6) Health carrier has the same meaning as in section 44-1303;

10 (7) Other prescription drug or device service means a service other
11 than a claims processing service, provided directly or indirectly,
12 whether in connection with or separate from a claims processing service,
13 including, but not limited to:

14 (a) Negotiating a rebate, discount, or other financial incentive or
15 arrangement with a drug company;

16 (b) Disbursing or distributing a rebate;

17 (c) Managing or participating in an incentive program or arrangement
18 for a pharmacist service;

19 (d) Negotiating or entering into a contractual arrangement with a
20 pharmacist or pharmacy;

21 (e) Developing and maintaining a formulary;

22 (f) Designing a prescription benefit program; or

23 (g) Advertising or promoting a service;

24 (8) Pharmacist has the same meaning as in section 38-2832;

25 (9) Pharmacist service means a product, good, or service or any
26 combination thereof provided as a part of the practice of pharmacy;

27 (10) Pharmacy has the same meaning as in section 71-425;

28 (11)(a) Pharmacy benefit manager means a person, business, or
29 entity, including a wholly or partially owned or controlled subsidiary of
30 a pharmacy benefit manager, that provides a claims processing service or
31 other prescription drug or device service for a health benefit plan to a

1 covered person who is a resident of this state; and

2 (b) Pharmacy benefit manager does not include:

3 (i) A health care facility licensed in this state;

4 (ii) A health care professional licensed in this state;

5 (iii) A consultant who only provides advice as to the selection or
6 performance of a pharmacy benefit manager; or

7 (iv) A health carrier to the extent that it performs any claims
8 processing service or other prescription drug or device service
9 exclusively for its enrollees; and

10 (12) Plan sponsor has the same meaning as in section 44-2702.

11 Sec. 4. (1) The Pharmacy Benefit Manager Licensure and Regulation
12 Act applies to any contract or health benefit plan issued, renewed,
13 recredentialed, amended, or extended on or after the operative date of
14 this act, including any health carrier that performs a claims processing
15 service or other prescription drug or device service through a third
16 party.

17 (2) As a condition of licensure, any contract in existence on the
18 date a pharmacy benefit manager receives its license to do business in
19 this state shall comply with the requirements of the act.

20 (3) Nothing in the act is intended or shall be construed to conflict
21 with existing relevant federal law.

22 Sec. 5. (1) A person shall not establish or operate as a pharmacy
23 benefit manager in this state for a health benefit plan without first
24 obtaining a license from the director under the Pharmacy Benefit Manager
25 Licensure and Regulation Act.

26 (2) The director may adopt and promulgate rules and regulations
27 establishing the licensing application, financial, and reporting
28 requirements for pharmacy benefit managers under the act.

29 (3) A person applying for a pharmacy benefit manager license shall
30 submit an application for licensure in the form and manner prescribed by
31 the director.

1 (4) A person submitting an application for a pharmacy benefit
2 manager license shall include with the application a nonrefundable
3 application fee. The director shall establish the nonrefundable
4 application fee in an amount not to exceed five hundred dollars.

5 (5) The director may refuse to issue or renew a license if the
6 director determines that the applicant or any individual responsible for
7 the conduct of affairs of the applicant is not competent, trustworthy,
8 financially responsible, or of good personal and business reputation, has
9 been found to have violated the insurance laws of this state or any other
10 jurisdiction, or has had an insurance or other certificate of authority
11 or license denied or revoked for cause by any jurisdiction.

12 (6)(a) Unless surrendered, suspended, or revoked by the director, a
13 license issued under this section is valid as long as the pharmacy
14 benefit manager continues to do business in this state and remains in
15 compliance with the provisions of the act and any applicable rules and
16 regulations, including the completion of a renewal application on a form
17 prescribed by the director and payment of an annual license renewal fee.
18 The director shall establish the annual license renewal fee in an amount
19 not to exceed two hundred fifty dollars.

20 (b) Such application and renewal fee shall be received by the
21 director on or before thirty days prior to the anniversary of the
22 effective date of the pharmacy benefit manager's initial or most recent
23 license.

24 Sec. 6. (1) A participation contract between a pharmacy benefit
25 manager and any pharmacist or pharmacy providing prescription drug
26 coverage for a health benefit plan shall not prohibit or restrict any
27 pharmacy or pharmacist from or penalize any pharmacy or pharmacist for
28 disclosing to any covered person any health care information that the
29 pharmacy or pharmacist deems appropriate regarding:

30 (a) The nature of treatment, risks, or an alternative to such
31 treatment;

- 1 (b) The availability of an alternate therapy, consultation, or test;
2 (c) The decision of a utilization reviewer or similar person to
3 authorize or deny a service;
4 (d) The process that is used to authorize or deny a health care
5 service or benefit; or
6 (e) Information on any financial incentive or structure used by the
7 health carrier.
- 8 (2) A pharmacy benefit manager shall not prohibit a pharmacy or
9 pharmacist from discussing information regarding the total cost for a
10 pharmacist service for a prescription drug or from selling a more
11 affordable alternative to the covered person if a more affordable
12 alternative is available.
- 13 (3) A pharmacy benefit manager contract with a participating
14 pharmacist or pharmacy shall not prohibit, restrict, or limit disclosure
15 of information to the director, law enforcement, or a state or federal
16 governmental official, provided that:
- 17 (a) The recipient of the information represents that such recipient
18 has the authority, to the extent provided by state or federal law, to
19 maintain proprietary information as confidential; and
- 20 (b) Prior to disclosure of information designated as confidential,
21 the pharmacist or pharmacy:
- 22 (i) Marks as confidential any document in which the information
23 appears; or
- 24 (ii) Requests confidential treatment for any oral communication of
25 the information.
- 26 (4) A pharmacy benefit manager shall not terminate the contract with
27 or penalize a pharmacist or pharmacy due to the pharmacist or pharmacy:
- 28 (a) Disclosing information about a pharmacy benefit manager
29 practice, except information determined to be a trade secret, as
30 determined by state law or the director; or
- 31 (b) Sharing any portion of the pharmacy benefit manager contract

1 with the director pursuant to a complaint or a query regarding whether
2 the contract is in compliance with the Pharmacy Benefit Manager Licensure
3 and Regulation Act.

4 (5)(a) A pharmacy benefit manager shall not require a covered person
5 purchasing a covered prescription drug to pay an amount greater than the
6 lesser of the covered person's cost-sharing amount under the terms of the
7 health benefit plan or the amount the covered person would pay for the
8 drug if the covered person were paying the cash price.

9 (b) Any amount paid by a covered person under subdivision (5)(a) of
10 this section shall be attributable toward any deductible or, to the
11 extent consistent with section 2707 of the federal Public Health Service
12 Act, 42 U.S.C. 300gg-6, as such section existed on January 1, 2022, the
13 annual out-of-pocket maximum under the covered person's health benefit
14 plan.

15 Sec. 7. (1) Unless otherwise prohibited by federal law, an auditing
16 entity conducting a pharmacy audit shall:

17 (a) Give any pharmacy notice fifteen business days prior to
18 conducting an initial onsite audit;

19 (b) For any audit that involves clinical or professional judgement,
20 conduct such audit by or in consultation with a pharmacist; and

21 (c) Audit each pharmacy under the same standards and parameters as
22 other similarly situated pharmacies.

23 (2) Unless otherwise prohibited by federal law, for any pharmacy
24 audit conducted by an auditing entity:

25 (a) The period covered by the audit shall not exceed twenty-four
26 months from the date that the claim was submitted to the auditing entity,
27 unless a longer period is required under state or federal law;

28 (b) If an auditing entity uses random sampling as a method for
29 selecting a set of claims for examination, the sample size shall be
30 appropriate for a statistically reliable sample;

31 (c) The auditing entity shall provide the pharmacy a masked list

1 containing any prescription number or date range that the auditing entity
2 is seeking to audit;

3 (d) No onsite audit shall take place during the first five business
4 days of the month without the consent of the pharmacy;

5 (e) No auditor shall enter the area of any pharmacy where patient-
6 specific information is available without being escorted by an employee
7 of the pharmacy and, to the extent possible, each auditor shall remain
8 out of the sight and hearing range of any pharmacy customer;

9 (f) No recoupment shall be deducted from or applied against a future
10 remittance until after the appeal process is complete and both parties
11 receive the results of the final audit;

12 (g) No pharmacy benefit manager shall require information to be
13 written on a prescription unless such information is required to be
14 written on the prescription by state or federal law;

15 (h) Recoupment may be assessed for information not written on a
16 prescription if:

17 (i)(A) Such information is required in the provider manual; or

18 (B) The information is required by the federal Food and Drug
19 Administration or the drug manufacturer's product safety program; and

20 (ii) The information required under subdivision (i)(A) or (B) of
21 this subdivision (h) is not readily available for the auditing entity at
22 the time of the audit; and

23 (i) No auditing entity or agent shall receive payment based on a
24 percentage of any recoupment.

25 (3) For recoupment under the Pharmacy Benefit Manager Licensure and
26 Regulation Act, the auditing entity shall:

27 (a) Include consumer-oriented parameters based on manufacturer
28 listings in the audit parameters;

29 (b) Consider the pharmacy's usual and customary price for a
30 compounded medication as the reimbursable cost, unless the pricing method
31 is outlined in the pharmacy provider contract;

1 (c) Base a finding of overpayment or underpayment on the actual
2 overpayment or underpayment and not a projection that relies on the
3 number of patients served who have a similar diagnosis, the number of
4 similar orders, or the number of refills for similar drugs;

5 (d) Not use extrapolation to calculate the recoupment or penalties
6 unless required by state or federal law;

7 (e) Not include a dispensing fee in the calculation of an
8 overpayment, unless a prescription was not actually dispensed, the
9 prescriber denied authorization, the prescription dispensed was a
10 medication error by the pharmacy, or the identified overpayment is solely
11 based on an extra dispensing fee;

12 (f) Not consider as fraud any clerical or record-keeping error, such
13 as a typographical error, scrivener's error, or computer error regarding
14 a required document or record. Such error may be subject to recoupment;

15 (g) Not assess any recoupment in the case of an error that has no
16 actual financial harm to the covered person or health benefit plan. An
17 error that is the result of the pharmacy failing to comply with a formal
18 corrective action plan may be subject to recoupment; and

19 (h) Not allow interest to accrue during the audit period for either
20 party, beginning with the notice of the audit and ending with the final
21 audit report.

22 (4)(a) To validate a pharmacy record and the delivery of a pharmacy
23 service, the pharmacy may use an authentic and verifiable statement or
24 record, including a medication administration record of a nursing home,
25 assisted-living facility, hospital, physician, or other authorized
26 practitioner or an additional audit documentation parameter located in
27 the provider manual.

28 (b) Any legal prescription that meets the requirements in this
29 section may be used to validate a claim in connection with a
30 prescription, refill, or change in a prescription, including a medication
31 administration record, fax, e-prescription, or documented telephone call

1 from the prescriber to the prescriber's agent.

2 (5) The auditing entity conducting the audit shall establish a
3 written appeal process which shall include procedures for appealing both
4 a preliminary audit report and a final audit report.

5 (6)(a) A preliminary audit report shall be delivered to the pharmacy
6 within one hundred twenty days after the conclusion of the audit.

7 (b) A pharmacy shall be allowed at least thirty days following
8 receipt of a preliminary audit report to provide documentation to address
9 any discrepancy found in the audit.

10 (c) A final audit report shall be delivered to the pharmacy within
11 one hundred twenty days after receipt of the preliminary audit report or
12 the appeal process has been exhausted, whichever is later.

13 (d) An auditing entity shall remit any money due to a pharmacy or
14 pharmacist as the result of an underpayment of a claim within forty-five
15 days after the appeal process has been exhausted and the final audit
16 report has been issued.

17 (7) Where contractually required, an auditing entity shall provide a
18 copy to the plan sponsor of any of the plan sponsor's claims that were
19 included in the audit, and any recouped money shall be returned to the
20 health benefit plan or plan sponsor.

21 (8) This section does not apply to any investigative audit that
22 involves suspected fraud, willful misrepresentation, or abuse, or any
23 audit completed by a state-funded health care program.

24 Sec. 8. (1) With respect to each contract and contract renewal
25 between a pharmacy benefit manager and a pharmacy, the pharmacy benefit
26 manager shall:

27 (a) Update any maximum allowable cost price list at least every
28 seven business days, noting any price change from the previous list, and
29 provide a means by which a network pharmacy may promptly review a current
30 price in an electronic, print, or telephonic format within one business
31 day of any such change at no cost to the pharmacy;

1 (b) Maintain a procedure to eliminate a product from the maximum
2 allowable cost price list in a timely manner to remain consistent with
3 any change in the marketplace; and

4 (c) Make the maximum allowable cost price list available to each
5 contracted pharmacy in a format that is readily accessible and usable to
6 the contracted pharmacy.

7 (2) A pharmacy benefit manager shall not place a prescription drug
8 on a maximum allowable cost price list unless the drug is available for
9 purchase by pharmacies in this state from a national or regional drug
10 wholesaler and is not obsolete.

11 (3) Each contract between a pharmacy benefit manager and a pharmacy
12 shall include a process to appeal, investigate, and resolve disputes
13 regarding any maximum allowable cost price. The process shall include:

14 (a) A fifteen-business-day limit on the right to appeal following
15 submission of an initial claim by a pharmacy;

16 (b) A requirement that any appeal be investigated and resolved
17 within seven business days after the appeal is received by the pharmacy
18 benefit manager; and

19 (c) A requirement that the pharmacy benefit manager provide a reason
20 for any denial of an appeal and identify the national drug code for the
21 drug that may be purchased by the pharmacy at a price at or below the
22 price on the maximum allowable cost price list as determined by the
23 pharmacy benefit manager.

24 (4) If an appeal is determined to be valid by the pharmacy benefit
25 manager, the pharmacy benefit manager shall:

26 (a) Make an adjustment in the drug price no later than one day after
27 the appeal is resolved; and

28 (b) Permit the appealing pharmacy to reverse and rebill the claim in
29 question, using the date of the original claim.

30 Sec. 9. (1) A pharmacy benefit manager that reimburses a 340B
31 entity or a 340B contract pharmacy for a drug that is subject to an

1 agreement under 42 U.S.C. 256b shall not reimburse the 340B entity or the
2 340B contract pharmacy for the pharmacy-dispensed drug at a rate lower
3 than that paid for the same drug to similarly situated pharmacies that
4 are not 340B entities or 340B contract pharmacies, and shall not assess
5 any fee, chargeback, or other adjustment upon the 340B entity or 340B
6 contract pharmacy on the basis that the 340B entity or 340B contract
7 pharmacy participates in the program set forth in 42 U.S.C. 256b.

8 (2) A pharmacy benefit manager shall not discriminate against a 340B
9 entity or 340B contract pharmacy in a manner that prevents or interferes
10 with a covered individual's choice to receive such drug from the
11 corresponding 340B entity or 340B contract pharmacy.

12 (3) For purposes of this section:

13 (a) 340B contract pharmacy means any pharmacy under contract with a
14 340B entity to dispense drugs on behalf of such 340B entity; and

15 (b) 340B entity means an entity participating in the federal 340B
16 drug discount program, as described in 42 U.S.C. 256b.

17 Sec. 10. A pharmacy benefit manager shall not exclude a Nebraska
18 pharmacy from participation in the pharmacy benefit manager's specialty
19 pharmacy network if:

20 (1) The pharmacy holds a specialty pharmacy accreditation from a
21 nationally recognized independent accrediting organization; and

22 (2) The pharmacy is willing to accept the terms and conditions of
23 the pharmacy benefit manager's agreement with the pharmacy benefit
24 manager's specialty pharmacies.

25 Sec. 11. (1) The director shall enforce compliance with the
26 requirements of the Pharmacy Benefit Manager Licensure and Regulation
27 Act.

28 (2)(a) Pursuant to the Insurers Examination Act, the director may
29 examine or audit the books and records of a pharmacy benefit manager
30 providing a claims processing service or other prescription drug or
31 device service for a health benefit plan to determine compliance with the

1 act.

2 (b) Information or data acquired during an examination under
3 subdivision (2)(a) of this section is:

4 (i) Considered proprietary and confidential;

5 (ii) Not subject to sections 84-712, 84-712.01, and 84-712.03 to
6 84-712.09;

7 (iii) Not subject to subpoena; and

8 (iv) Not subject to discovery or admissible as evidence in any
9 private civil action.

10 (3) The director may use any document or information provided
11 pursuant to subsection (3) or (4) of section 6 of this act in the
12 performance of the director's duties to determine compliance with the
13 Pharmacy Benefit Manager Licensure and Regulation Act.

14 (4) The director may impose a monetary penalty on a pharmacy benefit
15 manager or the health carrier with which a pharmacy benefit manager is
16 contracted for a violation of the Pharmacy Benefit Manager Licensure and
17 Regulation Act. The director shall establish the monetary penalty for a
18 violation of the act in an amount not to exceed one thousand dollars per
19 entity for each violation.

20 Sec. 12. The director may adopt and promulgate rules and
21 regulations to carry out the Pharmacy Benefit Manager Licensure and
22 Regulation Act.

23 Sec. 13. This act becomes operative on January 1, 2023.

24 Sec. 14. If any section in this act or any part of any section is
25 declared invalid or unconstitutional, the declaration shall not affect
26 the validity or constitutionality of the remaining portions.

27 Sec. 15. The following section is outright repealed: Section
28 71-2484, Revised Statutes Cumulative Supplement, 2020.