

1 State of Arkansas
2 95th General Assembly
3 Regular Session, 2025
4

As Engrossed: H3/19/25

A Bill

SENATE BILL 104

5 By: Senators C. Penzo, M. Johnson
6 By: Representative Lundstrum
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS PHARMACY BENEFITS
10 MANAGER LICENSURE ACT; TO PROTECT PATIENTS' RIGHTS
11 AND ACCESS TO MEDICATIONS; TO DECLARE AN EMERGENCY;
12 AND FOR OTHER PURPOSES.
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Subtitle

15 TO AMEND THE ARKANSAS PHARMACY BENEFITS
16 MANAGER LICENSURE ACT; TO PROTECT
17 PATIENTS' RIGHTS AND ACCESS TO
18 MEDICATIONS; AND TO DECLARE AN
19 EMERGENCY.
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22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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24 SECTION 1. DO NOT CODIFY. Legislative intent.

25 It is the intent of the General Assembly that this act shall regulate
26 the business practices of healthcare payors and pharmacy benefits managers:

27 (1) To ensure adequate access to pharmacy services as intended
28 and designed by underlying health benefit plans;

29 (2) To protect patients from unfair and deceptive trade
30 practices within the state; and

31 (3) To ensure pharmacy benefits management companies do not
32 interfere with a patient's rights under the patient's underlying health
33 benefit plan and always consider each patient's unique conditions and
34 limitations when enforcing any access prerequisites or conditions.
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36 SECTION 2. Arkansas Code § 23-92-503, concerning the definitions used



1 in the Arkansas Pharmacy Benefits Manager Licensure Act, is amended to add
2 additional subdivisions to read as follows:

3 (16)(A) "Affiliate" means an entity that controls, is controlled
4 by, or is under common control with another entity, including an entity in
5 which control is established through one (1) or more intermediary entities,
6 such that the common controlling interest may be two (2) or more levels
7 removed from the specified entity.

8 (B) Whether an entity is an "affiliate" does not depend on
9 the percentage or form of ownership interest or any allocation of membership
10 or ownership between entities, but it is the existence of control or common
11 control that is the sole determinative factor;

12 (17)(A) "Carve-out network" means a subset of a pharmacy
13 benefits manager's network that:

14 (i) Is created by the pharmacy benefits manager; and
15 (ii) Limits access to a certain pharmacy or
16 pharmacist for a specific drug or category of drugs.

17 (B) "Carve-out network" includes any network that
18 restricts enrollee access to in-person pharmacy services within this state by
19 offering only limited methods of obtaining a prescription drug, including
20 mail-order only options, while presenting the appearance of a full network of
21 available pharmacies;

22 (18) "Enrollee" means an individual who is entitled to receive
23 healthcare services under the terms of a health benefit plan;

24 (19)(A) "Ghost network" means a pharmacy benefits manager
25 network that includes a pharmacy or pharmacist as a participating provider
26 when that participating provider is:

27 (i) Not accepting new patients;
28 (ii) No longer in practice; or
29 (iii) Otherwise unavailable to or restricted from
30 providing services to enrollees in this state.

31 (B) "Ghost network" includes a pharmacy network in which a
32 significant number of listed participating providers are not accessible to
33 enrollees within a reasonable time frame or geographic distance;

34 (20) "Healthcare payor affiliate" means a pharmacy or pharmacist
35 that directly or indirectly, through one (1) or more intermediaries, owns or
36 controls, is owned or controlled by, or is under common ownership or control

1 with a healthcare payor; and

2 (21)(A) "Self-administered prescription drug" means a
3 pharmaceutical that when prescribed does not require assistance by a third
4 party to administer and can be dispensed by a pharmacy or pharmacist to an
5 enrollee for self-administration under federal and state laws and
6 regulations.

7 (B) "Self-administered prescription drug" does not include
8 over-the-counter medications that do not require a prescription.

9
10 SECTION 3. Arkansas Code § 23-92-506(b), concerning prohibited
11 practices under the Arkansas Pharmacy Benefits Manager Licensure Act, is
12 amended to add an additional subdivision to read as follows:

13 (9) Unless reviewed and approved by the commissioner in
14 coordination with the board, require pharmacy accreditation standards or
15 certification requirements inconsistent with, more stringent than, or in
16 addition to requirements of the board.

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18 SECTION 4. Arkansas Code Title 23, Chapter 92, Subchapter 5, is
19 amended to add additional sections to read as follows:

20 23-92-512. Unfair and deceptive trade practices.

21 (a)(1) A healthcare payor, healthcare payor affiliate, pharmacy
22 benefits manager, or pharmacy benefits manager affiliate shall not engage in
23 unfair or deceptive trade practices in the administration of pharmacy
24 benefits.

25 (2) Unfair or deceptive trade practices under subdivision (a)(1)
26 of this section include without limitation:

27 (A) Requiring an enrollee to utilize a particular
28 healthcare payor affiliate or pharmacy benefits manager affiliate;

29 (B) Requiring a pharmacy or pharmacist to forward or
30 retransmit a prescription to a specific healthcare payor affiliate or
31 pharmacy benefits manager affiliate unless the receiving healthcare payor
32 affiliate or pharmacy benefits manager affiliate can provide verifiable
33 documentation of the enrollee's consent to use that specific pharmacy;

34 (C) Implementing a policy or protocol that unreasonably
35 restricts an enrollee's choice of pharmacy within the pharmacy benefits
36 manager network, if:

1 (i)(a) The pharmacy meets the pharmacy benefits
2 manager network's relevant and reasonable terms of participation
3 requirements.

4 (b) A disagreement or concern regarding
5 whether relevant and reasonable terms of participation requirements are
6 relevant and reasonable shall be determined by the Insurance Commissioner;
7 and

8 (ii) The pharmacy has existing approval to dispense
9 one (1) or more self-administered prescription drugs in the pharmacy benefits
10 manager network or one (1) or more networks for the underlying health benefit
11 plan;

12 (D)(i) Providing an incentive or imposing a penalty that
13 effectively coerces or pressures an enrollee to use a particular healthcare
14 payor affiliate or pharmacy benefits manager affiliate.

15 (ii) Adjustments to an enrollee's cost-sharing
16 responsibilities, including copayments, coinsurance, or deductibles, that are
17 part of the health benefit plan's design are not considered incentives or
18 penalties under subdivision (a)(2)(D)(i) of this section;

19 (E) Failing to disclose to an enrollee the options
20 available for obtaining prescription drugs within the pharmacy benefits
21 manager network;

22 (F) Disclosing, sharing, or otherwise making available
23 enrollee information or enrollee-identifiable prescription information
24 submitted by a pharmacist or pharmacy to a healthcare payor affiliate or
25 pharmacy benefits manager affiliate without the written consent of the
26 enrollee;

27 (G) Using or disclosing enrollee information or enrollee-
28 identifiable prescription information for marketing or solicitation purposes
29 without the written consent of the enrollee; and

30 (H)(i) Engaging in any conduct that unlawfully restricts,
31 limits, or interferes with an enrollee's right to choose a pharmacy or
32 pharmacist, including without limitation actions that violate federal law or
33 state law or improperly steer enrollees to a specific pharmacy or pharmacist.

34 (ii) The prohibition under subdivision (a)(2)(H)(i)
35 of this section does not apply to a change in patient cost-sharing
36 obligations, including copayments, coinsurance, or deductibles, that are

1 permitted under applicable law.

2 (b)(1) A healthcare payor, healthcare payor affiliate, pharmacy
3 benefits manager, or pharmacy benefits manager affiliate shall not impose
4 restrictive terms or conditions that limit an enrollee's or an enrollee's
5 assigned representative's rights to seek an exception to or to appeal a
6 coverage decision or restriction with his or her health benefit plan.

7 (2) A healthcare payor, healthcare payor affiliate, pharmacy
8 benefits manager, or pharmacy benefits manager affiliate shall ensure that:

9 (A) The processes for seeking an exception and filing an
10 appeal are clearly communicated to patients in a publicly accessible manner
11 on its website;

12 (B) The information necessary to utilize the processes
13 under subdivision (b)(2)(A) of this section is presented in a manner that is
14 understandable and not hidden or obscured; and

15 (C) An enrollee is not hindered or obstructed from
16 exercising the rights granted to the enrollee under the enrollee's health
17 benefit plan.

18 (c)(1) A healthcare payor shall not prohibit, restrict, or impede an
19 enrollee's or an enrollee's authorized representative's ability to:

20 (A) Discuss the enrollee's health benefit plan, including
21 prescription drug benefits, with the healthcare payor or its authorized
22 representatives;

23 (B) Obtain necessary exceptions, approvals,
24 authorizations, or related information to access the enrollee's benefits; or

25 (C) Appeal decisions regarding the enrollee's benefits
26 coverage decisions as provided under the terms of the enrollee's health
27 benefit plan.

28 (2) The healthcare payor shall ensure that an enrollee has
29 reasonable access to the discussions, approvals, and appeals processes
30 regardless of the pharmacy benefits manager, affiliate, or third-party
31 administrator selected to administer prescription benefits.

32 (3) It is an unfair and deceptive trade practice for a
33 healthcare payor to delegate responsibilities in a manner that obstructs,
34 hinders, or prevents an enrollee from exercising the enrollee's rights under
35 his or her health benefit plan.

36 (d)(1) A pharmacy benefits manager and pharmacy benefits manager

1 affiliate shall adhere to all applicable federal and state privacy laws when
2 communicating with an enrollee.

3 (2) A pharmacy benefits manager and pharmacy benefits manager
4 affiliate shall not use enrollee information for marketing purposes without
5 the written consent of the enrollee.

6 (e) A pharmacy benefits manager and pharmacy benefits manager
7 affiliate shall comply with the timely processing of complaints and appeals
8 as established by rule of the commissioner.

9 (f)(1) The commissioner may promulgate rules necessary to implement,
10 administer, and enforce this section.

11 (2) Rules that the commissioner may adopt under this section
12 include without limitation rules relating to implementing a penalty structure
13 for a healthcare payor, healthcare payor affiliate, pharmacy benefits
14 manager, or pharmacy benefits manager affiliate that fails to comply with
15 this section that is based on the number of Arkansas residents serviced by
16 the healthcare payor, healthcare payor affiliate, pharmacy benefits manager,
17 or pharmacy benefits manager affiliate.

18 (g)(1) A violation of this subchapter is an unfair and deceptive act
19 or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et
20 seq.

21 (2) All remedies, penalties, and authority granted to the
22 Attorney General under the Deceptive Trade Practices Act, § 4-88-101 et seq.,
23 shall be available to the Attorney General for the enforcement of this
24 subchapter.

25
26 23-92-513. Prohibition of ghost networks.

27 (a)(1) A pharmacy benefits manager shall not create, utilize, or
28 maintain a ghost network within this state.

29 (2) For purposes of this section, a network shall not be
30 considered a ghost network if the network includes at least one (1) mail-
31 order pharmacy option and one (1) in-person pharmacy option that is
32 physically located in this state if both the mail-order pharmacy option and
33 the in-person pharmacy option are:

34 (A) Accepting new patients; and

35 (B) Otherwise available to an enrollee in this state.

36 (b)(1) A healthcare payor or pharmacy benefits manager shall not

1 create, utilize, or maintain a carve-out network within this state by:

2 (A) Limiting enrollee access to specific pharmacies or
3 pharmacists for self-administered prescription drugs when an enrollee is
4 directed to use a healthcare payor affiliate, pharmacy benefits manager
5 affiliate, or other limited option while the pharmacy benefits manager
6 network appears to offer a full range of pharmacist services;

7 (B) Failing to provide adequate access to pharmacy services for
8 all covered self-administered prescription drugs, including through a
9 licensed pharmacy physically located within this state; or

10 (C) Representing that a broad network of pharmacies or
11 pharmacists is available if, in practice, access to certain self-administered
12 prescription drugs is restricted to a carve-out network that lacks sufficient
13 in-state providers accessible to an enrollee.

14 (2) For purposes of this section, a network shall not be
15 considered a carve-out network if the network includes at least one (1) mail-
16 order pharmacy option and one (1) in-person pharmacy option that is
17 physically located in this state if both the mail-order pharmacy option and
18 the in-person pharmacy option are:

19 (A) Accepting new patients; and

20 (B) Otherwise available to an enrollee in this state.

21 (c) A healthcare payor or pharmacy benefits manager shall ensure that
22 its pharmacy benefits manager network of participating pharmacists and
23 pharmacies:

24 (1) Accurately reflects the availability of pharmacists and
25 pharmacies actively accepting new patients;

26 (2) Provides an enrollee with reasonable access to pharmacist
27 services within this state, including options for in-person consultations and
28 medication pickup from a licensed pharmacist or pharmacy in this state;

29 (3) Is not solely serviced by a mail-order pharmacy; and

30 (4) Is not solely serviced by a pharmacy benefits manager
31 affiliate or healthcare payor affiliate.

32 (d) A healthcare payor or pharmacy benefits manager shall:

33 (1) Regularly verify and update its pharmacy benefits manager
34 network directory to reflect the current availability of participating
35 pharmacists and pharmacies;

36 (2) Remove a pharmacist or pharmacy from its pharmacy benefits

1 manager network directory if that pharmacist or pharmacy is:

2 (A) Not accepting new patients;

3 (B) No longer in practice; or

4 (C) Otherwise unavailable to provide services; and

5 (3) Provide accurate and accessible information to an enrollee
6 regarding participating pharmacists and pharmacies within the pharmacy
7 benefits manager network in a publicly accessible manner on its website.

8 (e)(1) The Insurance Commissioner may promulgate rules necessary to
9 implement, administer, and enforce this section.

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

12 (A) Requiring a healthcare payor and pharmacy benefits
13 manager to submit periodic reports on pharmacy benefits manager network
14 adequacy and accessibility;

15 (B) Investigating a complaint regarding a ghost network
16 and taking appropriate enforcement action; and

17 (C) Implementing a penalty structure for a healthcare
18 payor or pharmacy benefits manager that fails to comply with this section
19 that:

20 (i) Is based on the number of Arkansas residents
21 serviced by the healthcare payor or pharmacy benefits manager; and

22 (ii) Does not exceed one hundred thousand dollars
23 (\$100,000) per violation.

24
25 23-92-514. Patient accommodation and nonrestriction clause.

26 (a) A healthcare payor or pharmacy benefits manager shall not enforce
27 the use of a particular healthcare payor affiliate or pharmacy benefits
28 manager affiliate without considering the enrollee's individual limitations,
29 including without limitation:

30 (1) Medical limitations, including chronic illnesses, temporary
31 or permanent disabilities, or conditions requiring specialized care or that
32 impair cognitive or motor functions;

33 (2) Complex therapies, when the self-administered prescription
34 drug is one (1) of multiple pharmaceuticals provided to an enrollee receiving
35 treatment and mailing the individual pharmaceutical has the potential to
36 interfere with the appropriate and timely administration requirements;

1 (3) Physical limitations, including mobility impairments or
2 inability to retrieve mail or other deliveries without assistance or risk for
3 physical harm to self while retrieving mail or other deliveries;

4 (4) Socioeconomic limitations, including financial hardships,
5 lack of reliable transportation, lack of a caregiver, or other socioeconomic
6 barriers that may prohibit an enrollee from being present during delivery or
7 prohibit an enrollee from accessing the delivery location;

8 (5) Housing limitations, including homelessness, medical
9 confinement, incarceration, unstable housing situations, residences without
10 secure mail delivery options, or residences with shared mail facilities;

11 (6) Chain of custody, when a dispensing pharmacy cannot
12 guarantee that the recipient of the self-administered prescription drug will
13 be present according to federal and state laws and regulations;

14 (7) Prescribing provider order contradictions, when the
15 dispensing pharmacy is unable to guarantee that the prescribing provider's
16 orders will be followed if the self-administered prescription drug is
17 delivered, including situations in which the prescribing provider requires
18 administration under direct supervision of a medical professional for a
19 customarily self-administered prescription drug;

20 (8) Medication storage and efficacy concerns, when the
21 dispensing pharmacy is unable to guarantee that the enrollee will receive the
22 self-administered prescription drug in a timely fashion that does not
23 interfere with the environmental storage and transportation requirements
24 denoted by the manufacturer of the pharmaceutical; and

25 (9) Other relevant limitations, including mental health
26 conditions, cognitive or behavioral impairments, or any other factors that
27 impede or put at risk an enrollee's ability to receive, access, or administer
28 his or her self-administered prescription drugs.

29 (b)(1) An enrollee may obtain medications from a pharmacy of his or
30 her choice when healthcare payor affiliate services or pharmacy benefits
31 manager affiliate services are not suitable due to the limitations specified
32 under subsection (a) of this section.

33 (2) A healthcare payor or pharmacy benefits manager shall
34 facilitate access to in-person pharmacy services without imposing additional
35 costs or penalties on the enrollee.

36 (c) A healthcare payor or pharmacy benefits manager shall not mandate

1 the use of a healthcare payor affiliate or pharmacy benefits manager
2 affiliate in cases in which use of a pharmacy benefits manager affiliate or
3 healthcare payor affiliate would adversely affect the enrollee's ability to
4 receive or administer his or her self-administered prescription drug safely
5 and effectively, considering the patient's individual circumstances under
6 subsection (a) of this section as determined by the enrollee's healthcare
7 provider.

8 (d) A healthcare payor and pharmacy benefits manager shall maintain
9 compliance in all dispensing practices with:

10 (1) The prescribing healthcare provider's orders; and

11 (2) All applicable federal and state laws regarding medication
12 dispensing and chain of custody.

13 (e) A healthcare payor or pharmacy benefits manager shall not
14 retaliate against an enrollee or healthcare provider for exercising his or
15 her rights under this section by:

16 (1) Increasing costs;

17 (2) Denying services; or

18 (3) Reporting to external agencies.

19 (f) A dispute arising from the enforcement of this section shall be
20 subject to a fair and prompt resolution process as defined by rule by the
21 Insurance Commissioner.

22 (g)(1) The commissioner may promulgate rules necessary to implement,
23 administer, and enforce this section.

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

26 (A) Resolving disputes that arise from enforcement of this
27 section through a fair and prompt resolution process; and

28 (B) Implementing a penalty structure for a healthcare
29 payor or pharmacy benefits manager that fails to comply with this section
30 that:

31 (i) Is based on the number of Arkansas residents
32 serviced by the healthcare payor or pharmacy benefits manager; and

33 (ii) Does not exceed one hundred thousand dollars
34 (\$100,000) per violation.

35
36 23-92-515. Self-administered prescription drug – Definition

1 controlling.

2 (a) The definition of "self-administered prescription drug" under this
3 subchapter is controlling, and that defined term shall not be altered,
4 modified, reclassified, relabeled, or reinterpreted by a health benefit plan,
5 healthcare payor, healthcare payor affiliate, pharmacy benefits manager, or
6 pharmacy benefits manager affiliate.

7 (b) A classification, labeling, or interpretation by a health benefit
8 plan, healthcare payor, healthcare payor affiliate, pharmacy benefits
9 manager, or pharmacy benefits manager affiliate does not override or
10 supersede the definition of "self-administered prescription drug" under this
11 subchapter.

12

13 23-92-516. Violation of Deceptive Trade Practices Act – Enforcement.

14 A prohibition of an activity under this subchapter is applicable to a
15 person or entity that:

16 (1) Performs the prohibited activity;

17 (2) Causes another person or entity to perform the prohibited
18 activity;

19 (3) Solicits, advises, encourages, or coerces another person or
20 entity to perform the prohibited activity;

21 (4) Aids or attempts to aid another person or entity in
22 performing a prohibited activity; or

23 (5) Indirectly performs the prohibited activity.

24

25 SECTION 5. EMERGENCY CLAUSE. It is found and determined by the
26 General Assembly of the State of Arkansas that an enrollee's access to
27 prescription medications is of immediate concern; that undue restrictions on
28 pharmacies and pharmacists hinder patient care; and that this act is
29 immediately necessary to protect an enrollee's rights and ensure timely
30 access to medications. Therefore, an emergency is declared to exist, and this
31 act being immediately necessary for the preservation of the public peace,
32 health, and safety shall become effective on:

33 (1) The date of its approval by the Governor;

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

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

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4 */s/C. Penzo*
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