

BILL ANALYSIS

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S.B. 528
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Pharmacy benefit managers (PBMs) engage in multiple practices that create barriers to fair competition for community pharmacies, impeding their ability to meet the needs of their patients. PBMs levy retroactive fees against pharmacies to level PBM costs or to penalize pharmacies for not reaching standards that are far beyond those set in other pharmacy quality platforms. They require pharmacies to attain excessive credentialing or certification to reduce their access to specialty drugs, which are frequently sold by a competing PBM-owned pharmacy. They pay their own affiliate pharmacies at a higher rate than they reimburse other pharmacies for the same services and often forbid pharmacy mail or delivery services while requiring patients to use a PBM-owned mail-order pharmacy.

Legislative efforts to regulate PBM practices often have been challenged in court by PBMs on the grounds such laws violate provisions of the Employee Retirement Income Security Act of 1974 (ERISA). However, the United States Supreme Court on December 10, 2020, ruled in favor of Arkansas in the seminal case of *Rutledge v PCMA*, holding a key Arkansas PBM reform law is not preempted by ERISA.

S.B. 528 amends Chapter 1369 of the Insurance Code by creating Subchapter K to protect against these and other practices.

Typically, a pharmacy adjudicates a claim at the time the patient picks up his or her medicine. Payment from the PBM is then received within a few weeks of that time. However, recent trends in pharmacy reimbursement PBMs have included clawing back thousands of dollars from pharmacies months after the patient has received their medicine based on ever changing non-transparent formulations of fees.

S.B. 528 ensures PBMs may not assess retroactive fees or payment reductions against a pharmacy except as the result of a legitimate audit outcome or unless agreed to by the pharmacy and may not make agreement to such retroactive reductions a condition of a contract or network participation. This bill allows PBMs to retroactively increase pharmacy payments based on performance incentives. The bill provides an exception to the prohibition on retroactive reductions in claims payments where the reduction is mutually agreed with the pharmacy and the health plan issuer and PBM may not condition the contract or network participation on the pharmacy's agreement to the retroactive reduction of claim payments.

S.B. 528 will reinstall predictability and transparency into the pharmacy reimbursement system so pharmacies can plan how best to serve their patients and grow their pharmacy business. PBMs must provide an easily accessible schedule of fee payments specifying each service or procedure a pharmacy may deliver and the corresponding payment amount, and which shows the methodology for calculating those payment amounts. With S.B. 528, a PBM will be deemed to satisfy the fee schedule requirement if the information is otherwise available in the contract.

Additionally, with S.B. 528, a PBM may not reimburse a PBM-affiliated pharmacy at a higher rate than it reimburses a non-affiliated pharmacy for providing the same service.

Typically, a PBM requires its contract with a pharmacy services administrative organization (PSAO) to remain confidential, even from the pharmacy. As a result, the pharmacy cannot obtain

a copy of the very contract that governs its rights and remedies in its relationship with the PBM. S.B. 528 requires that pharmacies be given access to these contracts.

Often independent pharmacies provide services beyond those offered by most other large retail chain pharmacies. These services include home delivery of patient medicine and compounding drugs suitable to the patient's specific needs. Though home delivery and compounding by licensed compounders are within the pharmacies' scope of practice as well as legal under state and federal law, PBMs have begun requiring various extra accreditation requirements to perform these traditional functions.

As permitted by law, S.B. 528 states PBMs must allow pharmacies to deliver or mail drugs to patients on request and to charge a fee for that service, if the pharmacy informs a patient before delivery that the fee will be charged and that it may not be reimbursable by the patient's health plan or PBM. A PBM may prohibit a pharmacy suspected of fraud from mailing prescriptions to its patients and may limit any pharmacy to mailing no more than 25 percent of its annual claims submitted to the PBM. This ensures patients can receive deliveries of vital medications from community pharmacies to their homes.

Because PBMs operate their own specialty pharmacies, they try to limit competition by making local pharmacies jump through more hoops to dispense certain drugs. But patients would rather get those life-saving drugs from the local pharmacy they trust, where they can be counseled by a pharmacist in person.

S.B. 528 prohibits a health plan or PBM from requiring a pharmacy to meet accreditation or certification standards exceeding federal/state standards. A PBM or health plan may not prohibit a pharmacy from dispensing any drug it can dispense under state/ federal law unless its manufacturer requires specific certifications or credentials the pharmacy does not possess; however, it allows a PBM or health plan to require a specialty pharmacy to attain up to two accreditations from the referenced list.

Lastly, S.B. 528 will prohibit a PBM from retaliating against a pharmacy for exercising any rights or remedy allowed under this bill. A PBM's response to an allegation of fraud shall not be deemed to be retaliation against a pharmacy.

As proposed, S.B. 528 amends current law relating to the contractual relationship between a pharmacist or pharmacy and a health benefit plan issuer or pharmacy benefit manager.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 1369, Insurance Code, by adding Subchapter L, as follows:

SUBCHAPTER L. CONTRACTS WITH PHARMACISTS AND PHARMACIES

Sec. 1369.551. DEFINITIONS. Defines "pharmacy benefit manager" (PBM), "pharmacy benefit network," and "pharmacy services administrative organization."

Sec. 1369.552. APPLICABILITY OF SUBCHAPTER. (a) Provides that this subchapter applies only to a health benefit plan (HBP) that provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness, and that is offered by certain insurance providers.

(b) Provides that, notwithstanding any other law, this subchapter applies to certain HBPs.

(c) Provides that this subchapter does not apply to an issuer or provider of health benefits under or a PBM administering pharmacy benefits under a workers' compensation insurance policy or other form of providing medical benefits under Title 5 (Workers' Compensation), Labor Code.

Sec. 1369.553. REDUCTION OF CERTAIN CLAIM PAYMENT AMOUNTS PROHIBITED. (a) Prohibits an HBP issuer or PBM from directly or indirectly reducing the amount of a claim payment to a pharmacist or pharmacy after adjudication of the claim through the use of an aggregated effective rate, quality assurance program, other direct or indirect remuneration fee, or otherwise, except in certain cases.

(b) Provides that nothing in this section prohibits an HBP or PBM from increasing a claim payment amount after adjudication of the claim.

Sec. 1369.554. REIMBURSEMENT OF AFFILIATED AND NONAFFILIATED PHARMACISTS AND PHARMACIES. (a) Defines "affiliated pharmacist or pharmacy" and "nonaffiliated pharmacist or pharmacy."

(b) Prohibits a PBM from paying an affiliated pharmacist or pharmacy a reimbursement amount that is more than the amount the PBM pays a nonaffiliated pharmacist or pharmacy for the same pharmacist service.

Sec. 1369.555. NETWORK CONTRACT FEE SCHEDULE. Requires that a pharmacy benefit network contract specify or reference a separate fee schedule. Requires that the fee schedule, unless otherwise available in the contract, be provided electronically in an easily accessible and complete spreadsheet format and, on request, in writing to each contracted pharmacist and pharmacy. Requires that certain information describing the amount of payment be included in the fee schedule.

Sec. 1369.556. DISCLOSURE OF PHARMACY SERVICES ADMINISTRATIVE ORGANIZATION CONTRACT. Provides that a pharmacist or pharmacy that is a member of a pharmacy services administrative organization that enters into a contract with an HBP issuer or PBM on the pharmacist's or pharmacy's behalf is entitled to receive from the pharmacy services administrative organization a copy of the contract provisions applicable to the pharmacist or pharmacy, including each provision relating to the pharmacist's or pharmacy's rights and obligations under the contract.

Sec. 1369.557. DELIVERY OF DRUGS. (a) Prohibits an HBP issuer or PBM, except in a case in which the HBP issuer or PBM makes a credible allegation of fraud against the pharmacist or pharmacy and provides reasonable notice of the allegation and the basis of the allegation to the pharmacist or pharmacy, from prohibiting as a condition of a contract a pharmacy or pharmacist from mailing or delivering authorized drugs to a patient or charging a shipping and handling fee to a patient if certain conditions are met.

(b) Prohibits a pharmacist or pharmacy from charging an HBP issuer or PBM for the applicable delivery of prescription drugs unless the charge is specifically agreed to by the HBP issuer or PBM.

(c) Authorizes an HBP issuer or PBM as a condition of a contract to, notwithstanding Subsection (a), prohibit a pharmacy or pharmacist from mailing the drugs for more than 25 percent of the claims the pharmacist or pharmacy submits to the HBP issuer or PBM during a calendar year.

Sec. 1369.558. PROFESSIONAL STANDARDS AND SCOPE OF PRACTICE REQUIREMENTS. (a) Prohibits an HBP issuer or PBM, as a condition of a contract with a pharmacist or pharmacy, from:

(1) requiring pharmacist or pharmacy accreditation standards or recertification requirements inconsistent with, more stringent than, or in

addition to federal and state requirements, except as provided by Subsection (b); or

(2) prohibiting a licensed pharmacist or pharmacy from dispensing any drug that is authorized to be dispensed under the pharmacist's or pharmacy's license unless certain conditions are met.

(b) Authorizes an HBP issuer or PBM to require as a condition of a contract with a specialty pharmacy that the specialty pharmacy obtain accreditation from not more than two of certain independent accreditation organizations listed in this subsection.

Sec. 1369.559. RETALIATION PROHIBITED. (a) Prohibits a PBM from retaliating against a pharmacist or pharmacy for exercising any right or remedy under Chapter 1369 (Benefits Relating to Prescription Drugs and Devices and Related Services). Sets forth a list of retaliatory actions prohibited under this section.

(b) Provides that a PBM is not considered to have retaliated against a pharmacist or pharmacy for the purposes of this section if the PBM takes an action in response to a credible allegation of fraud against the pharmacist or pharmacy; and provides reasonable notice to the pharmacist or pharmacy of the allegation of fraud and its basis before taking the action.

Sec. 1369.560. WAIVER PROHIBITED. Prohibits the provisions of this subchapter from being waived, voided, or nullified by contract.

SECTION 2. Makes application of this Act prospective.

SECTION 3. Effective date: September 1, 2021.