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2 92nd General Assembly

# A Bill

3 Regular Session, 2019

SENATE BILL 520

4

5 By: Senators K. Hammer, Caldwell, G. Leding, Maloch, B. Sample

6 By: Representatives M. Gray, Burch, M. Davis, D. Douglas, Eaves, Evans, V. Flowers, Gazaway,

7 Hillman, Jett, Lowery, Lundstrum, Murdock, Pilkington, Vaught, D. Whitaker

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## For An Act To Be Entitled

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AN ACT TO CLARIFY THE STATE INSURANCE DEPARTMENT'S

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REGULATORY AND ENFORCEMENT AUTHORITY CONCERNING

12

PHARMACY BENEFITS MANAGERS; TO MODIFY THE ARKANSAS

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PHARMACY BENEFITS MANAGER LICENSURE ACT; TO DECLARE

14

AN EMERGENCY; AND FOR OTHER PURPOSES.

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## Subtitle

18

TO CLARIFY THE STATE INSURANCE

19

DEPARTMENT'S REGULATORY AND ENFORCEMENT

20

AUTHORITY CONCERNING PHARMACY BENEFITS

21

MANAGERS; TO MODIFY THE ARKANSAS PHARMACY

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BENEFITS MANAGER LICENSURE ACT; AND TO

23

DECLARE AN EMERGENCY.

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BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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SECTION 1. Arkansas Code § 17-92-507(a)(1), concerning the definition

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of "Maximum Allowable Cost List" regarding Maximum Allowable Cost Lists as

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relating to pharmacists and pharmacies, is amended to read as follows:

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(1)(A) "Maximum Allowable Cost List" means a listing of drugs or

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other methodology used by a pharmacy benefits manager, directly or

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indirectly, setting the maximum allowable ~~cost on which reimbursement payment~~

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to a pharmacy or pharmacist ~~may be based for a generic drug, brand-name drug,~~

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biologic product, or other prescription drug.

36

(B) "Maximum Allowable Cost List" includes without



1 limitation:

2 (i) Average acquisition cost, including national  
 3 average drug acquisition cost;  
 4 (ii) Average manufacturer price;  
 5 (iii) Average wholesale price;  
 6 (iv) Brand effective rate or generic effective rate;  
 7 (v) Discount indexing;  
 8 (vi) Federal upper limits;  
 9 (vii) Wholesale acquisition cost; and  
 10 (viii) Any other term that a pharmacy benefits  
 11 manager or a healthcare insurer may use to establish reimbursement rates to a  
 12 pharmacist or pharmacy for pharmacist services;

13  
 14 SECTION 2. Arkansas Code § 17-92-507(a)(4), concerning the definition  
 15 of "pharmacist services" regarding services provided by pharmacists as  
 16 relating to pharmacists and pharmacies, is amended to read as follows:

17 (4) "Pharmacist services" means products, goods, ~~or~~ and  
 18 services, or any combination of products, goods, and services, provided as a  
 19 part of the practice of pharmacy ~~in Arkansas~~ as defined in § 17-92-101;  
 20

21 SECTION 3. Arkansas Code § 17-92-507(a), concerning definitions  
 22 related to Maximum Allowable Cost Lists, is amended to add an additional  
 23 subdivision to read as follows:

24 (10)(A) "Professional dispensing fee" means the professional  
 25 dispensing fee approved by the Centers for Medicare and Medicaid Services for  
 26 the fee-for-service Arkansas Medicaid Program for preferred brand drugs and  
 27 generic drugs.

28 (B) "Professional dispensing fee" includes without  
 29 limitation:

30 (i) Pharmacy costs and expenses related to a  
 31 pharmacist's:

32 (a) Time spent checking the computer for  
 33 information about an individual's coverage;

34 (b) Performance of a drug utilization review  
 35 and preferred drug list review activities;

36 (c) Measurement or mixing of a covered

1 outpatient drug;  
 2 (d) Filling the container;  
 3 (e) Beneficiary counseling;  
 4 (f) Physically providing the completed  
 5 prescription to the patient;  
 6 (g) Delivery of the completed prescription;  
 7 and  
 8 (h) Special packaging of the completed  
 9 prescription; and  
 10 (ii) Overhead associated with maintaining the  
 11 facility and equipment necessary to operate the pharmacy.

12  
 13 SECTION 4. Arkansas Code § 17-92-507(b), concerning Maximum Allowable  
 14 Cost Lists as relating to pharmacists and pharmacies, is amended to read as  
 15 follows:

16 (b) Before a pharmacy benefits manager places or continues a  
 17 particular drug on a Maximum Allowable Cost List, the drug:

18 (1) ~~Shall~~ If the drug is a generically equivalent drug as  
 19 defined in § 17-92-101, shall be listed as therapeutically equivalent and  
 20 pharmaceutically equivalent "A" or "B" rated in the United States Food and  
 21 Drug Administration's most recent version of the "Orange Book" or "Green  
 22 Book" or ~~has~~ have an NR or NA rating by ~~Medi-span~~ Medi-Span, Gold Standard,  
 23 or a similar rating by a nationally recognized reference;

24 (2) Shall be available for purchase by each pharmacy in the  
 25 state from national or regional wholesalers operating in Arkansas; and

26 (3) Shall not be obsolete.

27  
 28 SECTION 5. Arkansas Code § 17-92-507(c)(4), concerning Maximum  
 29 Allowable Cost Lists as relating to pharmacists and pharmacies, is amended to  
 30 read as follows:

31 (4)(A)(i) Provide a reasonable administrative appeal procedure  
 32 to allow pharmacies to challenge maximum allowable ~~costs~~ cost list and  
 33 reimbursements made under a maximum allowable cost list for a specific drug  
 34 or drugs as:

35 (a) Not meeting the requirements of this  
 36 section; or

1 (b) Being below the pharmacy acquisition cost  
2 plus the professional dispensing fee per dispensing event of the pharmacy  
3 providing pharmacist services.

4 (ii) The reasonable administrative appeal procedure  
5 shall include the following:

6 (a) A dedicated telephone number, ~~and~~ email  
7 address, and ~~or~~ website for the purpose of submitting administrative appeals;

8 (b) The ability to submit an administrative  
9 appeal directly to the pharmacy benefits manager regarding the pharmacy  
10 benefits plan or program or through a pharmacy service administrative  
11 organization; and

12 (c) No less than seven (7) business days to  
13 file an administrative appeal.

14 (B) The pharmacy benefits manager shall respond to the  
15 challenge under subdivision (c)(4)(A) of this section within seven (7)  
16 business days after receipt of the challenge.

17 (C) If a challenge is under subdivision (c)(4)(A) of this  
18 section, the pharmacy benefits manager shall within seven (7) business days  
19 after receipt of the challenge either:

20 (i) If the appeal is upheld:

21 (a) Make the change in the maximum allowable  
22 cost list payment to at least the pharmacy acquisition cost plus the  
23 professional dispensing fee per dispensing event of the pharmacy providing  
24 pharmacist services;

25 (b) Permit the challenging pharmacy or  
26 pharmacist to reverse and rebill the claim in question;

27 (c) Provide the National Drug Code that the  
28 increase or change is based on to the pharmacy or pharmacist; and

29 (d) Make the change under subdivision  
30 (c)(4)(C)(i)(a) of this section effective for each similarly situated  
31 pharmacy as defined by the payor subject to the Maximum Allowable Cost List;

32 (ii) If the appeal is denied, provide the  
33 challenging pharmacy or pharmacist the National Drug Code and the name of the  
34 national or regional pharmaceutical wholesalers operating in Arkansas that  
35 have the drug currently in stock at a price below the Maximum Allowable Cost  
36 List; or

1 (iii) If the National Drug Code provided by the  
2 pharmacy benefits manager is not available below the pharmacy acquisition  
3 cost from the pharmaceutical wholesaler from whom the pharmacy or pharmacist  
4 purchases the majority of prescription drugs for resale, then the pharmacy  
5 benefits manager shall adjust the Maximum Allowable Cost List above the  
6 challenging pharmacy's pharmacy acquisition cost plus the professional  
7 dispensing fee per dispensing event of the pharmacy providing pharmacist  
8 services, and permit the pharmacy to reverse and rebill each claim affected  
9 by the inability to procure the drug at a cost that is equal to or less than  
10 the previously challenged maximum allowable cost.

11  
12 SECTION 6. Arkansas Code § 17-92-507(e), concerning Maximum Allowable  
13 Cost Lists as relating to pharmacists and pharmacies, is amended to read as  
14 follows:

15 (e) A pharmacy or pharmacist may decline to provide the pharmacist  
16 services to a patient or pharmacy benefits manager if, as a result of a  
17 Maximum Allowable Cost List, a pharmacy or pharmacist is to be paid less than  
18 the pharmacy acquisition cost plus a professional dispensing fee per  
19 dispensing event of the pharmacy providing pharmacist services.

20  
21 SECTION 7. Arkansas Code § 23-92-503(13), concerning the definition of  
22 "rebate" under the Arkansas Pharmacy Benefits Manager Licensure Act, is  
23 amended to read as follows:

24 (13)(A) "Rebate" means a discount or other price concession, or  
25 a payment that is:

26 (i) ~~based~~ Based on utilization of a prescription  
27 drug; and

28 (ii) ~~that is paid~~ Paid by a manufacturer or third  
29 party, directly or indirectly, to a pharmacy benefits manager, pharmacy  
30 services administrative organization, or pharmacy after a claim has been  
31 processed and paid at a pharmacy.

32 (B) "Rebate" includes without limitation incentives,  
33 disbursements, and reasonable estimates of a volume-based discount; and  
34

35 SECTION 8. Arkansas Code § 23-92-503, concerning the definitions to be  
36 used under the Arkansas Pharmacy Benefits Manager Licensure Act, is amended

1 to add additional subdivisions to read as follows:

2 (15)(A) "Professional dispensing fee" means the professional  
3 dispensing fee approved by the Centers for Medicare and Medicaid Services for  
4 the fee-for-service Arkansas Medicaid Program for preferred brand drugs and  
5 generic drugs.

6 (B) "Professional dispensing fee" includes without  
7 limitation:

8 (i) Pharmacy costs and expenses related to a  
9 pharmacist's:

10 (a) Time spent checking the computer for  
11 information about an individual's coverage;

12 (b) Performing drug utilization review and  
13 preferred drug list review activities;

14 (c) Measurement or mixing of the covered  
15 outpatient drug;

16 (d) Filling the container;

17 (e) Beneficiary counseling;

18 (f) Physically providing the completed  
19 prescription to the patient;

20 (g) Delivery of the completed prescription;

21 and

22 (h) Special packaging of the completed  
23 preprescription; and

24 (ii) Overhead associated with maintaining the  
25 facility and equipment necessary to operate the pharmacy;

26 (16) "Spread pricing" means the model of prescription drug  
27 pricing in which the pharmacy benefits manager charges a health benefit plan  
28 a contracted price for prescription drugs, and the contracted price for the  
29 prescription drugs differs from the amount the pharmacy benefits manager  
30 directly or indirectly pays the pharmacist or pharmacy for pharmacist  
31 services; and

32 (17) "Unfair reimbursement for pharmacist services" means a  
33 pharmacy benefits manager's or healthcare insurer's directly or indirectly  
34 reimbursing a pharmacy or pharmacist for a prescription drug or pharmacist  
35 service in an amount less than the current approved fee for the fee-for-  
36 service Arkansas Medicaid Program-covered outpatient prescription drug

1 reimbursement that includes an ingredient cost for the prescription drug plus  
2 a professional dispensing fee per dispensing event.

3  
4 SECTION 9. Arkansas Code § 23-92-505 is amended to read as follows:

5 23-92-505. Pharmacy benefits manager network adequacy.

6 (a) A pharmacy benefits manager shall provide:

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

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

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

17 (b)(1) A pharmacy benefits manager shall report to the Insurance  
18 Commissioner on a quarterly basis for each healthcare insurer the following  
19 information:

20 (A) The aggregate amount of rebates received by the  
21 pharmacy benefits manager;

22 (B) The aggregate amount of rebates distributed to the  
23 appropriate healthcare insurer;

24 (C) The aggregate amount of rebates passed on to the  
25 enrollees of each healthcare insurer at the point of sale that reduced the  
26 enrollees applicable deductible, copayment, coinsurance, or other cost-  
27 sharing amount;

28 (D) The individual and aggregate amount paid by the  
29 healthcare insurer to the pharmacy benefits manager for pharmacist services  
30 itemized by pharmacy, by product, and by goods and services; and

31 (E) The individual and aggregate amount a pharmacy  
32 benefits manager paid for pharmacist services itemized by pharmacy, by  
33 product, and by goods and services.

34 (2) The report required under subdivision (b)(1) of this section  
35 is:

36 (A) Proprietary and confidential under § 23-61-107(a)(4)

1 and § 23-61-207; and

2 (B) Not subject to the Freedom of Information Act of 1967,  
3 § 25-19-101 et seq.

4 (c) A pharmacy benefits manager is prohibited from conducting spread  
5 pricing in this state.

6  
7 SECTION 10. Arkansas Code § 23-92-506(b), concerning prohibited  
8 practices for a pharmacy benefits manager under the Arkansas Pharmacy  
9 Benefits Manager Licensure Act, is amended to read as follows:

10 (b) A pharmacy benefits manager or representative of a pharmacy  
11 benefits manager shall not:

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

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

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

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

21 (C) Participation in a pharmacy benefits manager network;

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

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

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

31 (5)(A) Pay or reimburse a pharmacy or pharmacist for pharmacist  
32 services an amount that is an unfair reimbursement for pharmacist services,  
33 unless the pharmacy's or pharmacist's usual and customary charge to the  
34 general public is less than the unfair reimbursement for pharmacist services.

35 (B)(i) The Arkansas Employee Benefits Division community  
36 pharmacy reimbursement model for pharmacist services in partnership with the



1 University of Arkansas for Medical Sciences based prescription drug program  
 2 satisfies the intent of this subdivision.

3 (ii) A plan using the model described in subdivision  
 4 (b)(5)(B)(i) of this section is exempt from complying with subdivision  
 5 (b)(5)(A) of this section if the reimbursement model is maintained as  
 6 determined by the Insurance Commissioner.

7 (iii) If a plan deviates from this reimbursement  
 8 model, the plan shall be subject to subdivision (b)(5)(A) of this section; or

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

11  
 12 SECTION 11. Arkansas Code § 23-92-506(c), concerning the denial of  
 13 claims for pharmacist services, is amended to read as follows:

14 (c) A claim or aggregate of claims for pharmacist services shall not  
 15 be directly or indirectly retroactively denied or reduced after adjudication  
 16 of the claim or aggregate of claims unless:

- 17 (1) The original claim was submitted fraudulently;  
 18 (2) The original claim payment was incorrect because the  
 19 pharmacy or pharmacist had already been paid for the pharmacist services; or  
 20 (3) The pharmacist services were not properly rendered by the  
 21 pharmacy or pharmacist.

22  
 23 SECTION 12. Arkansas Code § 23-92-507, concerning the prohibition of  
 24 gag clauses under the Arkansas Pharmacy Benefits Manager Licensure Act, is  
 25 amended to add an additional subsection to read as follows:

26 (e) Without limiting its application to any other plan or program,  
 27 this section applies to an organization or entity directly or indirectly  
 28 providing services to patients under the Medicaid Provider-Led Organized Care  
 29 Act, § 20-77-2701 et seq., or any other Medicaid managed care program  
 30 operating in this state.

31  
 32 SECTION 13. Arkansas Code § 23-92-510, concerning the applicability of  
 33 the Arkansas Pharmacy Benefits Manager Licensure Act, is amended to add an  
 34 additional subsection to read as follows:

35 (c) Without limiting its application to any other plan or program,  
 36 this section applies to an organization or entity directly or indirectly

1 providing services to patients under the Medicaid Provider-Led Organized Care  
2 Act, § 20-77-2701 et seq. or any other Medicaid managed care program  
3 operating in this state.  
4

5 SECTION 14. EMERGENCY CLAUSE. It is found and determined by the  
6 General Assembly of the State of Arkansas that there is confusion about the  
7 regulation of pharmacy benefits managers and the enforcement authority of the  
8 State Insurance Department; that regulation of pharmacy benefits managers by  
9 the State Insurance Department is vital to stabilizing the pharmacy industry  
10 in this state; and that this act is immediately necessary because of the need  
11 for Arkansas residents to have continued access to pharmacy services across  
12 the state. Therefore, an emergency is declared to exist, and this act being  
13 immediately necessary for the preservation of the public peace, health, and  
14 safety shall become effective on:

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

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

19 (3) If the bill is vetoed by the Governor and the veto is  
20 overridden, the date the last house overrides the veto.  
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23 */s/K. Hammer*  
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