

HOUSE BILL No. 2383

By Committee on Insurance and Pensions

2-12

1 AN ACT concerning insurance; relating to the regulation of pharmacy
2 benefits managers; providing for enhanced oversight thereof; requiring
3 licensure rather than registration of such entities; amending K.S.A.
4 2020 Supp. 40-3821, 40-3822, 40-3823, 40-3824, 40-3825, 40-3826,
5 40-3827, 40-3829 and 40-3830 and repealing the existing sections.

6
7 *Be it enacted by the Legislature of the State of Kansas:*

8 New Section 1. (a) A pharmacy benefits manager's license may be
9 revoked, suspended or limited, the licensee may be censured or placed
10 under probationary conditions or an application for a license or for
11 reinstatement of a license may be denied upon a finding that:

12 (1) The applicant or licensee committed fraud or misrepresentation in
13 applying for or securing an original, renewal or reinstated license;

14 (2) the licensee has violated any lawful rule or regulation
15 promulgated by the commissioner or violated any lawful order or directive
16 of the commissioner previously entered by the commissioner;

17 (3) the PBM has engaged in fraudulent activity that constitutes a
18 violation of state or federal law;

19 (4) the commissioner has received consumer complaints that justify
20 an action under this section to protect the safety and interest of consumers;

21 (5) the licensee has failed to furnish the commissioner, or the
22 commissioner's investigators or representatives, any information legally
23 requested by the commissioner;

24 (6) the PBM has been determined by the commissioner to be in
25 violation of or noncompliance with state or federal law; or

26 (7) the PBM has failed to timely submit a renewal application and the
27 information required under K.S.A. 2020 Supp. 40-3824, and amendments
28 thereto. In lieu of a denial of a renewal application, the commissioner may
29 permit the PBM to submit to the commissioner a corrective action plan to
30 correct or cure any deficiencies.

31 (b) A PBM, pharmacy services administration organization or any
32 person acting for, or on behalf of, a PBM or pharmacy services
33 administration organization shall not cancel any contract with a pharmacy
34 or pharmacist, sue for breach of contract, use the decision to decline as a
35 cause for not renewing the contract or retaliate against or penalize the
36 pharmacy or pharmacist in any way for providing any information

1 requested by the commissioner in relation to any complaint or concern
2 under this section.

3 (c) This section shall be a part of and supplemental to article 38 of
4 chapter 40 of the Kansas Statutes Annotated, and amendments thereto.

5 New Sec. 2. (a) In addition to any fines or other penalties that the
6 commissioner may establish through rules and regulations, the
7 commissioner may enforce the provisions of this act as provided by K.S.A.
8 2020 Supp. 40-2405 through 40-2408 and 40-2411, and amendments
9 thereto.

10 (b) This section shall be a part of and supplemental to article 38 of
11 chapter 40 of the Kansas Statutes Annotated, and amendments thereto.

12 New Sec. 3. (a) On and after July 1, 2022, and annually thereafter,
13 each PBM shall submit to the commissioner a transparency report
14 containing data from the prior calendar year as it pertains to covered
15 entities and plan sponsors doing business in Kansas. The report shall
16 contain information required by, and be in a format provided by, the
17 commissioner.

18 (b) This section shall be a part of and supplemental to article 38 of
19 chapter 40 of the Kansas Statutes Annotated, and amendments thereto.

20 New Sec. 4. (a) Any pharmacy that has a contract or pharmacist who
21 has a contract, either directly or indirectly through a pharmacy services
22 administration organization, with a PBM administering any type of drug or
23 pharmacy benefit plan to provide covered drugs, devices or services at a
24 contractual reimbursement rate may decline to provide a covered drug,
25 device or service if the pharmacy or pharmacist is currently reimbursed or
26 will be reimbursed at less than the acquisition cost for the covered drug,
27 device or service.

28 (b) If the pharmacy or pharmacist declines to provide the drug, device
29 or service as authorized in subsection (a), then the pharmacy or pharmacist
30 may provide the customer with adequate information for the customer to
31 determine where the prescription for the drug, device or service may be
32 filled, or the pharmacy or pharmacist may communicate with the patient's
33 prescriber at the request of the patient to identify alternative treatment
34 options.

35 (c) A PBM, pharmacy services administration organization or any
36 person acting for, or on behalf of, a PBM or pharmacy services
37 administration organization shall not cancel any contract with a pharmacy
38 or pharmacist, sue for breach of contract, use the decision to decline as a
39 cause for not renewing the contract or retaliate against or penalize the
40 pharmacy or pharmacist in any way for exercising the pharmacy's or
41 pharmacist's rights under this section.

42 (d) (1) A PBM shall not reimburse a pharmacy or pharmacist in the
43 state an amount less than the amount that the pharmacy benefits manager

1 reimburses a pharmacy benefits manager affiliate for providing the same
2 pharmacist services.

3 (2) The amount shall be calculated on a per-unit basis based on the
4 same generic product identifier or generic code number.

5 (e) (1) A PBM shall not make or permit any reduction of payment
6 for pharmacist services by a pharmacy benefits manager or a healthcare
7 insurer directly or indirectly to a pharmacy under a reconciliation process
8 to an effective rate of reimbursement, including without limitation generic
9 effective rates, brand effective rates, direct and indirect remuneration fees
10 or any other reduction or aggregate reduction of payment; or

11 (2) A PBM shall not adjust a claim or aggregate of claims for
12 pharmacist services directly or indirectly retroactively denied or reduced
13 after adjudication of the claim or aggregate of claims unless:

14 (A) The original claim was submitted fraudulently;

15 (B) the original claim payment was incorrect because the pharmacy
16 or pharmacist had already been paid for the pharmacist services; or

17 (C) the pharmacist services were not properly rendered by the
18 pharmacy or pharmacist.

19 (f) A PBM, or representative of a PBM, shall not cause or knowingly
20 permit the use of advertisement, promotion, solicitation, representation,
21 proposal or offer that is untrue, deceptive or misleading to patients or the
22 general public regarding access to pharmacies in a pharmacy network.

23 (g) This section shall be a part of and supplemental to article 38 of
24 chapter 40 of the Kansas Statutes Annotated, and amendments
25 thereto.

26 Sec. 5. K.S.A. 2020 Supp. 40-3821 is hereby amended to read as
27 follows: 40-3821. (a) K.S.A. 2020 Supp. 40-3821 through 40-3828 *and*
28 *sections 1 through 4*, and amendments thereto, shall be known and may be
29 cited as the pharmacy benefits manager-~~registration~~ licensure act.

30 (b) *On and after January 1, 2022, a person shall not perform, act or*
31 *do business in this state as a PBM unless such person has a valid license*
32 *issued by the commissioner pursuant to this act.*

33 (c) This act shall apply to any ~~pharmacy benefits manager~~ PBM that
34 provides claims processing services, other prescription drug or device
35 services, or both, to covered persons who are residents of this state.

36 ~~(e)(d)~~ This act shall not apply to any ~~pharmacy benefits manager~~
37 PBM that holds a certificate of registration as an administrator pursuant to
38 K.S.A. 40-3810, and amendments thereto.

39 (e) *A license issued in accordance with this act shall be*
40 *nontransferable.*

41 Sec. 6. K.S.A. 2020 Supp. 40-3822 is hereby amended to read as
42 follows: 40-3822. For purposes of this act:

43 (a) "Commissioner" means the commissioner of insurance as defined

1 by K.S.A. 40-102, and amendments thereto.

2 (b) (1) "Covered entity" means:

3 (A) A nonprofit hospital or medical service corporation, health
4 insurer, health benefit plan or health maintenance organization; *or*

5 (B) ~~a health program administered by a department or the state in the~~
6 ~~capacity of provider of health coverage; or~~

7 ~~(C)~~—an employer, labor union or other group of persons organized in
8 the state that provides health coverage to covered individuals who are
9 employed or reside in the state.

10 (2) "Covered entity" shall not include any:

11 (A) ~~Self-funded plan that is exempt from state regulation pursuant to~~
12 ~~ERISA;~~

13 ~~(B)~~—Plan issued for coverage for federal employees; or

14 ~~(C)~~ (B) health plan that provides coverage only for accidental injury,
15 specified disease, hospital indemnity, medicare supplement, disability
16 income, long-term care or other limited benefit health insurance policies
17 and contracts.

18 (c) "Covered person" means a member, policyholder, subscriber,
19 enrollee, beneficiary, dependent or other individual participating in a
20 health benefit plan.

21 (d) *"Department" means the insurance department.*

22 (e) *"Health benefit plan" means the same as defined in K.S.A. 40-*
23 *4602, and amendments thereto.*

24 (f) *"Health insurer" means the same as defined in K.S.A. 40-4602,*
25 *and amendments thereto.*

26 (g) *"Maximum allowable cost" or "MAC" means any term or*
27 *methodology that a pharmacy benefits manager or a healthcare insurer*
28 *may use to establish the maximum amount that a pharmacy benefits*
29 *manager will reimburse a pharmacy or a pharmacist for pharmacist*
30 *services.*

31 (h) "Pharmacy benefits management" means:

32 (1) Any of the following services provided with regard to the
33 administration of the following pharmacy benefits:

34 (A) Mail service pharmacy;

35 (B) claims processing, retail network management and payment of
36 claims to pharmacies for prescription drugs dispensed to covered
37 individuals;

38 (C) clinical formulary development and management services;

39 (D) rebate contracting and administration;

40 (E) certain patient compliance, therapeutic intervention and generic
41 substitution programs; or

42 (F) disease management programs involving prescription drug
43 utilization; and

1 (2) (A) the procurement of prescription drugs by a prescription
 2 benefits manager at a negotiated rate for dispensation to covered
 3 individuals within this state; or

4 (B) the administration or management of prescription drug benefits
 5 provided by a covered insurance entity for the benefit of covered
 6 individuals.

7 ~~(e)~~(i) "Pharmacy benefits manager" or "PBM" means a person,
 8 business or other entity that performs pharmacy benefits management.
 9 "Pharmacy benefits manager" includes any person or entity acting in a
 10 contractual or employment relationship for a pharmacy benefits manager
 11 in the performance of pharmacy benefits management for a covered entity.
 12 ~~The term "Pharmacy benefits manager" shall~~ does not include a covered
 13 insurance entity.

14 ~~(f)~~(j) "Person" means an individual, partnership, corporation,
 15 organization or other business entity.

16 Sec. 7. K.S.A. 2020 Supp. 40-3823 is hereby amended to read as
 17 follows: 40-3823. ~~Registration requirement~~ *Requirements* to act as a
 18 pharmacy benefits manager.

19 (a) No person shall act or operate as a ~~pharmacy benefits manager~~
 20 *PBM* without first obtaining a valid ~~certificate of registration~~ *license*
 21 issued by the commissioner.

22 (b) Each person seeking a ~~certificate of registration~~ *license* to act as a
 23 ~~pharmacy benefits manager~~ *PBM* shall file with the commissioner an
 24 application for a ~~certificate of registration~~ *license* upon a form to be
 25 furnished by the commissioner. *At a minimum*, the application form shall
 26 include *the following information*:

27 (1) *The name, address and telephone number of the PBM.*

28 (2) The name, address, official position and professional
 29 qualifications of each individual who is responsible for the conduct of the
 30 affairs of the ~~pharmacy benefits manager~~ *PBM*, including all members of
 31 the board of directors, board of trustees, executive committee, other
 32 governing board or committee, the principal officers in the case of a
 33 corporation, the partners or members in the case of a partnership or
 34 association and any other person who exercises control or influence over
 35 the affairs of the ~~pharmacy benefits manager~~ *PBM*.

36 ~~(2)~~(3) The name and address of the applicant's agent for service of
 37 process in the state.

38 (4) *The name, address, phone number, email address, official position*
 39 *and professional qualifications of each person responsible for setting*
 40 *MAC prices, including all persons with authority to modify MAC prices in*
 41 *response to MAC appeals.*

42 ~~(3)~~(5) A nonrefundable application fee of ~~\$140~~ \$2,500.

43 (c) (1) *Upon receipt of an application, the commissioner may require*

1 *additional documentation or information necessary to verify the*
 2 *information contained in the application. Within 30 days of receiving an*
 3 *application, the commissioner may request additional information or*
 4 *submissions from an applicant for licensure and shall obtain any*
 5 *document or information reasonably necessary to verify the information*
 6 *contained in the application.*

7 *(2) Within 90 days after receipt of a completed application, the*
 8 *network adequacy report and the applicable license fee, the commissioner*
 9 *shall review the application and issue a license if the applicant is deemed*
 10 *qualified under this section. If the commissioner determines the applicant*
 11 *is not qualified, the commissioner shall notify the applicant and shall*
 12 *specify the reason for the denial.*

13 Sec. 8. K.S.A. 2020 Supp. 40-3824 is hereby amended to read as
 14 follows: 40-3824. (a) Each pharmacy benefits manager ~~registration~~ license
 15 shall expire on March 31 each year and may be renewed annually on the
 16 request of the ~~registrant~~ licensee. The application for renewal shall be
 17 submitted on a form furnished by the commissioner and accompanied by a
 18 renewal fee of ~~\$140~~ \$2,500. The application for renewal shall be in such
 19 form and contain such matters as the commissioner prescribes.

20 (b) If a ~~registration~~ license renewal fee is not paid by the prescribed
 21 date, the amount of the fee, plus a penalty fee of ~~\$140~~ \$2,500 shall be paid.
 22 The pharmacy benefits manager ~~registration~~ license may be revoked or
 23 suspended by the commissioner until the renewal fee and any penalty
 24 assessed has been paid.

25 (c) Any person who performs or is performing any pharmacy benefits
 26 management service on ~~the effective date of this act~~ must obtain a
 27 ~~certificate of registration~~ shall be required to obtain a license as a
 28 pharmacy benefits manager from the commissioner ~~within 90 days after~~
 29 ~~the effective date of this act~~ by January 1, 2022, in order to continue to do
 30 business in Kansas.

31 Sec. 9. K.S.A. 2020 Supp. 40-3825 is hereby amended to read as
 32 follows: 40-3825. ~~In accordance with the provisions of the rules and~~
 33 ~~regulations filing act, K.S.A. 77-415 et seq., and amendments thereto, (a)~~
 34 The commissioner may adopt, amend and revoke rules and regulations
 35 governing the administration and enforcement of this act, including, but
 36 not limited to:

37 (a)(1) The content of the application form;

38 (b)(2) the content of any other form or report required to implement
 39 this act; and

40 (e)(3) such other rules and regulations as the commissioner may deem
 41 necessary to ~~carry out~~ implement and administer the provisions of this act.

42 (b) *The commissioner shall adopt, amend and revoke all such*
 43 *necessary rules and regulations not later than July 1, 2022.*

1 Sec. 10. K.S.A. 2020 Supp. 40-3826 is hereby amended to read as
 2 follows: 40-3826. Any person who acts as a ~~pharmacy benefits manager~~
 3 ~~PBM~~ without being ~~registered~~ *licensed* as required by this act shall be
 4 subject to a fine of ~~\$500 for each~~ *\$5,000 for the period that the PBM is*
 5 *found to be in violation.*

6 (b) *If a PBM is found to be in violation of or noncompliant with any*
 7 *state or federal law, the PBM shall be subject to a fine of \$5,000 per*
 8 *violation and \$5,000 per occurrence of noncompliance.*

9 Sec. 11. K.S.A. 2020 Supp. 40-3827 is hereby amended to read as
 10 follows: 40-3827. (a) *There is hereby established in the state treasury the*
 11 *pharmacy benefits manager licensure fund. Such fund shall be*
 12 *administered by the commissioner for costs related to administering the*
 13 *pharmacy benefits manager licensing act. All expenditures from the*
 14 *pharmacy benefits manager licensure fund shall be made in accordance*
 15 *with appropriation acts upon warrants of the director of accounts and*
 16 *reports issued pursuant to vouchers approved by the commissioner or by*
 17 *the commissioner's designee.*

18 (b) The commissioner shall remit all moneys received by or for the
 19 commissioner under the provisions of this act to the state treasurer ~~at least~~
 20 ~~monthly~~ *in accordance with the provisions of K.S.A. 75-4215, and*
 21 *amendments thereto.* Upon receipt of each such remittance, the state
 22 treasurer shall deposit the entire amount thereof in the state treasury and
 23 such amount shall be credited to the pharmacy benefits manager
 24 ~~registration~~ *licensure fund.*

25 Sec. 12. K.S.A. 2020 Supp. 40-3829 is hereby amended to read as
 26 follows: 40-3829. As used in ~~this act~~ *K.S.A. 2020 Supp. 40-3829 and 40-*
 27 *3830, and amendments thereto:*

28 (a) ~~"List" means the list of drugs for which maximum allowable costs~~
 29 ~~have been established;~~

30 (b) ~~"Maximum allowable cost" or "MAC" means the maximum~~
 31 ~~amount that a pharmacy benefits manager will reimburse a pharmacy for~~
 32 ~~the cost of a generic drug~~ *"Maximum allowable cost list" or "MAC list"*
 33 *means a listing of drugs or other methodology used by a pharmacy*
 34 *benefits manager, directly or indirectly, that sets the maximum allowable*
 35 *payment to a pharmacy or pharmacist for a generic drug, brand-name*
 36 *drug, biologic product or other prescription drug;*

37 (e)(b) "network pharmacy" means a pharmacy that contracts with a
 38 pharmacy benefits manager; ~~and~~

39 (d)(c) "pharmacy benefits manager" or "PBM" ~~shall have the same~~
 40 ~~meaning as~~ *means the same as defined in K.S.A. 2020 Supp. 40-3822(e),*
 41 *and amendments thereto;*

42 (d) *"pharmaceutical wholesaler" means a person or entity that sells*
 43 *and distributes prescription pharmaceutical products, including, without*

1 limitation, a full line of brand-name, generic and over-the-counter
 2 pharmaceuticals, and that offers regular and private delivery to a
 3 pharmacy;

4 (e) "pharmacist services" means products, goods or services
 5 provided as a part of the practice of pharmacy in Kansas;

6 (f) "pharmacy acquisition cost" means the amount that a
 7 pharmaceutical wholesaler charges for a pharmaceutical product as listed
 8 on the pharmacy's billing invoice;

9 (g) "pharmacy benefits manager affiliate" means a pharmacy or
 10 pharmacist that directly or indirectly, through one or more intermediaries,
 11 owns or controls, is owned or controlled by or is under common
 12 ownership or control with a pharmacy benefits manager; and

13 (h) "pharmacy benefits plan or program" means a plan or program
 14 that pays for, reimburses, covers the cost of or otherwise provides for
 15 pharmacist services to individuals who reside in or are employed in this
 16 state.

17 Sec. 13. K.S.A. 2020 Supp. 40-3830 is hereby amended to read as
 18 follows: 40-3830. A pharmacy benefits manager shall:

19 (a) Not pay or reimburse a pharmacy or pharmacist for the
 20 ingredient drug product component of pharmacist services in an amount
 21 less than the pharmacy's acquisition cost;

22 ~~(a) Shall~~(b) not place a drug on a MAC list unless there are at least
 23 two therapeutically equivalent multi-source generic drugs, or at least one
 24 generic drug available from at least one manufacturer, generally available
 25 for purchase by network pharmacies from national or regional wholesalers
 26 and the national drug code, NDC, for the drug is not obsolete;:

27 ~~(b) Shall~~(c) provide to each network pharmacy at the beginning of
 28 the term of a contract and upon request thereafter, the sources utilized to
 29 determine the maximum allowable cost price;:

30 ~~(c) Shall provide a process for each network pharmacy provider to~~
 31 ~~readily access the maximum allowable price specific to that provider.~~(d)
 32 upon request of a network pharmacy, disclose the sources utilized for
 33 setting MAC price rates on each MAC price list included under the
 34 contract and identify each MAC price list for each plan sponsor and
 35 pharmacy network rate schedule that applies to the network pharmacy. A
 36 PBM shall make the list of the maximum allowable costs available in its
 37 entirety in a readily accessible format to all contracted pharmacies;

38 ~~(d) Shall~~(e) review and update each applicable maximum allowable
 39 cost list every seven-business calendar days, noting any price changes
 40 from the previous list, provide a means by which network pharmacies may
 41 promptly review current prices in an electronic, print or telephonic format
 42 and apply the updates to reimbursements ~~no~~ not later than one business
 43 day at no cost to the pharmacy. Such information shall be available to the

1 *pharmacy or the pharmacy's representative in a comprehensive,*
 2 *downloadable format that includes all national drug codes, the unit MAC*
 3 *price allowed and an identifying code connecting fee schedules and*
 4 *patients to the respective MAC list used to price claims for*
 5 *reimbursement;*

6 *(f) ensure that the MAC prices are not set below sources utilized by*
 7 *the PBM;*

8 ~~(e) Shall~~(g) *ensure that dispensing fees are not included in the*
 9 *calculation of maximum allowable cost;*

10 ~~(f) Shall~~(h) *establish a process an administrative appeal procedure*
 11 *by which a network pharmacy may appeal reimbursement challenge MAC*
 12 *and reimbursements made under MAC for a specific drug or drugs subject*
 13 *to maximum allowable cost as follows MAC as:*

14 *(1) Not meeting the requirements of this section; or*

15 *(2) being below the pharmacy acquisition cost.*

16 *(i) The administrative appeal procedure shall include the following:*

17 *(1) A dedicated telephone number and email address or website for*
 18 *the purpose of submitting administrative appeals; and*

19 *(2) the ability to submit an administrative appeal directly to the*
 20 *pharmacy benefits manager regarding the pharmacy benefits plan or*
 21 *program or through a pharmacy service administrative organization.*

22 *(j) The network pharmacy must shall file an appeal no not later than*
 23 *10 15 business days after the fill date.*

24 *(k) The PBM shall:*

25 *(1) Only request the following information for determining a MAC*
 26 *administrative appeal:*

27 *(A) The prescription number;*

28 *(B) the patient's name;*

29 *(C) the national drug code used during the filing of the claim;*

30 *(D) the quantity of medication;*

31 *(E) the reimbursement amount;*

32 *(F) the pharmacy acquisition cost; and*

33 ~~The PBM shall~~ *provide a response to the appealing network*
 34 *pharmacy no later than 10 seven business days after receiving an appeal*
 35 *request containing information sufficient for the PBM to process the*
 36 *appeal as specified by the contract.*

37 ~~(A)~~ *If the appeal is upheld, the PBM:*

38 ~~(A)~~ *(i) Shall make the adjustment in the drug price effective no later*
 39 *than one business day after the appeal is resolved and allow the pharmacy*
 40 *to reverse and reprocess the claim for the appropriate reimbursement*
 41 *amount;*

42 ~~(B)~~ *(ii) shall make the adjustment applicable to all similarly situated*
 43 *network pharmacy providers, as determined by the plan sponsor or*

1 pharmacy benefits manager, as appropriate; and
2 ~~(C) (iii) permit the appealing pharmacy to reverse and rebill the~~
3 ~~appealed claim. waive timely filing requirements to allow all affected~~
4 ~~pharmacies to reverse and reprocess claims to comply with this~~
5 ~~paragraph; and~~
6 (iv) provide the NDC number that the increase or change is based on
7 to the pharmacy or pharmacist.
8 ~~(A) (B)~~ (B) If the appeal is denied, the PBM shall provide:
9 (i) The appealing pharmacy the *specific sources utilized for setting*
10 *the maximum allowable cost, including the national drug code number*
11 *from a national or regional wholesaler operating in Kansas where the drug*
12 *is generally available for purchase at a price equal to or less than the*
13 *maximum allowable cost, and when applicable, may be substituted*
14 *lawfully; and*
15 (ii) *the appealing pharmacy or pharmacist the national drug code*
16 *number and the name of the national or regional pharmaceutical*
17 *wholesalers operating in Kansas that have the drug currently in stock at a*
18 *price below the MAC list, or if the national drug code number provided by*
19 *the PBM is not available below the pharmacy acquisition cost from the*
20 *pharmaceutical wholesaler from whom the pharmacy or pharmacist*
21 *purchases the majority of prescription drugs for resale, then the PBM*
22 *shall adjust the MAC list at an amount equal to or above the challenging*
23 *pharmacy's pharmacy acquisition cost and permit the pharmacy to reverse*
24 *and rebill each claim affected by the inability to procure the drug at a cost*
25 *that is equal to or less than the previously challenged MAC.*
26 (l) *This section shall apply to the PBM for the state healthcare*
27 *benefits program.*
28 Sec. 14. K.S.A. 2020 Supp. 40-3821, 40-3822, 40-3823, 40-3824, 40-
29 3825, 40-3826, 40-3827, 40-3829 and 40-3830 are hereby repealed.
30 Sec. 15. This act shall take effect and be in force from and after its
31 publication in the statute book.