

SESSION OF 2022

**SUPPLEMENTAL NOTE ON HOUSE SUBSTITUTE FOR
SENATE BILL NO. 28**

As Recommended by House Committee on
Insurance and Pensions

Brief*

House Sub. for SB 28 would enact law and amend requirements requiring registration of pharmacy benefits managers (PBMs) with the Commissioner of Insurance (Commissioner) to instead require licensure under the Pharmacy Benefits Manager Licensure Act (PBM Licensure Act). The bill would establish new licensure, administrative, and enforcement requirements on PBMs; maintain regulation under Chapter 40, Article 38 of the *Kansas Statutes Annotated*; and add a new section to the PBM Licensure Act. The bill would also amend provisions pertaining to maximum allowable cost (MAC) pricing and the appeals process.

On and after January 1, 2023, a person could not perform, act, or do business in Kansas as a PBM unless the person has a valid license issued by the Commissioner pursuant to the PBM Licensure Act.

PBM Licensure Act (New Section 1, Sections 2-8)

Disciplinary Action (New Section 1)

The bill would allow a PBM's license to be revoked, suspended, or limited, or the licensee to be censured or placed under probationary conditions, or an application for a license or reinstatement to be denied upon a finding of the existence of any of the following grounds:

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- The applicant or licensee committed fraud or misrepresentation in applying for or securing an original, renewal, or reinstated license;
- The licensee has violated any lawful rule and regulation promulgated by the Commissioner or violated any lawful order or directive of the Commissioner previously entered by the Commissioner;
- The PBM has engaged in a fraudulent activity that constitutes a violation of state or federal law;
- The licensee has failed to furnish to the Commissioner, or the Commissioner's investigators or representatives, any information legally requested by the Commissioner;
- The PBM has been determined by the Commissioner to be in violation of or in noncompliance with state or federal law; or
- The PBM has failed to timely submit a renewal application and the information required under KSA 40-3824. In lieu of a denial of a renewal application, the Commissioner could permit the PBM to submit to the Commissioner a corrective action plan to correct or cure any deficiencies.

The bill would designate this section as part of and supplemental to the PBM Licensure Act.

PBM Licensure Act – KSA 40-3821 (Section 2)

Act designation. The bill would rename KSA 40-3821 through KSA 40-3828 from the Pharmacy Benefits Registration Act to the Pharmacy Benefits Manager Licensure Act, add section 1 of the bill to the PBM Licensure Act, and require, on and after January 1, 2023, any PBM performing,

acting, or doing business in Kansas to hold a valid license issued by the Commissioner pursuant to this act.

The bill would also amend law, previously applying to the registration of PBMs (licensed under provisions of this bill), to state a license issued in accordance with this act is nontransferrable.

PBM Licensure Act – KSA 40-3822 (Section 3)

Definitions. The bill would amend definitions associated with the regulation of PBMs to add definitions for the terms “act,” “department,” “ERISA,” “health benefit plan,” “health insurer,” and “maximum allowable cost or MAC.” “Department” would be defined to mean the Insurance Department (Department).

PBM Licensure Act – KSA 40-3823 (Section 4)

Application. The bill would update law requiring registration with the Commissioner to reflect licensure and would include new information to be included on the application form:

- Name, address, and telephone number of the PBM;
- Name, address, phone number, email address, and official position of the employee who will serve as the primary contact for the Department;
- A copy of the PBM’s corporate charter, articles of incorporation, or other charter document;
- A template contract, which the bill would require to include a dispute resolution process, that ultimately involves an independent fact finder between:
 - The PBM and the health insurer; or

- The PBM and the pharmacy or a pharmacy's contracting agent; and
- A network adequacy report on a form prescribed by the Department through rules and regulations.

The bill would also modify language in an existing form requirement pertaining to the name, address, official position, and professional qualifications of individuals responsible for the conduct of the affairs of the PBM to remove any other person who exercises control or influence over the affairs of the pharmacy benefits manager.

Application fee. The bill would increase the nonrefundable application fee from \$140 (registration) to \$2,500 (licensure).

Material change of application information; review of application by Commissioner; and confidential and privileged information. The bill would require the licensee to inform the Commissioner of any material change to the application form and related submitted information within 90 days of such change. Failure to timely inform the Commissioner of a material change could result in a penalty in the amount of \$500. The bill would also require, within 90 days of receipt of a completed application, the network adequacy report, and the applicable license fee, the Commissioner to review the application and issue a license if the applicant is deemed qualified. If the Commissioner determines the applicant is not qualified, the Commissioner would be required to notify the applicant and specify the reason for denial.

The bill would provide that all documents, materials, or other information and copies in the possession or control of the Department or any other governmental entity that are obtained by or disclosed to the Commissioner or any other person in the course of an application, examination, or investigation made pursuant to this act shall be confidential by law and privileged; shall not be subject to any open

records, freedom of information, sunshine, or other public record disclosure laws; and shall not be subject to subpoena or discovery. The bill would further specify that the confidentiality provisions would apply only to the disclosure of confidential documents outlined in the bill (e.g., information disclosed in the course of an application, examination, or investigation) by the Department or other governmental entity and these provisions should not be construed to create any privilege in favor of any other party. The provision pertaining to confidentiality and disclosure would expire on July 1, 2027, unless the Legislature reviews and reenacts this provision pursuant to KSA 45-229 (Kansas Open Records Act, legislative review of exceptions to disclosure) prior to July 1, 2027.

PBM Licensure Act – KSA 40-3824 (Section 5)

License expiration, renewal. The bill would maintain the current (registration) expiration date of March 31 each year, providing a PBM license would expire on March 31 and permitting annual renewal at the request of the licensee. The bill would increase the renewal fee from \$140 (registration) to \$2,500 (licensure), increase the penalty fee for failure to pay the renewal fee by the prescribed date from \$140 (registration) to \$2,500 (licensure), and require any person performing pharmacy benefits management service to obtain a license as a PBM no later than January 1, 2023, in order to continue to do business in Kansas.

PBM Licensure Act – KSA 40-3825 (Section 6)

Rules and regulations. The bill would require the Commissioner to adopt, amend, and revoke all necessary rules and regulations no later than July 1, 2023.

PBM Licensure Act – KSA 40-3826 (Section 7)

Violations of the PBM Licensure Act, statement of violations, appeals hearing, and penalties. The bill would

authorize the Commissioner, if the Commissioner has reason to believe that a PBM has been engaged in this state or is engaging in this state in activity that violates the PBM Licensure Act, to issue and serve on a PBM a statement detailing the charges of violation and conduct a hearing in accordance with the provisions of the Kansas Administrative Procedure Act.

If, after a hearing, the Commissioner determines that the PBM subject to the charges has violated the PBM Licensure Act, the Commissioner would be permitted to, in the exercise of discretion, order any one or more of the following:

- Payment of a monetary penalty of not more than \$1,000 for each and every act or violation. The bill would specify the total of the monetary penalties for such violations cannot exceed \$10,000;
 - If the PBM knew or reasonably should have known that such manager was in violation of this act, payment of a monetary penalty of \$5,000 for each and every act or violation. The total of the monetary penalties for these violations could not exceed \$50,000 in any six-month period;
- If the PBM knew or reasonably should have known such person was in violation of this act, the suspension or revocation of the PBM's license; or
- The assessment of any costs incurred as a result of conducting the administrative hearing authorized by provisions of this bill against the PBM. The bill would define "costs," as used in this section, to include witness fees, mileage allowances, any costs associated with reproduction of documents that become part of the hearing record, and expenses of making a record of the hearing.

The bill would further provide that if the deadline for filing a petition for review has expired and no petition has been

filed, the Commissioner may reopen and modify or set aside any portion or the entirety of any administrative order issued under provisions of the bill. The bill would also specify that the reopening of any such order may occur if, in the Commissioner's opinion, the conditions of fact or law have changed to warrant such action or if such an action is warranted in the public interest.

Failure to obtain a license, fines. The bill would modify the fine associated with failure to register with the Commissioner (\$500) to a fine associated with failure to be licensed and set this fine at \$5,000 for the period of time the PBM is found to be in violation.

PBM Licensure Act – KSA 40-3827 (Section 8)

Licensure fund. The bill would rename the PBM Registration Fund as the Pharmacy Benefits Manager Licensure Fund (Fund) and establish the Fund in the State Treasury, require administration by the Commissioner for costs associated with licensing, and provide for expenditures from this Fund. As in current law, all moneys deposited in the Fund would be credited to the Fund.

PBM – Maximum Allowable Cost (Sections 9-10)

MAC Pricing and Definitions – KSA 40-3829 (Section 9)

Definitions. The bill would amend law relating to MAC pricing and reimbursements to pharmacies. The bill would update the definition of “maximum allowable cost or MAC” to assign the definition established in the PBM Licensure Act. The bill would also create these definitions:

- “Pharmacy benefits plan or pharmacy benefits program” would mean a plan or program that pays for, reimburses, covers the cost of, or otherwise

provides for pharmacist services to individuals who reside in or are employed in this state; and

- “Wholesaler” would mean a person or entity that sells and distributes prescription pharmaceutical products, including, but not limited to, a full line of brand name, generic, and over-the-counter pharmaceuticals and that offers regular and private delivery to a pharmacy.

MAC List Requirements; Updates; Appeals Process – KSA 40-3830 (Section 10)

The bill would amend law pertaining to the MAC list and reimbursement appeals process for network pharmacies to require the establishment of a reasonable administrative appeal procedure to allow a pharmacy or pharmacy’s contracting agent to challenge MAC for a specific drug as:

- Not meeting requirements of the bill’s provisions pertaining to MAC list; and
- Being below the cost at which the pharmacy may obtain the drug.

The bill would require the following to be included in any administrative appeals procedure:

- A dedicated telephone number and email address or website for the purpose of submitting administrative appeals; and
- The ability to submit an administrative directly to the PBM regarding the pharmacy benefits plan or program or through a pharmacy service administrative organization.

The bill would clarify a continuing provision pertaining to filing of an administrative appeal by a network pharmacy not

later than 10 business days after the fill date to include the network pharmacy's contracting agent.

The bill would also require the PBM request only the following information to determine a MAC administrative appeal:

- Prescription number;
- Provider's name;
- National Drug Code (NDC) used during the filing of the claim;
- Date of the fill;
- Reimbursement amount; and
- Such other information related to the appealed claim as required by contract.

The bill would also update provisions pertaining to the denial of the appeal to require the PBM to provide, in addition to the NDC number from a national or regional wholesaler operating in Kansas meeting certain criteria, the reason for the denial. Provisions in this section (MAC list and appeals process) would apply to PBMs, which include the PBM for the State Health Care Benefits Program (the State Employee Health Plan).

Technical Amendments

The bill would make technical amendments.

Background

HB 2733 was introduced by the House Committee on Appropriations at the request of Representative Steven Johnson. The contents of HB 2733, as amended by House

Committee, were incorporated in a substitute bill, House Sub. for SB 28. [Note: The original contents of SB 28, pertaining to reinsurance, were enacted in 2021 House Sub. for SB 78.]

House Committee on Insurance and Pensions

In the House Committee hearing on March 14, 2022, representatives of the Kansas Pharmacists Association (KPhA) and the Pharmaceutical Care Management Association (PCMA) provided **proponent** testimony, addressing the collaborative effort to reach a compromise that meets the needs of pharmacists and PBMs in the regulatory process established for PBMs in Kansas. The KPhA representative noted the bill would establish a process of licensure of PBMs by replacing the current registration process with a more robust approach to identifying those entities providing PBM services and outlining the licensure application and approval processes. The PCMA representative noted the significant change in Kansas law for both the regulation and enforcement of PBM activities and indicated it is hoped the bill would address concerns previously expressed by pharmacists.

No other testimony was provided.

Following the hearing, the Committee, without objection, took action on the bill. The Committee adopted technical amendments submitted by the Revisor to update the bill title, replace or omit references to pharmacist services, and make clarifying changes. The Committee removed the contents of SB 28 (codifying the National Association of Insurance Commissioners credit for reinsurance statute and amendments to the Kansas credit for reinsurance statute) and inserted provisions of HB 2733, as amended.

Fiscal Information

According to the fiscal note prepared by the Division of the Budget on HB 2733, as introduced, the Department indicates the bill could increase the number of complaints regarding administrative appeals of pricing. As a result, the Department would need to add 1.00 FTE policy examiner position to the Rate and Form Compliance Division. The cost to the Department from the Pharmacy Benefits Manager Licensure Fund would be \$72,000 (\$67,000 for salary and benefits, \$5,000 for computer and other office equipment). The Department currently has 54 Pharmacy Benefit Managers registered; if the renewal fee increases from \$140 to \$2,500, the revenue collected is estimated to be \$135,000 to be deposited into the Pharmacy Benefits Manager Licensure Fund. Any fiscal effect associated with the bill is not reflected in *The FY 2023 Governor's Budget Report*.

Insurance; PBM Licensure Act; pharmacy benefits manager; Commissioner of Insurance; confidential and privileged information; fines and penalties; Pharmacy Benefits Manager Licensure Fund; maximum allowable cost and appeals