

South Carolina Pharmacy Benefit Manager Licensure & Regulation Act

S. 359

Section 1. What this bill does: Takes Effect on January 01, 2021.

- 1.) **§38-71-2210 (A) (1)** - Requires Pharmacy Benefit Managers (PBMs) who provide prescription drug claims processing to obtain a license to do business in South Carolina with the South Carolina Department of Insurance for the purpose of protecting the public health, safety, and welfare.
- 2.) **§38-71-2220 (A)** – Prohibits a PBM from preventing a network pharmacist/pharmacy from disclosing prescription drug coverage for health benefit plans or prohibit, restrict any pharmacist or pharmacy from providing healthcare information to a covered beneficiary deemed appropriate within their scope of practice. (Anti-Gag Clauses);
- 3.) **§38-71-2220 (B)** – Prohibits a PBM from preventing a pharmacist/pharmacy from discussing the total cost for prescription services with a covered patient including, a cheaper alternative. (e.g., cash price). Caution: The law does prohibit the pharmacy from providing PBM “proprietary” information. (e.g., Pharmacy Reimbursement).
- 4.) **§38-71-2220 (C)** – Prohibits a PBM from preventing a pharmacist/pharmacy from disclosing information with the Director of the SC Insurance Department investigating or examining a complaint against a PBM. (SCDOI Complaint Form) (Anti-Gag Clause).
- 5.) **§38-71-2230 (A); sub. (1-9)** - **Prohibits** PBMs from:
 1. Generating advertisements, promotions, solicitations, representations, or proposals that are *untrue, deceptive, or misleading*;
 - a. PBM communications have often led consumers to believe that they could only use the PBM’s mail order pharmacy or a certain chain pharmacy. They use this tactic to get around mandatory mail prohibition laws;
 2. Charge a pharmacist/pharmacy a “fee” related to the adjudication of a claim other than a “reasonable fee” for the receipt and processing of the pharmacy claim;
 3. Engage in anticompetitive behavior for the purpose of driving out competition or financially injuring competitors in a pattern or practice of reimbursing independents in SC consistently less than what the PBM reimburses its own affiliates (e.g., Caremark/CVS or wholly owned mail order facility);
 4. Require a pharmacist/pharmacy to collect from an insured patient at POS, an amount that exceeds the lesser of:
 - a. The contracted copayment;
 - b. The amount the individual would pay for a drug if paying cash
 - c. The contracted amount for the drug

5. PBM's mandating the use of their out-of-state mail order pharmacies unless the insured's health plan's design requires it. (Health plan's design or PBM's?);
6. Charge a "fee" to adjudicate a claim without providing the cause for each claim adjustment or fee. (Are DIR fees adjudication fees?);
7. Penalizing or retaliating against a pharmacist/pharmacy for exercising your rights under this chapter.
8. Prohibit a pharmacist/pharmacy from offering and providing direct and limited delivery services including incidental mailing services to an insured as an ancillary service of the pharmacy;

6.) §38-71-2230 (B) sub. (1-4) Prohibits Retroactive Claim Denial/Reduction:

(B) Prohibits the retroactive denial or reduction of an adjudicated pharmacy service claim unless:

1. Original claim was fraudulent;
2. Original claim payment was incorrectly paid more than once;
3. Pharmacy services were not properly rendered by the pharmacists/pharmacy;
4. Adjustment was agreed upon by the pharmacy prior to the denial/reduction.

(C) This section **DOES NOT** limit overpayment recoveries as set forth in **§38-59-250**. - Prohibits a chargeback or recoupment for a clerical or record error in a required document by a pharmacy including a typographical or computer error unless it resulted in an overpayment to the pharmacy.

(D) Requires PBMs to make any payments due to a pharmacist/pharmacy who may have been terminated from the PBMs network;

(E) Allows a PBM to maintain multiple networks for different pharmacy services (e.g., Specialty Drugs, Mail Order, Chain v. Independents, Compounding) and to require different "accreditation" or "certification" for each network. All accreditations and/or certification **MUST** be applied without regard to a pharmacist's/pharmacy's status as an independent pharmacy.

Each individual pharmacy location as identified by their NCPDP # MAY have access to one or more networks as long as that location meets the "accreditation" and/or "certification" for each network.

(F) Any pharmacist/pharmacy has the right to "refuse" to fill a prescription in accordance with §40-43-86 (E) (6) of the Pharmacy Practice Act.

7.) § 38-71-2240 (A-E) - MAC Pricing Appeals and Protections:

(A) Requires that BEFORE a PBM places a particular drug on their MAC list they **MUST**:

- 1.) Be an “A” or “B” rated generic as listed in the most recent version of the FDA’s Orange Book or has an “NR” or “NA” rating or similar rating by a nationally recognized reference.
- 2.) Be available for purchase in SC from a national or regional wholesaler “operating” in the state.
- 3.) MUST Not be Obsolete.

(B) A PBM Shall:

- 1.) Provide a process for a network pharmacy to access the MAC-specific to that provider.
- 2.) Update the MAC cost list at least once every seven (7) calendar days.
- 3.) Provide a process for each pharmacy subject to MAC, access to any MAC cost updates.
- 4.) Ensure that “*dispensing fees*” are Not Included in the calculation of MAC.
- 5.) Establish a “*reasonable administrative appeal procedure*” in which a contracted pharmacy may appeal a reimbursement for a drug if the reimbursement *is less than the “net” amount that the network provider paid to suppliers of the drug*. This administration appeal process must include:
 - a) A “dedicated” telephone number and email address or website for the purpose of submitting appeals.
 - b) Ability to submit an appeal DIRECTLY to the PBM or, through the pharmacy’s PSAO who has a contract with the PBM.

(C) MAC Price Appeal Timeline – The appealing pharmacy has *no less* than ten (10) calendar days to file a MAC price appeal from the applicable fill date

(D) PBMs have ten (10) calendar days after receipt of notice of appeal either to:

1. If the appeal was upheld:
 - a) Notify the pharmacy of the decision;
 - b) Make the change(s) to the MAC Pricing list effective the date the appeal is resolved;
 - c) Permit the appealing pharmacy to reverse and rebill;
 - d) Make changes effective for EACH similarly situated pharmacy as defined by the payor subject to MAC effective as of the date the appeal is resolved.
2. If the appeal is denied:

If the appeal is denied, the PBM must provide the appealing pharmacy a “reason” for the denial and the NDC# and the name of the national or regional wholesaler operating in SC.

(E) Applicability to Certain Health Plans

1. The provisions of the MAC Pricing Appeals section of this Act DO NOT Apply SC Medicaid/MMCO plans.
2. Applies to PEBA plans only if they are contracted with a PBM (ESI).

Section 2. §38-71-2260 (A-B)

- A. Nothing in this law shall be construed as conflicting with federal law.
- B. This article does not apply to Medicaid/Medicare programs.

§38-2-10 (A) sub, (1-2) and (B) – Provides for PBM penalties and fines for violating provisions of this law including licensure suspension or revocation and including any civil or criminal recovery actions.