



March 17, 2017

The Honorable Steve Bullock
Office of the Governor
PO Box 200801
Helena MT 59620-1330

Re: Veto Request for HB 276: Revise Reimbursement for Pharmacies

Dear Governor Bullock:

On behalf of the Pharmaceutical Care Management Association (PCMA) we must respectfully request your veto on HB 276. PCMA is the national trade association for America's Pharmacy Benefit Managers (PBMs), which administer prescription drug plans for more than 266 million Americans with health coverage provided by plan sponsors such as large employers, health insurers, labor unions, and federal and state-sponsored health programs.

The Montana Legislature recently passed HB 276, a bill that does two significant things: (1) compels breaches of private contracts related to "reference pricing" for brand name drugs, that are entered into by health care payers, PBMs, and their vendors, and (2) authorizes pharmacies to violate contracts with PBMs and health care payers by refusing to dispense drugs to patients if they are not making a profit by dispensing the drug.

PBMs enter into contracts with pharmacies so that PBM clients (health care payers such as health plans, insurance carriers, large employers, and state governments) can establish adequate networks of pharmacies to serve health plan/insurance carrier enrollees. Health plans rely on these PBM-pharmacy contracts because these contracts establish reliable networks of available pharmacies that patients can turn to when they need to pick up prescriptions. In return for the obligation to dispense pharmaceuticals to patients, pharmacies obtain access to more business (patients), who represent profit opportunity for pharmacies, both through pharmaceutical reimbursements by PBMs, and by patient foot traffic and purchase of other, non-prescription products. These PBM-pharmacy contracts have many rights and obligations, and are entered into in full disclosure by both parties.

Additionally, HB 276 addresses "reference pricing," which is essentially a list of average prices for brand name drugs that are compiled and licensed for use by health care payers and PBMs in the form of a subscription. The subscription is offered by vendors or national reference sources that gather this information in the pharmaceutical market. Contracts with national reference sources (e.g., Medispan) are private subscription contracts and are confidential to the vendor. Pharmacies are free to subscribe to the identical national reference sources if they so choose, but by contract, PBMs are prohibited from sharing this information because they are private subscriptions. PBMs also have no control over the data and cannot update these numbers because PBMs do not actually collect the data—they only subscribe to the reports of the data.



PCMA is concerned about the legal effects that HB 276 has on existing contracts because the bill allows pharmacies to breach contractual obligations with PBMs and payers, and compels PBMs and payers to breach contracts signed with the vendors who create reference pricing lists. In short, **HB 276 violates the Contracts Clause of the United States Constitution because the terms of the proposed law substantially impair existing private contracts but provide no significant public purpose of law.**

The Contracts Clause states “no state shall...pass any...[l]aw impairing the Obligation of Contracts.” HB 276 fails on the three-part test the U.S. Supreme Court has outlined for evaluating a statute’s constitutionality under the Contracts Clause.¹

First, given that the requirements in the proposed law are effectively retroactive, the law would substantially impair *pre-existing* contractual relationships.

Second, Montana does not have a significant and legitimate *public purpose* to re-write hundreds if not thousands of *existing private contracts*. The legislature has outlined no broad social or economic problem to remedy. In fact, the bill’s title is clear: to revise reimbursement for pharmacies. It is clear that the purpose is to assure pharmacies higher reimbursements on brand drugs, regardless of terms in the contracts they have already agreed to. The state has picked winners and losers in the marketplace—choosing pharmacies to be given a special window to “look into” the reference pricing of a particular health plan. The state has provided no explanation as to why pharmacies should alone be so privileged, with state putting its thumb on scale on their behalf.

Further evidence of lack of a problem to be remedied by this bill is that the provision in Section 3 that allows pharmacies to *refuse to fill* a prescription for a patient if the reference pricing amount is less than the acquisition cost. This provision clearly benefits pharmacies, but will create harm for Montana patients, who may find themselves unable to fill their prescriptions at local pharmacies, in contravention to the assurances that their health plans have provided them, in reliance on the existing PBM-pharmacy contracts.

Third, the bill’s terms are a clear *overreach* because they substantially alter the parties’ reasonable contractual relationship in the following ways: (1) HB 276 broadly defines “reference pricing” to include “products, supplies, and services” in existing contracts, meaning all the terms of the PBM/pharmacy contracts are affected—including administrative fees and possibly dispensing fees; (2) HB 276 requires revelation to pharmacies of the reference pricing thus nullifying the confidentiality and limitations on the use and disclosure of licensed data agreements negotiated by parties. HB 276 essentially gives non-parties to the client/PBM contracts competitively sensitive information.

PCMA also has concerns from a policy perspective. Statutory language that allows pharmacies to refuse to fill a prescription when a patient is relying on the ability to pick up a prescription at a particular pharmacy creates a significant consumer access problem. In a rural state like Montana, the closest pharmacy could be a significant distance, causing major inconvenience to the patient and a possible delay in beginning an important drug therapy.

¹ See, *Energy Reserves v. Kansas Power & Light*, Sup.Ct. 1983.



Furthermore, Section 2 of HB 276 (proposed 33-22-172(4)) stops PBMs from prohibiting pharmacies from “discussing reimbursement criteria with a patient.” The term “reimbursement criteria” is ambiguous and unclear. PBMs actually *encourage* pharmacies to discuss more affordable options with patients, but PBMs do *discourage* pharmacies from talking about reimbursement rates with patients. Patients should not be burdened with or feel like they are put in the middle of contract issues or reimbursement issues between PBMs and pharmacies. Not to mention, reimbursement rates between PBMs and pharmacies are competitively sensitive information, which if shared with other pharmacies, could encourage tacit collusion among pharmacies.

HB 276 allows pharmacies to enter into contracts, then pick and choose which contract terms they feel like complying with later. This bill sets a dangerous precedent by putting gaping holes in PBM-pharmacy contracts. It is foreseeable that *every* health care provider in Montana would want an excuse from performing the aspects of a contract they do not like, yet continue to benefit from the aspects of a contract they do like.

Finally, HB 276 requires PBMs to update reference pricing lists every 10 days. Though PBMs have access to pricing lists that they have subscribed to, they do not have the ability to change the lists. This is vendor-supplied information and PBMs do not have control of these lists.

It is for these reasons that PCMA must respectfully request your veto of HB 276. Please do not hesitate to contact me at 202-756-5715 if you would like to discuss our request further. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Barbara A. Levy", written in a cursive style.

Barbara A. Levy
General Counsel

cc: The Honorable Tim Fox, Attorney General
The Honorable Matt Rosendale, Commissioner of Insurance