S.B. 539

EMERGENCY REQUEST OF SENATE MINORITY LEADER

SENATE BILL NO. 539—SENATORS ROBERSON, GANSERT, KIECKHEFER, HARRIS, HARDY; GOICOECHEA, GUSTAVSON, HAMMOND AND SETTELMEYER

MAY 16, 2017

Referred to Committee on Health and Human Services

SUMMARY—Revises provisions relating to prescription drugs. (BDR 40-1217)

FISCAL NOTE: Effect on Local Government: Increases or Newly Provides for Term of Imprisonment in County or City Jail or Detention Facility.

Effect on the State: Yes.

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EXPLANATION – Matter in bolded italics is new; matter between brackets [omitted material] is material to be omitted.

AN ACT relating to prescription drugs; requiring the Department of Health and Human Services to compile a list of certain prescription drugs that are used to treat diabetes; requiring the manufacturer of a drug included on the list to provide certain information to the Department; requiring the Department to compile a report based on such information; providing that certain information does not constitute a trade secret; requiring a pharmacy benefit manager to obtain a license from the Commissioner of Insurance; imposing certain requirements on a pharmacy benefit manager; providing a penalty; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 Existing law requires the organization with the largest membership in this State which represents the interests of retail merchants to prepare a list of not less than 100 prescription drugs most commonly prescribed to residents of this State. (NRS 439.905) Existing law also requires the Department of Health and Human Services to place on the Internet website maintained by the Department certain information reported by pharmacies concerning the prices charged by the pharmacies for drugs that appear on that list. (NRS 439.915) Section 4 of this bill requires the
Section 4 requires the manufacturer of a drug included on that list to submit to the Department a report concerning the reasons for the cost increase. Section 4 requires the Department to analyze the information submitted by such manufacturers and compile a report concerning the reasons for and effect of the increases in the price of prescription drugs used to treat diabetes. Section 6 of this bill requires the Department to place the report on the Internet website maintained by the Department. Section 8 of this bill authorizes the Department to impose an administrative penalty against any manufacturer that fails to report the information required by section 4. Sections 5 and 7 of this bill make conforming changes.

Existing law requires certain persons engaged in business relating to insurance to be licensed by the Commissioner of Insurance. (NRS 683A.090, 683A.201)

Section 18 of this bill additionally requires a pharmacy benefit manager to be licensed by the Commissioner. Section 18 also authorizes the Commissioner to adopt regulations governing the management of prescription drug coverage by a pharmacy benefit manager. Section 19 of this bill provides that a pharmacy benefit manager has a fiduciary duty to an insurer with which the pharmacy benefit manager has entered into a contract to manage prescription drug coverage. Section 19 also requires a pharmacy benefit manager to provide to such an insurer a certain percentage of the rebates issued by a manufacturer to the pharmacy benefit manager for the sale to an insured person of a prescription drug used to treat diabetes.

Section 20 of this bill prohibits a pharmacy benefit manager from engaging in certain trade practices.

Section 21 of this bill requires a pharmacy benefit manager to post certain information on the Internet website maintained by the pharmacy benefit manager and report certain information to the Division of Insurance of the Department of Business and Industry. Section 9 of this bill provides that any such information required to be posted or reported is not a trade secret.

Federal law prohibits states from regulating an employee benefit plan established under the Employee Retirement Income Security Act of 1974. (29 U.S.C. § 1144) Section 17 of this bill provides that the requirements that this bill imposes upon pharmacy benefit managers and insurers do not apply to the management or provision of prescription drug benefits included in such a plan.

Sections 23-25 of this bill impose certain requirements relating to the collection of child support from a pharmacy benefit manager who is a natural person. Section 26 of this bill authorizes the Commissioner to impose disciplinary action against a pharmacy benefit manager that violates such requirements. Additionally, a violation of those requirements is punishable as a misdemeanor. (NRS 679A.180)

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 439 of NRS is hereby amended by adding thereto the provisions set forth as sections 2, 3 and 4 of this act.

Sec. 2. “Manufacturer” has the meaning ascribed to it in NRS 639.009.

Sec. 3. “Pharmacy” means every store or shop licensed by the State Board of Pharmacy where drugs, controlled substances, poisons, medicines or chemicals are stored or possessed, or
dispensed or sold at retail, or displayed for sale at retail, or where prescriptions are compounded or dispensed. The term does not include an institutional pharmacy as defined in NRS 639.0085.

Sec. 4. 1. On or before February 1 of each year, the Department shall compile a list of all prescription drugs used to treat diabetes that meet the requirements of subsection 2. When determining which drugs to include on the list, the Department shall consider any rebates, discounts or other reductions in the price of the drug.

2. Each prescription drug included on the list compiled pursuant to subsection 1 must have been subject to an increase in the wholesale acquisition cost of the drug of a percentage equal to or greater than:

(a) The percentage increase in the Consumer Price Index, Medical Care Component during the immediately preceding calendar year; or
(b) Twice the percentage increase in the Consumer Price Index, Medical Care Component during the immediately preceding 2 calendar years.

3. On or before July 1 of a year in which a drug is included on the list compiled pursuant to subsection 1, the manufacturer of the drug shall submit to the Department a report describing the reasons for the increase in the wholesale acquisition cost of the drug described in subsection 2. The report must include, without limitation:

(a) A list of each factor that has contributed to the increase;
(b) The percentage of the total increase that is attributable to each factor;
(c) An explanation of the role of each factor in the increase; and
(d) Any other information prescribed by regulation by the Department.

4. On or before September 1 of each year, the Department shall analyze the information submitted pursuant to subsection 3 and compile a report of the reasons for increases in the price of prescription drugs used to treat diabetes and the effect of those price increases on the cost to the residents of this State.

5. As used in this section, “wholesale acquisition cost” means the manufacturer’s list price for a prescription drug to wholesalers or direct purchasers in the United States, not including any discounts, rebates or reductions in price, as reported in wholesale price guides or other publications of drug pricing data.

Sec. 5. NRS 439.900 is hereby amended to read as follows:

439.900 As used in NRS 439.900 to 439.940, inclusive, and sections 2, 3 and 4 of this act, unless the context otherwise requires,
“pharmacy” means every store or shop licensed by the State Board of Pharmacy where drugs, controlled substances, poisons, medicines or chemicals are stored or possessed, or dispensed or sold at retail, or displayed for sale at retail, or where prescriptions are compounded or dispensed. The term does not include an institutional pharmacy as defined in NRS 639.0085. the words and terms defined in sections 2 and 3 of this act have the meanings ascribed to them in those sections.

Sec. 6. NRS 439.915 is hereby amended to read as follows:

439.915 1. Except as otherwise provided in subsection 2, the Department shall:
(a) Place or cause to be placed on the Internet website maintained by the Department the information provided by each pharmacy pursuant to NRS 439.910 and the report compiled by the Department pursuant to section 4 of this act;
(b) Ensure that the information provided by each pharmacy pursuant to NRS 439.910 and placed on the Internet website maintained by the Department is organized so that each individual pharmacy has its own separate entry on that website; and
(c) Ensure that the usual and customary price that each pharmacy charges for each prescription drug that is on the list prepared pursuant to NRS 439.905 and that is stocked by the pharmacy:
(1) Is presented on the Internet website maintained by the Department in a manner which complies with the requirements of NRS 439.920; and
(2) Is updated not less frequently than once each calendar quarter.
Nothing in this subsection prohibits the Department from determining the usual and customary price that a pharmacy charges for a prescription drug by extracting or otherwise obtaining such information from claims reported by pharmacies to the Medicaid program.
2. If a pharmacy is part of a larger company or corporation or a chain of pharmacies or retail stores, the Department may present the pricing information pertaining to such a pharmacy in such a manner that the pricing information is combined with the pricing information relative to other pharmacies that are part of the same company, corporation or chain, to the extent that the pricing information does not differ among those pharmacies.
3. The Department may establish additional or alternative procedures by which a consumer who is unable to access the Internet or is otherwise unable to receive the information described in subsection 1 in the manner in which it is presented by the Department may obtain that information:
(a) In the form of paper records;
(b) Through the use of a telephonic system; or
(c) Using other methods or technologies designed specifically to assist consumers who are hearing impaired or visually impaired.

4. As used in this section, “usual and customary price” means the usual and customary charges that a provider charges to the general public for a drug, as described in 42 C.F.R. § 447.331.

Sec. 7. NRS 439.930 is hereby amended to read as follows:

439.930 The Department shall adopt such regulations as it determines to be necessary or advisable to carry out the provisions of NRS 439.900 to 439.940, inclusive, and sections 2, 3 and 4 of this act. Such regulations must provide for, without limitation:

1. Notice to consumers stating that:
   (a) Although the Department will strive to ensure that consumers receive accurate information regarding pharmacies, including, without limitation, the prices charged by those pharmacies for the prescription drugs and generic equivalents that are on the list prepared pursuant to NRS 439.905, the Department is unable to guarantee the accuracy of such information;
   (b) If a consumer follows an Internet link from the Internet website maintained by the Department to an Internet website maintained by a pharmacy, the Department is unable to guarantee the accuracy of any information made available on the Internet website maintained by the pharmacy; and
   (c) The Department advises consumers to contact a pharmacy directly to verify the accuracy of any information regarding the pharmacy which is made available to consumers pursuant to NRS 439.900 to 439.940, inclusive, and sections 2, 3 and 4 of this act;

2. Procedures adopted to direct consumers who have questions regarding the program described in NRS 439.900 to 439.940, inclusive, and sections 2, 3 and 4 of this act to contact the Office for Consumer Health Assistance of the Department;

3. Provisions in accordance with which the Department will allow an Internet link to the information provided by each pharmacy pursuant to NRS 439.910 and made available on the Department’s Internet website to be placed on other Internet websites managed or maintained by other persons and entities, including, without limitation, Internet websites managed or maintained by:
   (a) Other governmental entities, including, without limitation, the State Board of Pharmacy and the Office of the Governor; and
   (b) Nonprofit organizations and advocacy groups;

4. Procedures pursuant to which consumers and pharmacies may report to the Department that information made available to
consumers pursuant to NRS 439.900 to 439.940, inclusive, and
sections 2, 3 and 4 of this act is inaccurate;
5. The form and manner in which pharmacies are to provide to
the Department the information described in NRS 439.910; and
6. Standards and criteria pursuant to which the Department
may remove from its Internet website information regarding a
pharmacy or an Internet link to the Internet website maintained by a
pharmacy, or both, if the Department determines that the pharmacy
has:
   (a) Ceased to be licensed and in good standing pursuant to
chapter 639 of NRS; or
   (b) Engaged in a pattern of providing to consumers information
that is false or would be misleading to reasonably informed persons.
Sec. 8. NRS 439.940 is hereby amended to read as follows:
439.940 If a pharmacy that is licensed under the provisions of
chapter 639 of NRS and is located within the State of Nevada or a
manufacturer that does business in this State fails to provide to the
Department the information required to be provided pursuant to
NRS 439.910 or fails to provide such information on a timely basis,
and the failure was not caused by excusable neglect, technical
problems or other extenuating circumstances, the Department may
impose against the pharmacy or manufacturer an administrative
penalty of not more than $500 for each day of such failure.
Sec. 9. NRS 600A.030 is hereby amended to read as follows:
600A.030 As used in this chapter, unless the context otherwise
requires:
1. “Improper means” includes, without limitation:
   (a) Theft;
   (b) Bribery;
   (c) Misrepresentation;
   (d) Willful breach or willful inducement of a breach of a duty to
maintain secrecy;
   (e) Willful breach or willful inducement of a breach of a duty
imposed by common law, statute, contract, license, protective order
or other court or administrative order; and
   (f) Espionage through electronic or other means.
2. “Misappropriation” means:
   (a) Acquisition of the trade secret of another by a person by
improper means;
   (b) Acquisition of a trade secret of another by a person who
knows or has reason to know that the trade secret was acquired by
improper means; or
   (c) Disclosure or use of a trade secret of another without express
or implied consent by a person who:
(1) Used improper means to acquire knowledge of the trade secret;
(2) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
   (I) Derived from or through a person who had used improper means to acquire it;
   (II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
   (III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
(3) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

3. “Owner” means the person who holds legal or equitable title to a trade secret.

4. “Person” means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

5. “Trade secret” means:
   (a) Information, including, without limitation, a formula, pattern, compilation, program, device, method, technique, product, system, process, design, prototype, procedure, computer programming instruction or code that:
      (I) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other persons who can obtain commercial or economic value from its disclosure or use; and
      (II) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
   (b) Does not include any information that a manufacturer is required to report pursuant to section 4 of this act or information that a pharmacy benefit manager is required to post or report pursuant to section 21 of this act, to the extent that such information is required to be disclosed by those sections.

Sec. 10. Chapter 683A of NRS is hereby amended by adding thereto the provisions set forth as sections 11 to 21, inclusive, of this act.

Sec. 11. “Pharmacy benefit manager” means an entity that contracts with or is employed by a third party, as defined in section 16 of this act, and manages the pharmacy benefits plan, as defined in section 15 of this act, provided by the third party.

Sec. 12. As used in sections 12 to 21, inclusive, of this act, unless the context otherwise requires, the words and terms defined
in sections 13 to 16, inclusive, of this act have the meanings
ascribed to them in those sections.

Sec. 13. “Covered person” means a person who is covered by
a pharmacy benefits plan.

Sec. 14. “Pharmacy” has the meaning ascribed to it in
NRS 639.012.

Sec. 15. “Pharmacy benefits plan” means coverage of
prescription drugs provided by a third party.

Sec. 16. “Third party” means:

1. An insurer, as that term is defined in NRS 679B.540;
2. A health benefit plan, as that term is defined in NRS
689A.540, for employees which provides a pharmacy benefits
plan;
3. A participating public agency, as that term is defined in
NRS 287.04052, and any other local governmental agency of the
State of Nevada which provides a system of health insurance for
the benefit of its officers and employees, and the dependents of
officers and employees, pursuant to chapter 287 of NRS; or
4. Any other insurer or organization that provides health
coverage or benefits or coverage of prescription drugs as part of
workers’ compensation insurance in accordance with state or
federal law.

The term does not include an insurer that provides coverage
under a policy of casualty or property insurance.

Sec. 17. The requirements of sections 12 to 21, inclusive, of
this act and any regulations adopted by the Commissioner
pursuant thereto do not apply to the coverage of prescription drugs
under a plan that is subject to the Employee Retirement Income
Security Act of 1974 or any information relating to such coverage.

Sec. 18. 1. A pharmacy benefit manager shall not operate
in this State unless the pharmacy benefit manager has obtained a
license from the Commissioner.

2. A person who wishes to obtain a license as a pharmacy
benefit manager must:

(a) Submit an application to the Commissioner in the form
prescribed by the Commissioner; and
(b) Pay the licensure fee prescribed by regulation by the
Commissioner.

3. The Commissioner may adopt such regulations as he or
she deems necessary and appropriate to establish the
qualifications to receive a license as a pharmacy benefit manager
and ensure compliance with the requirements of sections 12 to 21,
inclusive, of this act.

Sec. 19. 1. A pharmacy benefit manager has a fiduciary
duty to a third party with which the pharmacy benefit manager
has entered into a contract to manage the pharmacy benefits plan of the third party and shall notify the third party in writing of any activity, policy or practice of the pharmacy benefit manager that presents a conflict of interest that interferes with the ability of the pharmacy benefit manager to discharge that fiduciary duty.

2. A pharmacy benefit manager shall reimburse to a third party with which it has entered into a contract described in subsection 1 at least 80 percent of the amount of any rebate obtained from a manufacturer for the sale to a covered person of a prescription drug used to treat diabetes.

Sec. 20. 1. A pharmacy benefit manager shall not:
(a) Prohibit a pharmacist or pharmacy from providing information to a covered person concerning the amount of any copayment or coinsurance for a prescription drug or informing a covered person concerning the clinical efficacy of a less expensive alternative drug;
(b) Penalize a pharmacist or pharmacy for providing the information described in paragraph (a) or selling a less expensive alternative drug to a covered person;
(c) Prohibit a pharmacy from offering or providing delivery services directly to a covered person as an ancillary service of the pharmacy; or
(d) If the pharmacy benefit manager manages a pharmacy benefits plan that provides coverage through a network plan, charge a copayment or coinsurance for a prescription drug in an amount that is greater than the total amount paid to a pharmacy that is in the network of providers under contract with the third party.

2. As used in this section, “network plan” means a health benefit plan offered by a health carrier under which the financing and delivery of medical care is provided, in whole or in part, through a defined set of providers under contract with the carrier. The term does not include an arrangement for the financing of premiums.

Sec. 21. 1. A pharmacy benefit manager shall post on an Internet website that is maintained by the pharmacy benefit manager and accessible to the public the rate at which the pharmacy benefit manager reimburses each pharmacy for each prescription drug used to treat diabetes that is covered by a prescription drug plan managed by the pharmacy benefit manager.

2. On or before February 1 of each year, a pharmacy benefit manager shall submit to the Division a report which includes:
(a) The total amount of all rebates that the pharmacy benefit manager negotiated with manufacturers, as defined in NRS
639.009, during the immediately preceding calendar year for
prescription drugs used to treat diabetes;
(b) The total amount of all rebates described in paragraph (a)
that were retained by the pharmacy benefit manager; and
(c) The total amount of all rebates described in paragraph (a)
that were negotiated for purchases of such drugs for use by:
   (1) Recipients of Medicare;
   (2) Recipients of Medicaid;
   (3) Persons covered by third parties that are governmental
entities which are not described in subparagraph (1) or (2); and
   (4) Persons covered by third parties that are not
governmental entities.
3. The Division shall post the reports submitted pursuant to
subsection 2 on an Internet website maintained by the Division.
Sec. 22. NRS 683A.020 is hereby amended to read as follows:
683A.020 As used in this Code, unless the context otherwise
requires, the words and terms defined in NRS 683A.025 to
683A.078, inclusive, and section 11 of this act have the meanings
ascribed to them in those sections.
Sec. 23. NRS 683A.383 is hereby amended to read as follows:
683A.383 1. A natural person who applies for the issuance or
renewal of a certificate of registration as an administrator or a
license as a producer of insurance, managing general agent or
pharmacy benefit manager shall submit to the Commissioner the
statement prescribed by the Division of Welfare and Supportive
Services of the Department of Health and Human Services pursuant
to NRS 425.520. The statement must be completed and signed by
the applicant.
2. The Commissioner shall include the statement required
pursuant to subsection 1 in:
   (a) The application or any other forms that must be submitted
for the issuance or renewal of the certificate of registration or
license; or
   (b) A separate form prescribed by the Commissioner.
3. A certificate of registration as an administrator or a license
as a producer of insurance, managing general agent or
pharmacy benefit manager may not be issued or renewed by the
Commissioner if the applicant is a natural person who:
   (a) Fails to submit the statement required pursuant to subsection
1; or
   (b) Indicates on the statement submitted pursuant to subsection
1 that he or she is subject to a court order for the support of a child
and is not in compliance with the order or a plan approved by the
district attorney or other public agency enforcing the order for the
repayment of the amount owed pursuant to the order.
4. If an applicant indicates on the statement submitted pursuant to subsection 1 that the applicant is subject to a court order for the support of a child and is not in compliance with the order or a plan approved by the district attorney or other public agency enforcing the order for the repayment of the amount owed pursuant to the order, the Commissioner shall advise the applicant to contact the district attorney or other public agency enforcing the order to determine the actions that the applicant may take to satisfy the arrearage.

Sec. 24. NRS 683A.385 is hereby amended to read as follows:

683A.385  1. If the Commissioner receives a copy of a court order issued pursuant to NRS 425.540 that provides for the suspension of all professional, occupational and recreational licenses, certificates and permits issued to a person who is the holder of a certificate of registration as an administrator or a license as a producer of insurance, managing general agent or pharmacy benefit manager, the Commissioner shall suspend the certificate of registration or license issued to that person at the end of the 30th day after the date on which the court order was issued unless the Commissioner receives a letter issued to the holder of the certificate of registration or license by the district attorney or other public agency pursuant to NRS 425.550 stating that the holder of the certificate of registration or license has complied with the subpoena or warrant or has satisfied the arrearage pursuant to NRS 425.560.

2. The Commissioner shall reinstate a certificate of registration as an administrator or a license as a producer of insurance, managing general agent or pharmacy benefit manager that has been suspended by a district court pursuant to NRS 425.540 if the Commissioner receives a letter issued by the district attorney or other public agency pursuant to NRS 425.550 to the person whose certificate of registration or license was suspended stating that the person whose certificate of registration or license was suspended has complied with the subpoena or warrant or has satisfied the arrearage pursuant to NRS 425.560.

Sec. 25. NRS 683A.387 is hereby amended to read as follows:

683A.387  The application of a natural person who applies for the issuance of a certificate of registration as an administrator or a license as a producer of insurance, managing general agent or pharmacy benefit manager must include the social security number of the applicant.

Sec. 26. NRS 683A.451 is hereby amended to read as follows:

683A.451  The Commissioner may refuse to issue a license or certificate pursuant to this chapter or may place any person to whom a license or certificate is issued pursuant to this chapter on probation, suspend the person for not more than 12 months, or
revoke or refuse to renew his or her license or certificate, or may impose an administrative fine or take any combination of the foregoing actions, for one or more of the following causes:

1. Providing incorrect, misleading, incomplete or partially untrue information in his or her application for a license.
2. Violating a law regulating insurance, or violating a regulation, order or subpoena of the Commissioner or an equivalent officer of another state.
3. Obtaining or attempting to obtain a license through misrepresentation or fraud.
4. Misappropriating, converting or improperly withholding money or property received in the course of the business of insurance.
5. Intentionally misrepresenting the terms of an actual or proposed contract of or application for insurance.
6. Conviction of a felony or a crime which involves theft, fraud, dishonesty or moral turpitude.
7. Admitting or being found to have committed an unfair trade practice or fraud.
8. Using fraudulent, coercive or dishonest practices, or demonstrated incompetence, untrustworthiness or financial irresponsibility in the conduct of business, or otherwise, in this State or elsewhere.
9. Denial, suspension or revocation of a license as a producer of insurance or pharmacy benefit manager, or its equivalent, in any other state, territory or province.
10. Forging another’s name to an application for insurance or any other document relating to the transaction of insurance.
11. Improperly using notes or other reference material to complete an examination for a license related to insurance.
12. Knowingly accepting business related to insurance from an unlicensed person.
13. Failing to comply with an administrative or judicial order imposing an obligation of child support.
14. Failing to pay a tax as required by law.
15. Failing to adequately discharge the fiduciary duty imposed upon a pharmacy benefit manager by section 19 of this act.

Sec. 27. 1. The provisions of sections 19 and 20 of this act do not apply to any contract existing on January 1, 2018, for the pharmacy benefit manager to manage a pharmacy benefits plan for a third party until the contract is renewed.

2. As used in this section:
(a) “Pharmacy benefit manager” has the meaning ascribed to it in section 11 of this act.
(b) “Pharmacy benefits plan” has the meaning ascribed to it in section 15 of this act.

(c) “Third party” has the meaning ascribed to it in section 16 of this act.

Sec. 28. This act becomes effective upon passage and approval for the purpose of adopting regulations and performing any other administrative tasks that are necessary to carry out the provisions of this act and on January 1, 2018, for all other purposes.