

PHARMACY GAG CLAUSES

AAFP Position

The American Academy of Family Physicians (AAFP) supports a variety of measures to increase transparency and promote affordability of critical medications. The AAFP [recognizes](#) the potential of affordable generic medications as a cost-effective substitute for many brand-name prescription medications and also [supports](#) the full disclosure to physicians and patients of financial ties between drug manufacturers, pharmacists, and others. The AAFP is a member of the Campaign for Sustainable Rx Pricing (CSRxP), a nonpartisan coalition of nonprofit medical associations, insurers, and hospitals committed to pushing back against drug price increases. Lowering the cost of prescription drugs is critical to ensuring that patients get the drugs they need.

The Role of Pharmacy Benefit Managers

According to the National Conference of State Legislatures' [Prescription Drug Policy Resource Center](#), the US spent \$448.2 billion on prescription drugs in 2016, a 5.8 percent increase compared to 2015. Overall, prescription drugs account for 10 percent of all health spending in the US. These trends are largely influenced by pharmacy benefit managers (PBMs), organizations that manage prescription drug benefits for health insurers, Medicare Part D drug plans, large employers, and other payers.¹ Their primary function is to negotiate prices with drug manufacturers and pharmacies to control the rise in drug costs and spending. In the past, PBMs allowed insurers to combine customer bases to achieve better negotiations with drug manufacturers. Today, PBMs themselves work directly with drug manufacturers and pharmacies to determine the price of drugs and better negotiate discounts for patients, thereby increasing access to drugs and promoting better health outcomes.

Since PBMs receive rebates from drug manufacturers, they may have an incentive to prefer working with high-priced drugs instead of cheaper, sometimes more cost-effective drugs in order to receive a larger rebate. As a result, some health care stakeholders have questioned the integrity of PBMs and if they should disclose the rebates they receive from drug companies, or whether they should be able to keep the rebates at all. State officials' frustration with the lack of transparency associated with PBMs, insurance companies, and drug makers led West Virginia's Medicaid program to fire its PBMs in July 2017 and act as its own PBM, saving \$54.4 million and stating they would no longer pay insurers to contract with CVS and Express Scripts for pharmacy benefits.^{2,3}

What does the Pharmacy Gag Clause Entail?

Imposed by PBMs and embedded in their contracts with pharmacies, pharmacy gag clauses prevent pharmacists from informing patients of a more affordable payment option for their prescriptions. Pharmacists who go against the contracts and reveal a cheaper option are penalized or fined. A [study](#) from the University of Southern California Schaeffer Center for Health Policy & Economics found that a patient's drug copay exceeded the total cost of the drug 23 percent of the time – a phenomenon known

¹ The Commonwealth Fund. (2019). "Pharmacy Benefit Managers and Their Role in Drug Spending." Web.

² Herman B. (2018). "The windfalls of secrecy." *Axios*. Web.

³ National Community Pharmacists Association. (2019). "West Virginia Medicaid saves \$54.4 million with prescription drug carve-out". Web.

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as a clawback, or prescription drug overpayment – for an average overpayment of \$7.69 per prescription, costing patients more than \$135 million per year.

A related practice, known as spread pricing, occurs when PBMs are reimbursed by health plans and employers at a higher price for generic drugs than what they pay pharmacies for those drugs. In these scenarios, the PBM pockets the difference. Studies have shown that spread pricing also increases both prescription drug costs and out of pocket costs for patients.⁴

State Legislation

Since 2015, 29 states (AL, AZ, AR, CA, CO, CT, DE, FL, GA, IN, KS, KY, LA, ME, MD, MN, MS, NV, NH, NC, ND, RI, SC, SD, TN, TX, UT, VT, WV) have enacted legislation banning pharmacy gag clauses. For example, recent [legislation](#) in California affirms that a patient is not required to pay more than the pharmacy's retail price for a prescription drug if that price is less than the copayment or coinsurance amount and allows pharmacists to discuss various payment options available to patients to ensure they are not overpaying.

Arkansas has been especially active in this space and has passed [legislation](#) to regulate PBMs, authorizes PBM penalties and fines, and bans gag clauses. The state's Fair Disclosure of State Funded Payments for Pharmacists' Services Act [mandates](#) that PBMs seeking payment for pharmacist services must itemize by individual claim the actual amount paid to the pharmacy or pharmacist for their services, the identity of the pharmacy or pharmacist, and the prescription number.

On April 15, 2019, Arkansas passed additional [legislation](#) eliminating spread pricing, prohibiting payment reductions that create unfair market conditions, and closing the loophole on the definition of maximum allowable cost to include all drugs and payment methods. The law also requires all PBM rebates, drug manufacturer payments to PBMs, and other costs to be reported to the Arkansas Insurance Department.

Federal Legislation

In addition to state action to combat gag clauses and promote drug affordability and transparency, two bills were signed into federal law in 2018 making gag clauses in contracts illegal. [The Patient Right to Know Drug Prices Act](#) prohibits private insurers and PBMs from restricting a pharmacy or pharmacist's ability to provide drug price information to their patients when there is a difference between the cost of the drug under the insurance plan and the cost of the drug without insurance. Similarly, the [Know the Lowest Price Act](#) applies the same conditions to individuals covered under Medicare Advantage and Medicare Part D plans. The AAFP has voiced [support](#) for this act to Congress, advocating for the reduction of consumers' out-of-pocket spending on medications and the move towards better treatment adherence.

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⁴ Kacik A. (2019). "PBM's spread pricing inflates healthcare spending, commission finds." *Modern Healthcare*. Web.