

State of South Dakota

EIGHTY-EIGHTH SESSION
LEGISLATIVE ASSEMBLY, 2013

607U0375

SENATE BILL NO. 133

Introduced by: Senators Rave, Holien, Lederman, Lucas, Sutton, and Tidemann and
Representatives Cronin, Bartling, Hawley, Lust, Magstadt, Munsterman,
Rounds, Solum, and Tyler

1 FOR AN ACT ENTITLED, An Act to establish a pharmacy audit integrity program.

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 Section 1. The pharmacy audit integrity program is hereby established to provide standards
4 for an audit of pharmacy records carried out by a pharmacy benefits manager or any entity that
5 represents the pharmacy benefits manager.

6 Section 2. Term used in this Act mean:

7 (1) "Entity," a pharmacy benefits manager or any person or organization that represents
8 these companies, groups, or organizations in any capacity;

9 (2) "Plan sponsor," the employer in the case of an employee benefit plan established or
10 maintained by a single employer or the employee organization in the case of a plan
11 established or maintained by an employee organization, an association, joint board,
12 trustee, committee, or other similar group that establishes or maintains the plan.

13 Section 3. The pharmacy benefits manager shall disclose an amendment to the pharmacy
14 audit terms in a contract between a pharmacy and a pharmacy benefits manager to the pharmacy



1 at least sixty days prior to the effective date of the proposed change.

2 Section 4. Unless otherwise prohibited by federal statutes or regulations, any entity
3 conducting a pharmacy audit shall:

- 4 (1) Give a pharmacy a minimum thirty days written notice before conducting initial on-
5 site audit;
- 6 (2) Conduct an audit that involves clinical or professional judgment in consultation with
7 a licensed pharmacist; and
- 8 (3) Audit each pharmacy under the same standards and parameters as other similarly
9 situated pharmacies.

10 Section 5. Unless otherwise prohibited by federal statutes or regulations, for any entity
11 conducting a pharmacy audit the following audit items apply:

- 12 (1) The period covered by the audit may not exceed twenty-four months from the date
13 that the claim was submitted to or adjudicated by the entity, unless a longer period
14 is required under state or federal law;
- 15 (2) If an entity uses random sampling as a method for selecting a set of claims for
16 examination, the sample size shall be appropriate for a statistically reliable sample.
17 Notwithstanding any other provision, the auditing entity shall provide the pharmacy
18 a masked list that provides a prescription number or date range that the auditing
19 entity is seeking to audit;
- 20 (3) An on-site audit may not take place during the first five business days of the month
21 unless the pharmacy consents;
- 22 (4) An auditor may not enter any portion of the pharmacy area where patient-specific
23 information is available unless escorted, and to the extent possible shall remain out
24 of sight and hearing range of the pharmacy patients;

1 (5) Any recoupment may not be deducted against future remittances until final
2 completion of any appeals process and both parties have received the results of the
3 final audit;

4 (6) A pharmacy benefits manager may not require information to be written on a
5 prescription unless the information is required to be written on the prescription by
6 state or federal law. Recoupment may be assessed for items not written on the
7 prescription if:

8 (a) Additional information is required in the provider manual; or

9 (b) The information is required by the Food and Drug Administration; or

10 (c) The information is required by the drug manufacturer's product safety
11 program; and

12 (d) The information in subsections (a), (b), or (c) is not readily available for the
13 auditor at the time of the audit;

14 (7) The auditing company or agent may not receive payment based on a percentage of
15 the amount recovered. This section does not prevent the entity conducting the audit
16 from charging or assessing the responsible party, directly or indirectly, based on
17 amounts recouped if:

18 (a) The plan sponsor and the entity conducting the audit have a contract that
19 explicitly states the percentage charge or assessment to the plan sponsor; and

20 (b) A commission to an agent or employee of the entity conducting the audit is not
21 based, directly or indirectly, on amounts recouped.

22 Section 6. For recoupment or chargeback, the following criteria apply:

23 (1) Audit parameters shall consider consumer-oriented parameters based on
24 manufacturer listings;

- 1 (2) A pharmacy's usual and customary price for compounded medications is considered
2 the reimbursable cost unless the pricing methodology is outlined in the provider
3 contract;
- 4 (3) A finding of overpayment or underpayment can only be based on the actual
5 overpayment or underpayment and not a projection based on the number of patients
6 served having a similar diagnosis or on the number of similar orders or refills for
7 similar drugs;
- 8 (4) The entity conducting the audit may not use extrapolation in calculating the
9 recoupment or penalties for audits unless required by state or federal law or
10 regulation;
- 11 (5) Calculations of overpayments may not include dispensing fees unless:
 - 12 (a) A prescription was not actually dispensed;
 - 13 (b) The prescriber denied authorization;
 - 14 (c) The prescription dispensed was a medication error by the pharmacy; or
 - 15 (d) The identified overpayment is solely based on an extra dispensing fee;
- 16 (6) An entity may not consider any clerical or record-keeping error, such as a
17 typographical error, scrivener's error, or computer error regarding a required
18 document or record as fraud. However, such errors may be subject to recoupment;
- 19 (7) In the case of errors that have no actual financial harm to the patient or plan, the
20 pharmacy benefits manager may not assess any chargebacks. Errors that are a result
21 of the pharmacy's failing to comply with a formal corrective action plan may be
22 subject to recovery; and
- 23 (8) Interest may not accrue during the audit period for either party. The audit period
24 begins with the notice of the audit and ends with the final audit report.

1 Section 7. To validate the pharmacy record and delivery, the pharmacy may use authentic
2 and verifiable statements or record including medication administration records of a nursing
3 home, assisted living facility, hospital, physician, or other authorized practitioner or additional
4 audit documentation parameters located in the provider manual. Any legal prescription that
5 meets the requirements in this chapter may be used to validate claims in connection with
6 prescriptions, refills, or changes in prescriptions, including medication administration records,
7 faxes, e-prescriptions, or documented telephone calls from the prescriber or the prescriber's
8 agents.

9 Section 8. The entity conducting the audit shall establish a written appeals process which
10 shall include appeals of preliminary reports and final reports.

11 Section 9. A preliminary audit report shall be delivered to the pharmacy within sixty days
12 after the conclusion of the audit. A pharmacy shall be allowed at least forty-five days following
13 receipt of the preliminary audit, to provide documentation to address any discrepancy found in
14 the audit. A final audit report shall be delivered to the pharmacy with one hundred twenty days
15 after receipt of the preliminary audit report or final appeal, whichever is later. An entity shall
16 remit any money due to a pharmacy or pharmacist as a result of an underpayment of a claim
17 within forty-five days after the appeals process has been exhausted and the final audit report has
18 been issued.

19 Section 10. If contractually required, an auditing entity shall provide a copy of the claims
20 included in the audit to the plan sponsor, and any recouped money shall be returned to the plan
21 sponsor.

22 Section 11. The provisions of this Act do not apply to any investigative audit that involves
23 fraud, willful misrepresentation, or on any audit completed by the State of South Dakota on
24 health care programs operated by the state.

1 Section 12. That § 37-24-6 be amended to read as follows:

2 37-24-6. It is a deceptive act or practice for any person to:

3 (1) Knowingly and intentionally act, use, or employ any deceptive act or practice, fraud,
4 false pretense, false promises, or misrepresentation or to conceal, suppress, or omit
5 any material fact in connection with the sale or advertisement of any merchandise,
6 regardless of whether any person has in fact been misled, deceived, or damaged
7 thereby;

8 (2) Advertise price reductions without satisfying one of the following:

9 (a) Including in the advertisement the specific basis for the claim of a price
10 reduction; or

11 (b) Offering the merchandise for sale at the higher price from which the reduction
12 is taken for at least seven consecutive business days during the sixty-day
13 period prior to the advertisement.

14 Any person advertising consumer property or services in this state, which
15 advertisements contain representations or statements as to any type of savings claim,
16 including reduced price claims and price comparison value claims, shall maintain
17 reasonable records for a period of two years from the date of sale and advertisement,
18 which records shall disclose the factual basis for such representations or statements
19 and from which the validity of any such claim be established. However, these
20 reasonable record provisions do not apply to the sale of any merchandise which:

21 (a) Is of a class of merchandise that is routinely advertised on at least a weekly
22 basis in newspapers, shopping tabloids, or similar publications; and

23 (b) Has a sales price before price reduction that is less than fifteen dollars per
24 item;

- 1 (3) Represent a sale of merchandise at reduced rates due to the cessation of business
2 operations and after the date of the first advertisement remain in business under the
3 same, or substantially the same, ownership or trade name, or continue to offer for sale
4 the same type of merchandise at the same location for more than one hundred twenty
5 days;
- 6 (4) Give or offer a rebate, discount, or anything of value to an individual as an
7 inducement for selling consumer property or services in consideration of giving the
8 names of prospective purchasers or otherwise aiding in making a sale to another
9 person, if the earning of the rebate, discount, or other thing of value is contingent
10 upon the occurrence of an event subsequent to the time the individual agrees to the
11 sale;
- 12 (5) Engage in any scheme or plan for disposal or distribution of merchandise whereby
13 a participant pays a valuable consideration for the chance to receive compensation
14 primarily for introducing one or more additional persons into participation in the
15 planner's scheme or for the chance to receive compensation when the person
16 introduced by the participant introduces a new participant;
- 17 (6) Send, deliver, provide, mail, or cause to be sent, delivered, provided, or mailed any
18 unordered consumer property or service, or any bill or invoice for unordered
19 consumer property or service provided;
- 20 (7) Advertise a rate, price, or fee for a hotel, motel, campsite, or other lodging
21 accommodation which is not in fact available to the public under the terms
22 advertised. It is not a violation of this subdivision to establish contract rates which
23 are different than public rates;
- 24 (8) Charge a rate, price, or fee for a hotel, motel, campsite, or other lodging

1 accommodation which is different than the rate, price, or fee charged on the first
2 night of the guest's stay unless, at the initial registration of the guest, a written
3 notification of each price, rate, or fee to be charged during the guest's reserved
4 continuous stay is delivered to the guest and an acknowledgment of receipt of the
5 notice is signed by the guest and kept by the innkeeper for the same period of time
6 as is required by § 34-18-21;

7 (9) Knowingly and intentionally fail to mail to a future guest a written confirmation of
8 the date and rates of reservations made for any accommodation at a hotel, motel,
9 campsite, or other lodging accommodation when a written request for confirmation
10 is received from the future guest;

11 (10) Refuse to return or reverse the charge for a deposit upon any hotel, motel, campsite,
12 or other lodging accommodation which is canceled by the guest more than thirty days
13 before the date of the reservation. The innkeeper may establish a policy requiring a
14 longer time for notice of cancellation or a handling fee in the event of cancellation,
15 which may not exceed twenty-five dollars, if the policy is in writing and is delivered
16 or mailed to the guest at or near the making of the reservation;

17 (11) Knowingly advertise or cause to be listed through the internet or in a telephone
18 directory a business address that misrepresents where the business is actually located
19 or that falsely states that the business is located in the same area covered by the
20 telephone directory. This subdivision does not apply to a telephone service provider,
21 an internet service provider, or a publisher or distributor of a telephone directory,
22 unless the conduct proscribed in this subdivision is on behalf of the provider,
23 publisher, or distributor;

24 (12) Sell, market, promote, advertise, or otherwise distribute any card or other purchasing

1 mechanism or device that is not insurance that purports to offer discounts or access
2 to discounts from pharmacies for prescription drug purchases if:

- 3 (a) The card or other purchasing mechanism or device does not expressly state in
4 bold and prominent type, prevalently placed, that discounts are not insurance;
- 5 (b) The discounts are not specifically authorized by a separate contract with each
6 pharmacy listed in conjunction with the card or other purchasing mechanism
7 or device; or
- 8 (c) The discount or access to discounts offered, or the range of discounts or access
9 to the range of discounts, is misleading, deceptive, or fraudulent, regardless
10 of the literal wording.

11 The provisions of this subdivision do not apply to a customer discount or
12 membership card issued by a store or buying club for use in that store or buying club,
13 or a patient access program voluntarily sponsored by a pharmaceutical manufacturer,
14 or a consortium of pharmaceutical manufacturers, that provide free or discounted
15 prescription drug products directly to low income or uninsured individuals either
16 through a discount card or direct shipment;

- 17 (13) Send or cause to be sent an unsolicited commercial electronic mail message that does
18 not include in the subject line of such message "ADV:" as the first four characters.
19 If the message contains information that consists of explicit sexual material that may
20 only be viewed, purchased, rented, leased, or held in possession by an individual
21 eighteen years of age and older, the subject line of each message shall include
22 "ADV:ADLT" as the first eight characters. An unsolicited commercial electronic
23 mail message does not include a message sent to a person with whom the initiator has
24 an existing personal or business relationship or a message sent at the request or

1 express consent of the recipient;

2 (14) To fail to conduct an audit of a pharmacy under and pursuant to the terms of the
3 pharmacy audit integrity program pursuant to this Act.

4 Each act in violation of this section is a Class 2 misdemeanor. Any subsequent conviction
5 of an act in violation of this statute, which occurs within two years is a Class 1 misdemeanor.
6 Any subsequent conviction of an act in violation of this statute, which occurs within two years
7 of a conviction of a Class 1 misdemeanor pursuant to this statute, is a Class 6 felony.

8 Section 13. In addition to the remedies otherwise provided for in this Act, in chapter 58-29E,
9 or under general South Dakota law, any pharmacy subject to an audit procedure may bring a
10 civil action to enforce the provisions of this Act and to seek damages from the pharmacy
11 benefits manager and any person or organization representing the entity during the audit process
12 for the violation of the provisions of this Act.