

Wolf, Sheldon

From: Lee, Judy E.
Sent: Wednesday, February 8, 2023 10:22 PM
To: -Grp-NDLA Senate Human Services; Wolf, Sheldon; Lahr, Pat; NDLA, Intern 02 - Pouliot, Lindsey
Subject: FW: SB 2378 - Pharmacy Choice

Sheldon, please load this and Mr. Askew's other message in 2378 testimony.

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From: Askew, Andrew <Andrew.Askew@EssentiaHealth.org>
Sent: Wednesday, February 8, 2023 10:11 PM
To: Lee, Judy E. <jlee@ndlegis.gov>; Clemens, David <dclemens@ndlegis.gov>; Cleary, Sean <scleary@ndlegis.gov>; Roers, Kristin <kroers@ndlegis.gov>; Hogan, Kathy L. <khogan@ndlegis.gov>; Weston, Kent <kweston@ndlegis.gov>
Cc: Mike Schwab <mschwab@nodakpharmacy.net>; Bartuska, Chrystal A. <cabartuska@nd.gov>
Subject: SB 2378 - Pharmacy Choice

Greetings, committee members:

I write to follow up on today's hearing on SB 2378 in hopes of addressing some of the assertions made in testimony today. As you probably are now well aware of, this is a very complex and contentious debate that can cause a lot of confusion.

Most importantly, SB 2378 **does not prohibit the practice of white bagging**. Senate Bill 2378 restricts insurance plans from **mandating or forcing patients** to exclusively receive medications through white bagging. In other words, SB 2378 gives patients the choice to receive medications through white bagging or their preferred local providers, which is why it is being described as "pharmacy choice." Below is the operative language, which begins at page 1, line 21:

"A pharmacy benefit manager . . . **may not [r]equire** a patient as a condition of payment or reimbursement, to purchase pharmacist services, including prescription drugs, exclusively through a mail-order pharmacy or a pharmacy benefit manager affiliate" (Emphasis added).

While we believe it is clear that this provision bans insurance plans from mandating which pharmacy patients must use, the supporters of SB 2378 are amendable to amending the bill if additional clarity is needed.

There was also a lot of focus on the cost of receiving these expensive clinician administered drugs in a hospital or clinic setting. What was not made clear to the committee was that the amounts "**charged**" by hospitals and clinics are actually **negotiated** between insurance payers and care providers. In other words, hospitals and clinic are reimbursed according to the negotiated rates agreed to by the insurance plans. Hospitals and clinics do not simply charge whatever amount they want – they charge the amount agreed to by the insurance plans.

Another question was raised about whether ERISA preempts the state from preventing patients from being forced to obtain medications through out of state specialty pharmacies. In 2020, the Supreme Court of the United States unanimously held that ERISA **does not preempt** all state regulations of PBMs. In the wake of the *Rutledge* decision, the

Eighth Circuit Court of Appeals held in *Wilke v Pharmaceutical Care Management Association* that North Dakota's 2017 laws regulating PBM practices, such as limiting the fees they may charge pharmacies, limiting copayments, and regulating drug benefit provisions and plan structures, **was not preempted by ERISA**.

Since *Rutledge* and its progeny, there is increasing and considerable interests from state legislations to reign in payers and PBMs on various front, including white bagging mandates. For example, Essentia and Mayo Clinic have brought similar legislation in Minnesota this year. In 2021, three states enacted white bagging laws (AR, LA, VA). Keeping with this trend, at least 10 states were actively considering white-bagging legislation so far in 2022. Two additional states, Florida and Wisconsin, considered white-bagging bills that ultimately failed in committee. Of the 10 states debating white bagging legislation, at least two, West Virginia and Oklahoma, have passed their bill through at least one legislative chamber.

Finally, we think it is important to underscore that the patient safety and care concerns are not hypothetical. These are concerns playing out throughout North Dakota that present daily challenges for our providers and patients. Attached please find a testimonial from an Essentia pharmacist in Fargo, highlighting the patient impacts of white bagging. As referenced in the document, the other large health system in Fargo (i.e., Sanford Hospital) **does not** allow white bagging. As a result, patients who are unable to obtain medications through Sanford because of mandatory white bagging requirements mandates, are often sent to Essentia, which has a more lenient policy toward white bagging in order to ensure patients are not deprived access to what is often life-saving care.

As I mentioned, this is a complex – and often confusing – issue. What isn't complex or confusing is the fact that when patients are forced to receive white bagged medications, their out-of-pocket costs drastically increase and their access to timely, safe medications is reduced. As the committee deliberates, we respectfully ask that you support a DO PASS recommendation for SB 2378. Thank you for your time and consideration!

Sincerely,

Andy Askew

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