



## **HB 1584 NEUTRAL TESTIMONY**

*John Arnold, Deputy Commissioner*

House Industry, Business and Labor Committee

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Good afternoon, Chairman Warrey and members of the House IBL committee.

My name is John Arnold, Deputy Insurance Commissioner, and I'd like to thank you for hearing our Department's neutral testimony for House Bill 1584.

When considering what action to take in regulating Pharmacy Benefit Managers (PBMs), I urge the committee to first consider the goal of the regulation. Is the regulation intended to protect consumers, or is it intended to protect pharmacists? I am not suggesting that one of these goals is superior to the other, but the answer to the question should guide the regulatory discussion.

If the goal is to protect consumers, namely through the reduction in prescription drug prices, I am compelled to inform you that the experience of the handful of states that have been leaders in PBM regulation have not seen this goal come to fruition. This isn't to say that some form of regulation may be successful in attaining that goal, but we haven't yet seen what that regulation looks like. So, if the goal is to lower prescription drug prices, I would encourage your consideration to resist the urge to act and further explore possible avenues to do this.

If, however, the goal is to protect pharmacists and pharmacies, this type of regulation may be beneficial. Some of the states that have been early adopters of PBM regulation have seen pharmacists and pharmacies receive increased payment from PBMs. But again, consumers have not seen the direct benefit of this sort of regulation.

I believe that the answer to the question of what the goal of the regulation is vital because it should then inform which entity would be appropriate for implementing the regulation. The Insurance Department is first and foremost a consumer protection agency. We regulate the insurance industry from the perspective of safeguarding promises made to North Dakota's insurance consumers. While PBMs certainly interact with insurance companies, it is important to remember that they are neither insurance companies nor insurance producers. They currently license as a third-party administrator, however that is to allow them to provide insurance companies with administrative services, not to pool and underwrite risk.

If the goal of the regulation is to protect pharmacists, then I would suggest that an entity that is more familiar with pharmacists, pharmacies, and the pharmaceutical industry may be the better fit. Given that, it may be appropriate for the legislature to consider whether it may be appropriate to evolve the Board of Pharmacy, perhaps to the extent of making it a state agency to alleviate conflicts of interest concerns that may arise from that entity regulating to the benefit of the members of the board, into a body that could license, regulate, and enforce PBMs.

As drafted, HB 1584 also includes the regulation of PBMs to include full compliance with chapter 19-02.1, the North Dakota Food, Drug, and Cosmetic Act. The Department of Health and Human Services already has enforcement authority for this chapter, including partial PBM regulation found in sections 16.1, 16.2, 16.3, and 16.5.

As drafted, HB 1584 recognizes that these three entities all currently have some touchpoint with PBMs, as seen on page 5, lines 6-8. I respect the effort to utilize existing state resources rather than adding FTEs but relying on joint exercise of common powers agreements has two notable flaws. First, a lack of leadership. As drafted, the Insurance Commissioner is responsible for the implementation of HB 1584, however the Commissioner has no authority over the staff of the Department of Health and Human Services or the Board of Pharmacy. The Commissioner cannot address prioritization or work, scheduling, or performance issues in those agencies as it relates to duties of this bill. Second, the experience of other states has shown that the volume of work that such regulation requires dedicated staff. States that have passed laws, such as this bill, without dedicated staff have had to add those staff at the subsequent legislative session.

I've testified in the past that the necessary resources rely less on the population of the state, and more on the population of PBMs, which is roughly even across the country. While our lower population than many states may well correlate with fewer prescriptions being filled, the number of complaints is less important than the grouping of the complaints by PBM and by type are likely uniform.

For example, last weekend I attended a conference and the Insurance Commissioner from Kentucky mentioned that in January alone her office received over 3,000 complaints. Given that North Dakota's population is approximately 17% of Kentucky's population, we could still anticipate well over 500 complaints a month. Having staff sort the complaints is perhaps the only portion of the process that depends on population. One or two individuals may be able to process that volume of incoming complaints. Once sorted, we would envision needing a pharmacist and one or two attorneys to review the complaints and interact with PBMs. Additionally, we would anticipate the need for a company analyst and a fraud analyst. Irrespective of whether the Insurance Department fulfills this regulatory need or some other entity, we suggest that effective regulation requires five to seven dedicated staff. This is not an endeavor that can be spread between the existing staff of three separate entities.

In addition to the broader issues detailed above, there are two other points that need to be considered as you look at HB 1584. First is the oversight of not creating a separate license of PBMs. Under HB 1584 as introduced, PBMs would continue to hold a third-party administer license. This is problematic because of the 250-plus third-party administrators that we license, I cannot tell you how many of them are PBMs. The lack of clarity in licensing has caused issues in at least one other state, and I would suggest that we learn from that mistake.

Lastly, there is the Rutledge issue. I stand before you today not to imply that I have an opinion on the authority granted by Rutledge, nor to propose that the threat of a lawsuit should impact your decision as legislators, but just to suggest that since the courts seem to still be in the process of determining the full impact of the Rutledge ruling it may be prudent to amend the bill to state that the Attorney General is responsible for any litigation that may arise from the implementation of HB 1584, or appropriate funding with which the entity that is ultimately tasked with this regulatory authority can rely on for Attorney General representation.

Thank you, Chairman Warrey and members of the committee. I am happy to try to answer any questions that you may have.