

Spotlight on 2018 State Drug Legislation: Part 3 – Pharmacist Gag Clauses

**Last Update: This post was written before the end of the 2018 legislative session. For the most recent count of states that passed these legislation, see the [Spotlight on 2018 State Drug Legislation Summary: The Year in Review](#) or download our [Summary Chart](#).*

**Updated 10/10/18: Since the original publication, the federal government enacted laws to ensure a federal ban on pharmaceutical gag-clauses.*

On Wednesday, October 10, President Trump signed into law both bills passed by Congress to ban gag clauses in pharmacy contracts: the Patient Right to Know Drug Prices Act ([S.2554](#)) affects employer-sponsored and individual drug plans and the Know the Lowest Price Act ([S.2553](#)) will affect Medicare Part D and Medicare Advantage plans.

Trump expects an immediate impact on drug prices and remarked at the [signing](#): “All our citizens deserve to know the lowest price available at our pharmacies, and now that’s what they’ll be getting.”

Updated 10/8/18: Since the original publication, Alaska, Delaware, and California have enacted gag clause prohibition laws, bringing the total number of states that passed laws in 2018 to 21 states. (See table below)

In this installment of The Source’s Spotlight on State Drug Legislation, we focus on one of the most popular pharmaceutical

legislative topics of the past year – banning gag clauses that prevent pharmacists from informing patients in cases where they could save money for a prescription by paying cash rather than using their insurance.

What Are Gag Clauses?

Pharmacy benefit managers (PBMs) and/or insurer sometimes insert language into contracts with pharmacies (a “gag clause”) that prevent pharmacists from telling customers when they can save money on prescriptions by paying with cash instead of insurance (i.e. when their cost-sharing exceeds the cash price for the drug). In addition, when a patient pays more in cost-sharing than the PBM or insurer pays to the pharmacy to dispense the drug, many PBMs or insurers “clawback”, or keep, the difference. Gag clauses in effect mean patients with prescription coverage sometimes pay more out of pocket when they use their insurance rather than pay the cash price because pharmacists are forbidden from telling them about the problem. This issue gave rise to news grabbing headlines like “Why a patient just paid a \$285 copay for a \$40 prescription”[\[1\]](#) and “Why Your Pharmacist Can’t Tell You That \$20 Prescription Could Cost Only \$8”.[\[2\]](#)

How big a problem are these gag clauses and clawbacks? A study by researchers at the USC Schaeffer Center for Health Policy and Economics found that in 2013, nearly a quarter (23%) of filled prescriptions involved a patient copayment that exceeded the reimbursement paid by the insurer by more than \$2, and total overpayments exceeded \$135 million.[\[3\]](#) This money came from the pocketbooks of patients who had prescription drug coverage and didn’t know they could save money by *not* using their coverage.

State Action to Prevent Patients from Paying More Than the Cash Price

As consumers became more aware of the issue, insurance companies

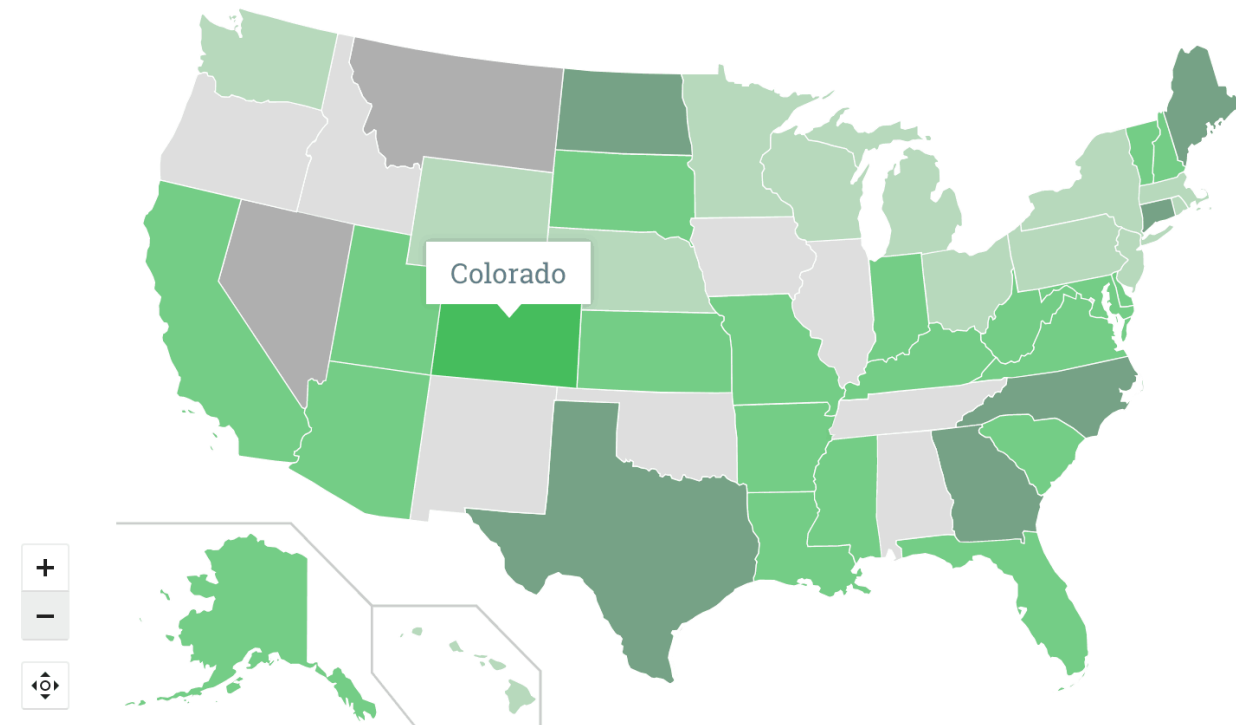
and PBMs faced intense public outcry against these practices and multiple lawsuits.[\[4\]](#) In addition, both state and federal lawmakers considered legislation to ban gag clauses or prohibit clawbacks. Prior to 2016, only two states (Maryland and Texas) prohibited clawbacks, and no state explicitly banned gag clauses in contracts between PBMs and pharmacies. In 2016 and 2017, 5 more states[\[5\]](#) joined Maryland and Texas, as legislative solutions to these practices gained significant momentum.

In the 2018 legislative session, 34 states considered bills, and 18 states passed new laws, to address these issues (see Map and Table 1). Some of the laws, like [SB 141](#) in South Dakota, outlaw any contract terms that prohibit or penalize a pharmacist or pharmacy for providing cost-sharing information on the amount a covered individual may pay for a particular prescription drug. Others, like [SB 208](#) in Utah, target clawbacks and provide that PBMs may not require an insured patient to pay, for a covered prescription drug, more than the lesser of: (a) the applicable cost share of the prescription drug being dispensed; or (b) the retail price of the drug without prescription drug coverage. Finally, others like [HB 2107](#) in Arizona, prevent both gag clauses and clawbacks. Currently, 24 states have prohibitions on gag-clauses, of which 18 also prohibit clawbacks, with pending legislation in 7 more states (see table 1). As momentum builds in state legislatures to prohibit these practices, at the federal level, the Senate Health Committee also approved a bill banning gag clauses.[\[6\]](#) It appears likely that all patients may soon be protected from exorbitant fees when the cash price for their prescription is less than their standard insurance co-pay.

Pharmacy Gag Clause Regulation

Gag clause regulation includes laws that allow pharmacists to disclose costs to insured patients and those that prohibit pharmacists from collecting more in cost-sharing from the insured patient than the cash price. Click on highlighted states to see pharmacy gag clause legislation considered or enacted in the 2018 session.

Key: ■ Existing Law ■ Enacted ■ Considered ■ No Legislative Session



Gag-clause Prohibitions in Perspective

The banning of gag-clauses is one of the most common legislative tools that states have used in the past few years to address rising drug prices. With widespread public outcry over the costs of prescription drugs, especially out-of-pocket costs, states are increasingly seeking to enact policies to address the rising costs of prescription drugs. As part of The Source's multi-part analysis of state pharmaceutical legislation, we have covered state efforts including [rate-setting for prescription drugs](#) and state attempts to [implement drug importation programs](#). Unlike the strategies covered in those posts, however, banning gag clauses and clawbacks does little if anything to address overall costs of prescription drugs. While states should be commended for acting to protect their residents, laws that prohibit gag clauses should be viewed as consumer protection action rather than meaningful efforts to rein in skyrocketing health care

costs. These laws are an important, but modest step toward achieving a pharmaceutical industry where the prices for drugs reflect their value in treating diseases.

Table 1: *State Legislation Prohibiting Pharmaceutical Gag Clauses and Clawbacks.*

In the first two columns, the darker orange designates enacted legislation with the year enacted in parenthesis. The lighter orange designates legislation that is still pending (last updated 8/24/18). Some bills are listed in both columns because they contain protections against both gag clauses and clawbacks. The third column lists bills considered in 2018 that did not become law. Follow the links on each bill or see the state page for more information.

State	Gag Clause Prohibition (year enacted)	Clawback prohibition (year enacted)	Failed 2018 Bills
Alabama			
Alaska	HB 240 (2018)		SB 209
Arizona	HB 2107 (2018)	HB 2107 (2018)	HB 2202
Arkansas	SB 2/HB 1010 (2018)	SB 542 (2015)	
California	AB 2863 and AB 315 (2018)	S 1021 and AB 2863 and AB 315	
Colorado	HB 1284 (2018)	HB 1284 (2018)	
Connecticut	SB 445 (2017)	SB 445 (2017)	
Delaware	HB 425 (2018)	HB 425 (2018)	
Florida	HB 351/SB 1494 (2018)	HB 351/SB 1494 (2018)	

Georgia	<u>SB 103/HB 276</u> (2017)	<u>SB 103/HB 276</u> (2017)	
Hawaii			<u>SB 3014/ HB 2644</u>
Idaho			
Illinois			
Indiana	<u>HB 1317</u> (2018)	<u>HB 1317</u> (2018)	
Iowa			
Kansas	<u>SB 351</u> (2018)		
Kentucky	<u>HB 463</u> (2018)	<u>HB 463</u> (2018)	
Louisiana	<u>SB 241</u> , <u>SB 282</u> , and <u>HB 436</u> (2018)	<u>SB 131</u> (2016)	<u>HB 547</u>
Maine	<u>SP 10/LD 6</u> (2017)	<u>SP 10/LD 6</u> (2017)	
Maryland	<u>SB 576/ HB 736</u> (2018)	<u>Md. Code Ann.,</u> <u>Ins. § 15-842</u>	
Massachusetts	<u>S 2108</u>		
Michigan			<u>HB 5858</u>
Minnesota			<u>HF 3106/SF 2669</u> , <u>HF 3535/SF 2674</u> , and <u>HF 3012/ SF 2596</u>
Mississippi	<u>HB 709</u> (2018)		<u>HB 426</u> and <u>SB 2076</u>
Missouri	<u>SB 826</u> (2018)	<u>SB 826</u> (2018)	<u>HB 1542</u>
Montana			
Nebraska			<u>LB 324</u>
Nevada			

New Hampshire	HB 1791 (2018)		HB 1741 and SB 354
New Jersey			S 2438/A 4041 and A 3993/S 2690 combined with A2214
New Mexico			
New York			A 8781/S 6940 , S 7191A /A 9893 , S 6629/A 8046 , and A 10215
North Carolina	HB 466 (2017)	HB 466 (2017)	
North Dakota	S 2558 (2017)	S 2558 (2017)	
Ohio	HB 479		
Oklahoma			
Oregon			
Pennsylvania	HB 2211 , SB 1166 , and SB 637		
Rhode Island			S 2406/H 7700
South Carolina	H 5038 (2018)		H 5044 and S 0815
South Dakota	SB 141 (2018)		
Tennessee			
Texas	SB 1076 (2012)	SB 1076 (2012)	
Utah	SB 208 (2018)		
Vermont	SB 92 (2018)	SB 92 (2018)	H 886

Virginia	<u>HB 1177/SB 933</u> (2018)	<u>HB 1177/SB 933</u> (2018)	<u>HB 1302</u>
Washington			<u>HB 2296</u> , <u>HB 2623</u> , and <u>SB 6026</u>
West Virginia	<u>SB 46</u> (2018)	<u>SB 46</u> (2018)	<u>SB 560</u> and <u>HB 4287</u>
Wisconsin			<u>SB 669</u> / <u>AB 800</u>
Wyoming			<u>HB 0107</u>

[1] Thompson M. **Why a patient paid a \$285 copay for a \$40 drug.** *PBS NewsHour*. <https://www.pbs.org/newshour/health/why-a-patient-paid-a-285-copay-for-a-40-drug>. Published August 19, 2018. Accessed August 24, 2018.

[2] Pear R. **Why Your Pharmacist Can't Tell You That \$20 Prescription Could Cost Only \$8.** *The New York Times*. <https://www.nytimes.com/2018/02/24/us/politics/pharmacy-benefit-managers-gag-clauses.html>. Published February 24, 2018. Accessed August 24, 2018.

[3] Van Nuys K. Joyce G. Ribero R. and Goldman D. **Overpaying for Prescription Drugs: The Copay Clawback Phenomenon.** *USC Schaffer Center for Health Policy and Economics*. March 2018. Available from: https://healthpolicy.usc.edu/wp-content/uploads/2018/03/2018.03_Overpaying20for20Prescription20Drugs_White20Paper_v.1-2.pdf

[4] See Van Nuys 2018 and references therein.

[5] States passing laws in 2016 and 2017 were Connecticut, Louisiana, Maine, North Carolina, and North Dakota.

[6] Hellman J. **Senate panel approves bill banning ‘gag clauses’ in pharmacy contracts.** *The Hill*. July 25, 2018. Available from: <http://thehill.com/policy/healthcare/398777-senate-panel-passes-bill-banning-gag-clauses-in-pharmacy-contracts>; The bill considered was: S.2554 – 115th Congress (2017-2018). Text available from: <https://www.congress.gov/bill/115th-congress/senate-bill/2554/text?r=10>