# CHAPTER 26
# Drugs and Cosmetics

# ARTICLE 1
# General Provisions

## 26-1-1. Short title.

Chapter 26, Article 1 NMSA 1978 may be cited as the "New Mexico Drug, Device and Cosmetic Act".

**History:** 1953 Comp., § 54-6-26, enacted by Laws 1967, ch. 23, § 1; 1987, ch. 270, § 1.

**ANNOTATIONS**

**Compiler's notes.** — Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For drug product selection, *see* Article 3 of this chapter.

For provisions of the Controlled Substances Act, *see* 30-31-1 NMSA 1978 et seq.

**The 1987 amendment,** effective June 19, 1987, substituted the present catchline for the former catchline, which read "Title of act"; substituted "Chapter 26, Article 1 NMSA 1978" for "This act"; and inserted "Device."

**Objective of article,** in general, is to help establish a closed regulatory system for the legitimate handlers of controlled drugs. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 25 Am. Jur. 2d Drugs, Narcotics, and Poisons §§ 1, 2, 8, 9, 10, 14, 15, 17, 19, 33, 69, 72, 75, 76, 98, 100, 130, 141, 191, 206.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion, 58 A.L.R.4th 7.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning cosmetics and other personal care products, 58 A.L.R.4th 40.

Products liability: mascara and other eye cosmetics, 63 A.L.R.4th 105.

Products liability of endorser, trade association, certifier, or similar party who expresses approval of product, 1 A.L.R.5th 431.

28 C.J.S. Supp. Drugs and Narcotics §§ 1 to 9.

## 26-1-2. Definitions.

As used in the New Mexico Drug, Device and Cosmetic Act:

A. "board" means the board of pharmacy or its duly authorized agent;

B. "person" includes an individual, partnership, corporation, association, institution or establishment;

C. "biological product" means any of the following that is applicable to the prevention, treatment or cure of a disease or condition of human beings:

(1) a virus;

(2) a therapeutic serum;

(3) a toxin;

(4) an antitoxin;

(5) a vaccine;

(6) blood;

(7) a blood component or derivative;

(8) an allergenic product;

(9) a protein, except any chemically synthesized polypeptide;

(10) a product that is analogous to any of the products listed in Paragraphs (1) through (9) of this subsection; or

(11) arsphenamine, a derivative of arsphenamine or any other trivalent organic arsenic compound;

D. "biosimilar" or "biosimilarity" means, in reference to a biological product that the federal food and drug administration has licensed, that:

(1) the biological product is highly similar to the reference product notwithstanding minor differences in clinically inactive components; and

(2) there are no clinically meaningful differences between the biological product and the reference product in terms of the safety, purity and potency of the product;

E. "controlled substance" means a drug, substance or immediate precursor enumerated in Schedules I through V of the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978];

F. "drug" means articles:

(1) recognized in an official compendium;

(2) intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in humans or other animals and includes the domestic animal biological products regulated under the federal Animal Virus, Serum, Toxin, Antitoxin Act, 37 Stat 832-833, 21 U.S.C. 151-158, and the biological products applicable to humans regulated under Federal 58 Stat 690, as amended, 42 U.S.C. 216, Section 351, 58 Stat 702, as amended, and 42 U.S.C. 262;

(3) other than food, that affect the structure or any function of the human body or the bodies of other animals; and

(4) intended for use as a component of Paragraph (1), (2) or (3) of this subsection, but "drug" does not include devices or their component parts or accessories;

G. "dangerous drug" means a drug, other than a controlled substance enumerated in Schedule I of the Controlled Substances Act, that because of a potentiality for harmful effect or the method of its use or the collateral measures necessary to its use is not safe except under the supervision of a practitioner licensed by law to direct the use of such drug and hence for which adequate directions for use cannot be prepared. "Adequate directions for use" means directions under which the layperson can use a drug or device safely and for the purposes for which it is intended. A drug shall be dispensed only upon the prescription or drug order of a practitioner licensed by law to administer or prescribe the drug if it:

(1) is a habit-forming drug and contains any quantity of a narcotic or hypnotic substance or a chemical derivative of such substance that has been found under the federal act and the board to be habit forming;

(2) because of its toxicity or other potential for harmful effect or the method of its use or the collateral measures necessary to its use is not safe for use except under the supervision of a practitioner licensed by law to administer or prescribe the drug;

(3) is limited by an approved application by Section 505 of the federal act to the use under the professional supervision of a practitioner licensed by law to administer or prescribe the drug;

(4) bears the legend: "Caution: federal law prohibits dispensing without prescription.";

(5) bears the legend: "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."; or

(6) bears the legend "Rx only";

H. "counterfeit drug" means a drug that is deliberately and fraudulently mislabeled with respect to its identity, ingredients or sources. Types of such pharmaceutical counterfeits may include:

(1) "identical copies", which are counterfeits made with the same ingredients, formulas and packaging as the originals but not made by the original manufacturer;

(2) "look-alikes", which are products that feature high-quality packaging and convincing appearances but contain little or no active ingredients and may contain harmful substances;

(3) "rejects", which are drugs that have been rejected by the manufacturer for not meeting quality standards; and

(4) "relabels", which are drugs that have passed their expiration dates or have been distributed by unauthorized foreign sources and may include placebos created for late-phase clinical trials;

I. "device", except when used in Subsection R of this section and in Subsection G of Section 26-1-3, Subsection L and Paragraph (4) of Subsection A of Section 26-1-11 and Subsection C of Section 26-1-24 NMSA 1978, means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article, including any component, part or accessory, that is:

(1) recognized in an official compendium;

(2) intended for use in the diagnosis of disease or other conditions or in the cure, mitigation, treatment or prevention of disease in humans or other animals; or

(3) intended to affect the structure or a function of the human body or the bodies of other animals and that does not achieve any of its principal intended purposes through chemical action within or on the human body or the bodies of other animals and that is not dependent on being metabolized for achievement of any of its principal intended purposes;

J. "prescription" means an order given individually for the person for whom prescribed, either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission, or indirectly by means of a written order signed by the prescriber, and bearing the name and address of the prescriber, the prescriber's license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use and the date of issue;

K. "practitioner" means a certified advanced practice chiropractic physician, physician, doctor of oriental medicine, dentist, veterinarian, euthanasia technician, certified nurse practitioner, clinical nurse specialist, pharmacist, pharmacist clinician, certified nurse-midwife, physician assistant, prescribing psychologist, dental hygienist, optometrist, naturopathic doctor or other person licensed or certified to prescribe and administer drugs that are subject to the New Mexico Drug, Device and Cosmetic Act. "Practitioner" also means a registered lay midwife licensed by the department of health who is certified or licensed in accordance with department of health rules to procure, carry and administer drugs that are subject to the New Mexico Drug, Device and Cosmetic Act;

L. "cosmetic" means:

(1) articles intended to be rubbed, poured, sprinkled or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance; and

(2) articles intended for use as a component of any articles enumerated in Paragraph (1) of this subsection, except that the term shall not include soap;

M. "interchangeable biological product" means a biological product that the federal food and drug administration has licensed and:

(1) has determined that the biological product is biosimilar to the reference product and can be expected to produce the same clinical result as the reference product in any given patient;

(2) for a biological product that is administered more than once to an individual and:

(a) has determined to have been administered more than once to the individual; or

(b) for which the risk in terms of safety or diminished efficacy of alternating or switching between use of the biological product and the reference product is not greater than the risk of using the reference product without alternation or switching; or

(3) has determined to be therapeutically equivalent as set forth in the latest edition or supplement to the federal food and drug administration's approved drug products with therapeutic equivalence evaluations;

N. "official compendium" means the official United States pharmacopeia and national formulary or the official homeopathic pharmacopoeia of the United States or any supplement to either of them;

O. "label" means a display of written, printed or graphic matter upon the immediate container of an article. A requirement made by or under the authority of the New Mexico Drug, Device and Cosmetic Act that any word, statement or other information appear on the label shall not be considered to be complied with unless the word, statement or other information also appears on the outside container or wrapper, if any, of the retail package of the article or is easily legible through the outside container or wrapper;

P. "immediate container" does not include package liners;

Q. "labeling" means all labels and other written, printed or graphic matter:

(1) on an article or its containers or wrappers; or

(2) accompanying an article;

R. "misbranded" means a label to an article that is misleading. In determining whether the label is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device or any combination of the foregoing, but also the extent to which the label fails to reveal facts material in the light of such representations or material with respect to consequences that may result from the use of the article to which the label relates under the conditions of use prescribed in the label or under such conditions of use as are customary or usual;

S. "advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of drugs, devices or cosmetics;

T. "antiseptic", when used in the labeling or advertisement of an antiseptic, shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be or represented as an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder or such other use as involves prolonged contact with the body;

U. "new drug" means a drug:

(1) the composition of which is such that the drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and efficacy of drugs, as safe and effective for use under the conditions prescribed, recommended or suggested in the labeling thereof; or

(2) the composition of which is such that the drug, as a result of investigation to determine its safety and efficacy for use under such conditions, has become so recognized, but that has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions;

V. "contaminated with filth" applies to a drug, device or cosmetic not securely protected from dirt, dust and, as far as may be necessary by all reasonable means, from all foreign or injurious contaminations, or a drug, device or cosmetic found to contain dirt, dust, foreign or injurious contamination or infestation;

W. "selling of drugs, devices or cosmetics" shall be considered to include the manufacture, production, processing, packing, exposure, offer, possession and holding of any such article for sale and the sale and the supplying or applying of any such article in the conduct of a drug or cosmetic establishment;

X. "color additive" means a material that:

(1) is a dye, pigment or other substance made by a process of synthesis or similar artifice or extracted, isolated or otherwise derived, with or without intermediate or final change of identity, from a vegetable, mineral, animal or other source; or

(2) when added or applied to a drug or cosmetic or to the human body or a part thereof, is capable, alone or through reaction with other substances, of imparting color thereto; except that such term does not include any material that has been or hereafter is exempted under the federal act;

Y. "federal act" means the Federal Food, Drug, and Cosmetic Act;

Z. "restricted device" means a device for which the sale, distribution or use is lawful only upon the written or oral authorization of a practitioner licensed by law to administer, prescribe or use the device and for which the federal food and drug administration requires special training or skills of the practitioner to use or prescribe. This definition does not include custom devices defined in the federal act and exempt from performance standards or premarket approval requirements under Section 520(b) of the federal act;

AA. "prescription device" means a device that, because of its potential for harm, the method of its use or the collateral measures necessary to its use, is not safe except under the supervision of a practitioner licensed in this state to direct the use of such device and for which "adequate directions for use" cannot be prepared, but that bears the label: "Caution: federal law restricts this device to sale by or on the order of a

_____", the blank to be filled with the word "physician", "physician assistant", "certified advanced practice chiropractic physician", "doctor of oriental medicine", "dentist", "veterinarian", "euthanasia technician", "certified nurse practitioner", "clinical nurse specialist", "pharmacist", "pharmacist clinician", "certified nurse-midwife", "dental hygienist", registered lay midwife, "optometrist" or "naturopathic doctor" or with the descriptive designation of any other practitioner licensed in this state to use or order the use of the device;

BB. "valid practitioner-patient relationship" means a professional relationship, as defined by the practitioner's licensing board, between the practitioner and the patient;

CC. "pedigree" means the recorded history of a drug;

DD. "drug order" means an order either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission or indirectly by means of a written order signed by the licensed practitioner or the practitioner's agent, and bearing the name and address of the practitioner and the practitioner's license classification and the name and quantity of the drug or device ordered for use at an inpatient or outpatient facility; and

EE. "reference product" means the single biological product against which a biosimilar was evaluated in its marketing application to the federal food and drug administration.

**History:** 1953 Comp., § 54-6-27, enacted by Laws 1967, ch. 23, § 2; 1971, ch. 245, § 2; 1972, ch. 84, § 43; 1977, ch. 117, § 1; 1987, ch. 270, § 2; 1997, ch. 240, § 1; 1997, ch. 244, § 1; 1997, ch. 253, § 2; 1999, ch. 298, § 1; 2001, ch. 50, § 1; 2002, ch. 100, § 1; 2005, ch. 152, § 1; 2008, ch. 9, § 3; 2008, ch. 44, § 4; 2009, ch. 102, § 1; 2011, ch. 113, § 1; 2013, ch. 157, § 1; 2015, ch. 131, § 6; 2017, ch. 48, § 1; 2019, ch. 11, § 1; 2019, ch. 244, § 14.

## ANNOTATIONS

**Cross references.** — For the Federal Food, Drug and Cosmetic Act, *see* 21 U.S.C.S. §§ 301 to 393.

For Section 505 of the federal act, *see* 21 U.S.C.S. § 355.

For Section 520(b) of the federal act, *see* 21 U.S.C.S. § 360j(b).

**2019 Multiple Amendments.** — Laws 2019, ch. 11, § 1 and Laws 2019, ch. 244, § 14, both effective June 14, 2019, enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2019, ch. 244, § 14, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2019, ch. 11, § 1 and Laws 2019, ch. 244, § 14 are

described below. To view the session laws in their entirety, *see* the 2019 session laws on *NMOneSource.com*.

The nature of the difference between the amendments is that Laws 2019, ch. 11, § 1, added registered lay midwives licensed by the department of health to the list of "practitioners" subject to all the privileges and responsibilities conferred by the New Mexico Drug, Device and Cosmetic Act, and made certain technical amendments, and Laws 2019, ch. 244, § 14, added "naturopathic doctor" within the definition of "practitioner", and included "naturopathic doctor" in the provision related to the use of a prescription device.

**Laws 2019, ch. 11, § 1,** effective June 14, 2019, added registered lay midwives licensed by the department of health to the list of "practitioners" subject to all the privileges and responsibilities conferred by the New Mexico Drug, Device and Cosmetic Act, and made certain technical amendments; in Subsection F, after "federal", deleted "Virus-Serum Toxin" and added "Animal Virus, Serum, Toxin, Antitoxin"; in Subsection K, added the last sentence of the subsection; in Subsection N, after "United States" deleted "pharmacopoeia" and added "pharmacopeia and"; and in Subsection AA, after "'dental hygienist'", added "'registered lay midwife'".

**Laws 2019, ch. 244, § 14,** effective June 14, 2019, added "naturopathic doctor" within the definition of "practitioner", and included "naturopathic doctor" in the provision related to the use of a prescription device; in Subsection F, Paragraph F(2), after "federal", deleted "Virus-Serum Toxin" and added "Animal Virus, Serum, Toxin, Antitoxin"; in Subsection K, after "optometrist", added "naturopathic doctor"; and in Subsection AA, after "'optometrist'", added "or 'naturopathic doctor'".

**The 2017 amendment,** effective June 16, 2017, defined "biosimilar", "biosimilarity", "interchangeable biological product", and "reference product", and rewrote the definition for "biological product"; deleted former Subsection C, which defined "biological product", added new Subsections C and D, and redesignated former Subsections D through K as Subsections E through L, respectively; added a new Subsection M and redesignated former Subsections L through BB as Subsections N through DD, respectively; in Subsection AA, after "'certified nurse-midwife'", deleted "or", and after "'dental hygienist'", added "or"; and added Subsection EE.

**The 2015 amendment,** effective June 19, 2015, included "optometrist" within the meanings of "practitioner" and "prescription device" as used in the New Mexico Drug, Device and Cosmetic Act; in Subsection J, after "dental hygienist", added "optometrist"; and in Subsection Y, after "'dental hygienist'", added "'optometrist'".

**The 2013 amendment,** effective June 14, 2013, added terms to allow pharmacists to fill a practitioner's drug order; in Subsection F, in the third sentence, after "upon the prescription", added "or drug order"; and added Subsection BB.

**The 2011 amendment,** effective June 17, 2011, in Subsection Y, permitted dental hygienists to order prescription devices.

**The 2009 amendment,** effective June 19, 2009, in Subsection J, added "euthanasia technician" and in Subsection Y, added "euthanasia technician".

**The 2008 amendment,** effective May 14, 2008, added "certified advanced practice chiropractic physician" in Subsection J and added "physician assistant" and "certified advanced practice chiropractic physician" in Subsection Y.

**The 2005 amendment,** effective June 17, 2005, redefined "counterfeit drug" in Subsection G to mean a drug that is deliberately and fraudulently mislabeled with respect to its identity, ingredients or sources and gives examples of counterfeits included in the definition; replaced "prescriber" with "a licensed practitioner or practitioner's agent" and provided that a prescription may include an order given by means of electronic transmission in the definition of "prescription" in Subsection I; added the definition of "valid practitioner-patient relationship" in Subsection Z to mean the relationship defined by the practitioner's licensing board; and added the definition of "pedigree" in Subsection AA to mean the recorded history of a drug.

**The 2002 amendment,** effective July 1, 2002, inserted "physician assistant, prescribing psychologist" in Subsection J.

**The 2001 amendment,** effective June 15, 2001, inserted "pharmacist" in the definition of "practitioner" in Subsection J and inserted "'pharmacist'" near the end of Subsection Y.

**The 1999 amendment,** effective June 18, 1999, deleted "but is not limited to" before "filterable viruses" in Subsection C(1), added Subsection F(6), added doctors of oriental medicine, certified nurse practitioners, clinical nurse specialists, and pharmacist clinicians to the definition of "practitioner" in Subsection J and to the list of practitioners allowed to use or order the use of prescription devices in Subsection Y.

**The 1997 amendment,** effective June 20, 1997, inserted "certified nurse-midwife" in Subsections J and Y and "or certified" following "licensed" in Subsection J, and made stylistic changes throughout the section.

**The 1987 amendment,** effective June 19, 1987, substituted "New Mexico Drug, Device and Cosmetic Act" for "New Mexico Drug and Cosmetic Act" in the introductory language and in Subsection J; in Subsection E deleted "Title 21 Part 600" from the end; in the third sentence in Subsections F(2) and F(3) inserted "or prescribe" following "administer"; in Subsection F(1) deleted "of pharmacy" following "board"; rewrote Subsection H; in Subsection K(2) inserted "enumerated in Paragraph (1) of this subsection"; in Subsection L inserted "national formulary or the" and deleted "official national formulary" preceding "or any supplement"; in Subsections S(1) and (2) inserted

"and efficacy"; in Subsection S(1) inserted "and effective"; added Subsections X and Y; and made minor stylistic changes throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew, 45 A.L.R.4th 777.

Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 A.L.R.4th 83.

What is "device" within the meaning of § 201(h) of Federal Food, Drug and Cosmetic Act (21 U.S.C.S. § 321(h)), 129 A.L.R. Fed. 343.

What is "new drug" within meaning of § 201(p) of Federal Food, Drug, and Cosmetic Act (21 U.S.C.S. § 321(p)), 133 A.L.R. Fed. 229.

## 26-1-3. Prohibited acts.

The following acts are prohibited:

A. the sale of any drug or device that is adulterated, misbranded or a counterfeit drug which is not a controlled substance;

B. the adulteration or misbranding of any drug or device;

C. the receipt or delivery in commerce of any drug or device that is adulterated, misbranded or a counterfeit drug which is not a controlled substance;

D. the dissemination of any false advertisement;

E. the giving of a false guaranty or undertaking, except by a person who relied on a guaranty or undertaking as attested by label or labeling from whom he received in good faith the drug or device for sale;

F. any act with respect to a drug or device when the act is done while the drug or device is held for sale and results in the drug or device being misbranded or adulterated;

G. the creation, sale, disposition, possession or concealment of any punch, die, plate, stone or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint, device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render the drug a counterfeit drug;

H. concealment, disposition or possession with intent to sell or preparation with intent to defraud of a counterfeit drug;

I. in the case of a dangerous drug distributed or offered for sale in this state, the failure of the manufacturer or repackager to transmit, to any practitioner licensed to administer the drug who makes a written request for information, true and correct copies of all printed matter which is required to be included in any package in which that drug is distributed or sold or such other printed matter as is approved under the federal act. Nothing in this subsection shall be construed to exempt any person from any labeling requirement imposed under other provisions of the New Mexico Drug, Device and Cosmetic Act [26-1-1 NMSA 1978] and the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978]; and

J. except as provided in Sections 26-3-1 through 26-3-3 NMSA 1978, dispensing or causing to be dispensed a different drug or brand of drug in place of the drug or brand of drug ordered or prescribed without the express permission in each case of the person ordering or prescribing.

**History:** 1953 Comp., § 54-6-28, enacted by Laws 1967, ch. 23, § 3; 1972, ch. 84, § 44; 1976, ch. 60, § 1; 1987, ch. 270, § 3.

**ANNOTATIONS**

**Cross references.** — For definitions, *see* 26-1-2 NMSA 1978.

For adulteration of drug or device, *see* 26-1-10 NMSA 1978.

For adulteration of cosmetics, *see* 26-1-25 NMSA 1978.

For penalties, *see* 26-1-26 NMSA 1978.

For the definition of "federal act", *see* 26-1-2W NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, deleted "or cosmetic" following "drug or device" throughout the section; in the last sentence in Subsection I inserted "Device"; in Subsection J substituted "Sections 26-3-1 through 26-3-3 NMSA 1978" for "Sections 54-6-28.1 through 54-6-28.3 NMSA 1953"; and made minor stylistic changes throughout the section.

## 26-1-3.1. Repealed.

**History:** 1978 Comp., § 26-1-3.1, enacted by Laws 1987, ch. 270, § 4; repealed Laws 2005, ch. 152, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2005, ch. 152, § 11, repealed 26-1-3.1 NMSA 1978, as enacted by Laws 1987, ch. 270, § 4, relating to other prohibited acts, effective June 30, 2007. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com.*

## 26-1-3.2. Prescription drug donation.

A. As used in this section:

(1) "clinic" means a facility licensed pursuant to Section 61-11-14 NMSA 1978 in which one or more licensed practitioners diagnose and treat patients and in which drugs are stored, dispensed or administered for the diagnosis and treatment of the facility's patients; provided that "clinic" does not include the privately owned practice of a licensed practitioner or group of licensed practitioners exempt under Section 61-11-22 NMSA 1978;

(2) "donor" means an individual who donates unused prescription drugs to a clinic or a participating practitioner for the purpose of redistribution to established patients of that clinic or practitioner;

(3) "participating practitioner" means a licensed practitioner who is authorized to prescribe drugs and who registers with the board, and is subject to rules promulgated by the board, to participate in the collection of donated drugs, prescribed for use by established patients of that practitioner and donated for the purpose of redistribution to established patients of that practitioner;

(4) "recipient" means an individual who voluntarily receives donated prescription drugs; and

(5) "tamper-evident" means a device or process that makes unauthorized access to protected pharmaceutical packaging easily detected.

B. Unused prescription drugs may be donated to a clinic or a participating practitioner and a clinic or a participating practitioner may accept and redistribute the donated prescription drugs in accordance with rules promulgated by the board.

C. The board shall promulgate rules to establish:

(1) procedures to allow the donation and redistribution of certain prescription drugs, including refrigerated drugs, that:

(a) ensure that the redistribution process is consistent with public health and safety standards; and

(b) exclude controlled substances.

(2) standards and procedures for accepting, storing, labeling and redistributing donated prescription drugs;

(3) standards and procedures for inspecting donated prescription drugs to determine that the packaging is tamper-evident and that the donated prescription drugs are unadulterated, safe and suitable for redistribution;

(4) a form to be signed by the recipient specifying:

(a) knowledge that the donor is not a pharmacist and took reasonable care of the donated prescription drug;

(b) knowledge that the donor is known to the clinic or the participating practitioner and that there is no reason to believe that the donated prescription drug was improperly handled or stored;

(c) that any person who exercises reasonable care in donating, accepting or redistributing pursuant to this section shall be immune from civil or criminal liability or professional disciplinary action of any kind for any related injury, death or loss; and

(d) that the immunity provided by this section shall not decrease or increase the civil or criminal liability of a drug manufacturer, distributor or dispenser that would have existed but for the donation;

(5) a form to be signed by the donor verifying that:

(a) the donated prescription drug has been properly stored and the container has not been opened or tampered with;

(b) the donated prescription drug has not been adulterated or misbranded; and

(c) the donor is voluntarily donating the prescription drug;

(6) a handling fee not to exceed twenty dollars ($20.00) that may be charged to the recipient by the clinic or the participating practitioner to cover the costs of inspecting, storing, labeling and redistributing the donated prescription drug; and

(7) any other standards deemed necessary by the board.

D. The board shall maintain and publish a current listing of clinics and participating practitioners.

E. Before redistributing donated prescription drugs, the clinic or the participating practitioner shall:

(1) comply with all applicable federal laws and the laws of the state that deal with the inspection, storage, labeling and redistribution of donated prescription drugs; and

(2) examine the donated prescription drug to determine that it has not been adulterated or misbranded and certify that the drug has been stored in compliance with the requirements of the product label.

F. Any person who exercises reasonable care in donating, accepting or redistributing prescription drugs pursuant to this section shall be immune from civil or criminal liability or professional disciplinary action of any kind for any related injury, death or loss.

G. The immunity provided by this section shall not decrease or increase the civil or criminal liability of a drug manufacturer, distributor or dispenser that would have existed but for the donation.

H. A manufacturer shall not be liable for failure to transfer or communicate product consumer information or the expiration date of the donated prescription drug pursuant to this section.

I. This section does not restrict the authority of an appropriate governmental agency to regulate or ban the use of any prescription drugs.

**History:** Laws 2011, ch. 119, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 119 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2011, 90 days after the adjournment of the legislature.

## 26-1-4. Power to enjoin violations.

In addition to the remedies provided the board is authorized to apply to the district court for, and the court shall have jurisdication [jurisdiction] upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any other person from violating any provision of Section 3 [26-1-3 NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act], irrespective of whether or not there exists an adequate remedy at law.

**History:** 1953 Comp., § 54-6-29, enacted by Laws 1967, ch. 23, § 4.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For warnings for minor violations, *see* 26-1-8 NMSA 1978.

For penalties generally, *see* 26-1-26 NMSA 1978.

**No authority to charge at board meeting and then collect fine.** — The pharmacy board has no authority to charge druggists or wholesalers at a meeting of the board and then set out and collect a fine for any violation or violations of the pharmacy laws at said meeting from said druggists or wholesalers. 1953 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

## 26-1-5. Penalty; exemptions.

No publisher, radio-broadcast licensee, or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor or seller of the article to which a false advertisement relates, shall be liable under this section [act] by reason of dissemination by him of such false advertisement, unless he has refused, on the request of the board, to furnish the board the name and post-office address of the manufacturer, packer, distributor, seller or advertising agency, who cause [caused] him to disseminate such advertisement.

**History:** 1953 Comp., § 54-6-30, enacted by Laws 1967, ch. 23, § 5.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

The words "this section" apparently refer to "this act," the New Mexico Drug, Device and Cosmetic Act, which is compiled as this article.

**Cross references.** — For definition of "advertisement", *see* 26-1-2Q NMSA 1978.

**No authority to charge at board meeting and then collect fine.** — The pharmacy board has no authority to charge druggist or wholesalers at a meeting of the board and then set out and collect a fine for any violation or violations of the pharmacy laws at said meeting from said druggists or wholesalers. 1953 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

## 26-1-6. Detection of drugs, devices or cosmetic believed adulterated, misbranded or counterfeit; condemnation; destruction or correction of defect; forfeiture and sale.

A. Whenever an authorized agent of the board has probable cause to believe that any drug, device or cosmetic is adulterated, misbranded or counterfeit, he shall affix to such article appropriate marking, giving notice that the article is suspected of being adulterated, misbranded or counterfeit and has been detained or embargoed, and warning all persons not to remove or dispose of such article until permission for removal or disposal is given by the agent or the court. It is unlawful for any person to remove or dispose of such detained or embargoed article without such permission.

B. When an article detained or embargoed has been found by the agent to be adulterated, misbranded or counterfeit he shall petition the judge of the district court in whose jurisdiction the article is detained or embargoed for a libel for condemnation of such article. When the agent has found that an article so detained or embargoed is not adulterated, misbranded or counterfeit he shall remove the marking.

C. If the court finds that a detained or embargoed article is adulterated or misbranded or counterfeit, the article shall, after entry of the decree, be destroyed at the expense of the claimant under the supervision of the agent, and all court costs and fees, and storage and other proper expenses shall be taxed against the claimant of the article or his agent. However, when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court, after entry of the decree and after costs, fees and expenses have been paid and a sufficient bond has been executed, conditioned that the article shall be so labeled or processed, may by order direct that the article be delivered to the claimant for labeling or processing under the supervision of an agent of the board. The expense of the supervision shall be paid by the claimant. The bond shall be returned to the claimant of the article on representation to the court by the board that the article is no longer in violation of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act] and that the expenses of the supervision have been paid.

D. The following may be seized by a duly authorized law enforcement official of the state whenever he has reasonable grounds to believe they are:

(1) a drug other than a controlled substance, that is counterfeit;

(2) a container of a counterfeit drug;

(3) any punch, die, plate, stone, labeling, container or other thing used or designed for use in making a counterfeit drug or drugs.

E. When an article, equipment or other thing is seized under Section 6D [26-1-6D NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act], the proceedings shall be brought in the name of the state by the

prosecuting attorney of the county in which the article was seized, and the libel shall be verified by a duly authorized agent of the state in a manner required by the law of this state. The libel shall describe the merchandise, state its location, state the name of the person in actual possession, state the name of the owner, if known to the duly authorized agent of the state, allege the essential elements of the violation which is claimed to exist and shall conclude with a prayer of due process to enforce the forfeiture. Upon the filing of libel the court shall properly cause process to issue to the authorized law enforcement official commanding him to seize the goods described in the libel and to hold the same for further order of the court. The authorized law enforcement official shall at the time of seizure serve a copy of said process upon the owner of said merchandise. Such service may be made personally, by mail or by publication according to the rules governing the service of civil process in this state. At the expiration of twenty days after such seizure, if no claimant has appeared to defend the libel, the court shall order the authorized law enforcement official to dispose of said merchandise.

F. Any person having an interest in the alleged article, equipment or other thing proceeded against, or any person against whom a civil or criminal liability would exist if said merchandise is in violation of Section 3 [26-1-3 NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act] may, within twenty days following the authorized law enforcement official's seizure, appear and file answer or demurrer to the libel. The answer or demurrer shall allege the interest or liability of the party filing it. In all other respects the issue shall be made up as in other civil actions.

G. Any article, equipment or other thing condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds, if sold, less the legal costs and charges, shall be paid to the general fund; but such article, equipment or other thing shall not be sold under such decree contrary to provisions of the New Mexico Drug and Cosmetic Act [New Mexico Drug Device and Cosmetic Act]. Whenever in any proceedings under this section the condemnation of any equipment or other thing, other than a drug, is decreed, the court shall allow the claim of any claimant, to the extent of such claimant's interest, for remission or mitigation of such forfeiture if such claimant proves to the satisfaction of the court that he has not committed or caused to be committed any prohibited act referred to in this section and has no interest in any drug referred to therein; that he has an interest in such equipment or other thing as owner or lienor or otherwise, acquired by him in good faith; and that he at no time had any knowledge or reason to believe that such equipment or other thing was being or would be used in, or to facilitate, the violation of the laws of this state relating to counterfeit drugs.

H. When a decree of condemnation is entered against the article, equipment or other thing, court costs and fees and storage and other proper expenses may be awarded against the person, if any, intervening as claimant of the article.

**History:** 1953 Comp., § 54-6-31, enacted by Laws 1967, ch. 23, § 6; 1971, ch. 241, § 1; 1972, ch. 84, § 45.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "counterfeit drug", *see* 26-1-2G NMSA 1978.

For definition of "misbranded", *see* 26-1-2P NMSA 1978.

For adulteration, *see* 26-1-10 and 26-1-25 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 2 C.J.S. Adulteration §§ 3 to 5.

## 26-1-7. Attorney general or district attorney to institute prosecutions.

It is the duty of the attorney general or the various district attorneys of this state to whom the board reports any violation of the New Mexico Drug, Device and Cosmetic Act to cause appropriate proceedings to be instituted in the proper courts without delay and to be prosecuted in the manner required by law.

**History:** 1953 Comp., § 54-6-32, enacted by Laws 1967, ch. 23, § 7; 2005, ch. 152, § 2.

**ANNOTATIONS**

**Cross references.** — For duties generally of attorney general, *see* 8-5-2 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, deleted the provision that requires the board to permit the person against whom criminal proceedings are contemplated to present his or her views to the board before a violation is reported to the district attorney.

**No authority to charge at board meeting and then collect fine.** — The pharmacy board has no authority to charge druggist or wholesalers at a meeting of the board and then set out and collect a fine for any violation or violations of the pharmacy laws at said meeting from said druggists or wholesalers. 1953 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

## 26-1-8. Minor violations of act; warnings authorized.

Nothing in the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] shall be construed as requiring the board to report for the institution of proceedings, minor violations of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act], whenever the board believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning.

**History:** 1953 Comp., § 54-6-33, enacted by Laws 1967, ch. 23, § 8.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

## 26-1-9. Addition of poisonous or deleterious substances; color additives.

A. The board may adopt regulations authorizing color additives.

B. Any added poisonous or deleterious substance or any color additive, shall with respect to any particular use or intended use be deemed unsafe for the purpose of application of Section 10A [26-1-10 NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] with respect to any drug or device or Section 25A [26-1-25 NMSA 1978] of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] with respect to any cosmetic unless there is in effect a regulation pursuant to Subsection C of this section limiting the quantity of such substance, and the use or intended use of such substance conform [conforms] to the terms prescribed by such regulation. While such regulation relating to such substance is in effect, drug or cosmetic shall not, by reason of bearing or containing such substance in accordance with the regulation be considered adulterated within the meaning of Section 10 or Section 25 of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act].

C. The board, whenever public health or other considerations in the state so require, is authorized to adopt, amend or repeal regulations whether or not in accordance with regulations promulgated under the federal act, prescribing the conditions under which a color additive may be safely used and exemptions where such color additive is to be used solely for investigational or experimental purposes, upon its own motion or upon the petition of any interested party requesting that such a regulation be established, and it shall be incumbent upon the petitioner to establish by data submitted to the board of pharmacy that a necessity exists for such regulation, and that its effect will not be detrimental to public health. If the data furnished by the petitioner is not sufficient to allow the board to determine whether such regulation should be promulgated, the board may require additional data to be submitted and failure to comply with the request shall be sufficient grounds to deny the request. In adopting, amending or repealing

regulations relating to such substances, the board shall consider among other relevant factors, the following which the petitioner, if any, shall furnish:

(1) the name and all pertinent information concerning such substance including where available, its chemical identity and composition, a statement of conditions of the proposed use, including directions, recommendations and suggestions and including specimens of proposed labeling, all relevant data bearing on the physical or other technical effect and the quantity required to produce such effect;

(2) the probable composition of, or the relevant exposure from the article and of any substance formed in or on a drug or cosmetic resulting from the use of such substance;

(3) safety factors which, in the opinion of experts qualified by scientific training and experience to evaluate the safety of such substances for the use or uses for which they are proposed to be used, are generally recognized as appropriate for the use of animal experimentation data;

(4) the availability of any needed practicable methods of analysis for determining the identity and quantity of:

(a) such substance in or on an article;

(b) any substance formed in or on such article because of the use of such substance; and

(c) the pure substance and all intermediates and impurities; and

(5) facts supporting a contention that the proposed use of such substance will serve a useful purpose.

**History:** 1953 Comp., § 54-6-34, enacted by Laws 1967, ch. 23, § 9.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For the definition of "federal act", *see* 26-1-2W NMSA 1978 and notes thereto.

## 26-1-10. Drug or device adulteration.

A drug or device shall be deemed to be adulterated:

A. if it consists in whole or in part of any filthy, putrid or decomposed substance; or if it has been produced, prepared, packed or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or if it is a drug and the methods used in, or the facilities of controls used for, its manufacture, processing, packing or holding do not conform to or are not operated or administered in conformity with current good manufacturing practice to assure that such drug meets the requirements of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] as to safety and has the identity and strength, and meets the quality and purity characteristics which it purports or is represented to possess; or if it is a drug and its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or if it is a drug and it bears or contains for purposes of coloring only a color additive which is unsafe within the meaning of the federal act or it is a color additive the intended use of which in drugs is for the purposes of coloring only, and is unsafe within the meaning of the federal act;

B. if it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality and purity shall be made in accordance with the tests or methods of assay set forth in such compendium or in the absence of or inadequacy of such tests or methods of assay, those prescribed under the authority of the federal act. No drug defined in an official compendium shall be deemed to be adulterated under this paragraph because it differs from the standard of strength, quality or purity therefor set forth if such standard is plainly stated on its label. Whenever a drug is recognized both in the United State [States] Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not those of the United States Pharmacopoeia;

C. if it is not subject to the provisions of Subsection B of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess; or

D. if it is a drug and any substance has been mixed or packed therewith so as to reduce its quality or strength; or substituted wholly or in part therefor.

**History:** 1953 Comp., § 54-6-35, enacted by Laws 1967, ch. 23, § 10.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "contaminated with filth", *see* 26-1-2T NMSA 1978.

For definition of "color additive", *see*26-1-2V NMSA 1978.

For definition of "federal act", *see* 26-1-2W NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 2 C.J.S. Adulteration § 2; 28 C.J.S. Drugs and Narcotics § 9.

## 26-1-11. Drug or device; misbranding.

A. A drug or device shall be deemed to be misbranded:

(1) if its labeling is false or misleading in any particular;

(2) if in package form, unless it bears a label containing the name and place of the business of the manufacturer, packer or distributor and an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided that reasonable variations shall be permitted and exemptions as to small packages shall be allowed in accordance with regulations prescribed by the board or issued under the federal act;

(3) if it is a drug subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 U.S.C. Section 353, which provisions describe those substances commonly referred to as "legend drugs", and if the drug is in package form, unless it bears a label on its immediate container, and on any outer container if such there be, including the name and place of the business of the manufacturer of the finished dosage form and the name and place of business of the packer or distributor and an accurate statement of the quantity of the contents in terms of weight, measure or numerical count;

(4) if any word, statement or other information required by or under authority of the New Mexico Drug, Device and Cosmetic Act to appear on the label or labeling is not prominently placed with such conspicuousness, as compared with other words, statements, designs or devices in the labeling, and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

(5) if it is for use by man and contains any quantity of a narcotic or hypnotic substance or any chemical derivative of such substance, which derivative after investigation has been found to be and designated as habit-forming by regulations

issued pursuant to Section 502(d) or 511 of the federal act, unless its label bears the name and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning - May be habit-forming" and meets labeling requirements of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970; or

(6) if it is a drug, unless the label bears, to the exclusion of any other nonproprietary name except the applicable systematic chemical name or the chemical formula, the established name, as defined in this section, of the drug, and in case it is fabricated from two or more active ingredients, the established name and quantity of each active ingredient, including the kind and quantity or proportion of any alcohol and also including the established name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, antipyrine, amidropyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glycosides, mercury, ouabain, strophanthin, strychnine, thyroid or any derivative or preparation of any such substances contained therein; provided that the requirements for stating the quantity of the active ingredients, other than the quantity of those specifically named in this section, shall apply only to prescription drugs; provided, further, that to the extent that compliance with the requirements of this section is impracticable, exemptions shall be allowed under regulations promulgated by the board or under the federal act.

B. As used in this section, the term "established name" with respect to a drug or ingredient means:

(1) the applicable official name designated pursuant to Section 508 of the federal act; or

(2) if there is no such name and such drug or such ingredient is an article recognized in an official compendium, then the official title in such compendium or if neither applies, then the common or usual name, if any, of such drug or of such ingredient; provided that where an article is recognized in the United States pharmacopoeia and in the homeopathic pharmacopoeia under different official titles, the official title used in the United States pharmacopoeia shall apply unless it is labeled and offered for sale as a homeopathic drug, in which case the official title used in the homeopathic pharmacopoeia shall apply.

C. A drug or device shall be deemed to be misbranded unless its labeling bears adequate directions for use and such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage or methods or duration of administration or application, in such manner and form as are necessary for the protection of users; provided that where adequate directions for use as applied to any drug or device are not necessary for the protection of the public health, the board shall promulgate regulations exempting such drug or device from such requirements; provided, further, that articles exempted under regulations issued under Section 502(f) of the federal act may also be exempt.

D. A drug or device shall be deemed to be misbranded if it purports to be a drug the name of which is recognized in an official compendium unless it is packed and labeled as prescribed therein; provided that the method of packing may be modified with the consent of the board. Whenever a drug is recognized in both the United States pharmacopoeia and the homeopathic pharmacopoeia of the United States, it shall be subject to the requirements of the United States pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the homeopathic pharmacopoeia of the United States and not those of the United States pharmacopoeia; provided, further, that in the event of inconsistency between the requirements of this subsection and those of Paragraph (6) of Subsection A of this section as to the name by which the drug or its ingredients shall be designated, the requirements of Paragraph (6) of Subsection A of this section shall prevail.

E. A drug or device shall be deemed to be misbranded if it has been found by the board or under the federal act to be a drug liable to deterioration unless it is packaged in such form and manner and its label bears the statement of such precautions as the regulations issued by the board or under the federal act require as necessary for the protection of public health. No regulation shall be established for any drug recognized in an official compendium until the board has informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body has failed within a reasonable time to prescribe such requirements.

F. A drug or device shall be deemed to be misbranded if it is a drug and its container is so made, formed or filled as to be misleading or if it is an imitation of another drug or if it is offered for sale under the name of another drug or if it bears a copy, counterfeit or colorable imitation of a trademark, label, container or identifying name or design of another drug.

G. A drug or device shall be deemed to be misbranded if it is dangerous to health when used in the dosage or with the frequency or duration prescribed, recommended or suggested in the labeling.

H. A drug or device shall be deemed to be misbranded if it is or purports to be or is represented as a drug composed wholly or partly of insulin unless it is from a batch with respect to which a certificate or release has been issued pursuant to Section 506 of the federal act and such certificate or release is in effect with respect to such drug.

I. A drug or device shall be deemed to be misbranded if it is or purports to be or is represented as a drug composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin or any other antibiotic drug or any derivative thereof unless it is from a batch with respect to which a certificate or release has been issued pursuant to Section 507 of the federal act and such certificate or release is in effect with respect to such drug; provided that this subsection shall not apply to any drug or class of drugs exempted by regulations promulgated under Section

507(c) or (d) of the federal act. For the purpose of this subsection, the term "antibiotic drug" means any drug intended for use by man containing any quantity of any chemical substance which is produced by a microorganism and which has the capacity to inhibit or destroy microorganisms in dilute solution, including the chemically synthesized equivalent of any such substance.

J. A drug or device shall be deemed to be misbranded if it is a color additive, the intended use of which in or on drugs is for the purpose of coloring only, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive, prescribed under the provisions of Subsection C of Section 26-1-9 NMSA 1978 or of the federal act.

K. A drug or device shall be deemed to be misbranded, in the case of any dangerous drug distributed or offered for sale in this state, unless the manufacturer, packer, distributor or retailer thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer or distributor or retailer with respect to that drug a true statement of:

(1) the established name as defined in Paragraph (6) of Subsection A of this section;

(2) the formula showing quantitatively each ingredient of the drug to the extent required for labels under Section 502(e) of the federal act; and

(3) such other information in brief summary relating to side effects and contraindications as are required in regulations issued under the federal act.

L. A drug or device shall be deemed to be misbranded if a trademark, trade name or other identifying mark, imprint or device of another or any likeness of the foregoing has been placed thereon or upon its container with intent to defraud.

M. Drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled or repacked in substantial quantities at establishments other than those where originally packaged in accordance with requirements of the New Mexico Drug, Device and Cosmetic Act shall be deemed to be misbranded unless such drugs or devices are being delivered, manufactured, processed, labeled, repacked or otherwise held in compliance with regulations issued by the board or under the federal act.

N. A dangerous drug, except for drugs declared dangerous pursuant to Subsection B of Section 26-1-18 NMSA 1978, shall be deemed to be misbranded if, at any time prior to dispensing, its label fails to bear either of the following legends:

(1) "Caution: federal law prohibits dispensing without prescription."; or

(2) "RX only".

**History:** 1953 Comp., § 54-6-36, enacted by Laws 1967, ch. 23, § 11; 1972, ch. 84, § 46; 1975, ch. 103, § 1; 1999, ch. 298, § 2.

**ANNOTATIONS**

**Cross references.** — For definition of "misbranded", *see* 26-1-2 NMSA 1978.

For the definition of "federal act", *see* 26-1-2W NMSA 1978.

For the federal Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

**The 1999 amendment,** effective June 18, 1999, substituted "New Mexico Drug, Device and Cosmetic Act" for "New Mexico Drug and Cosmetic Act" in Subsections A(4) and M, added "A drug or device shall be deemed to be misbranded" to the beginning of Subsections C to L, substituted "Section 507 of" for "Section 507 or" in Subsection I, substituted "Subsection C of Section 26-1-9 NMSA 1978" for "Section 9C of the New Mexico Drug and Cosmetic Act" in Subsection J, substituted "shall be deemed to be misbranded unless such" for "provided, that such" in Subsection M, and inserted "except for drugs declared dangerous pursuant to Subsection B of Section 26-1-18 NMSA 1978," and rewrote Subsection N, adding the exception near the beginning of the subsection and adding the legend, "RX only".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 28 C.J.S. Drugs and Narcotics § 9.

## 26-1-12. False advertising.

A. An advertisement of a drug, device or cosmetic shall be deemed to be false if it is false or misleading in any particular.

B. For the purpose of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] the advertisement of a drug or device representing it to have any effect in albuminuria, appendicitis, arteriosclerosis, blood poison, bone disease, Bright's disease, cancer, carbuncles, cholecystitis, diabetes, diphtheria, dropsy, erysipelas, gallstones, heart and vascular diseases, high blood pressure, mastoiditis, measles, meningitis, mumps, nephritis, otitis media, paralysis, pneumonia, poliomyelitis (infantile paralysis), prostate gland disorders, pyelitis, scarlet fever, sexual impotence, sinus infection, small pox [smallpox], tuberculosis, tumors, typhoid, uremia, veneral [venereal] disease, shall also be deemed to be false, except that no advertisement not in violation of Subsection A shall be deemed to be false under this subsection if it is disseminated only to members of the pharmacy, medical, dental or veterinary profession or appears only in the scientific periodicals of those professions or is disseminated only for the purpose of public health education by persons not commercially interested, directly or indirectly, in the sale of such drugs or devices; provided, that whenever the board determines that an advance in medical science has made any type of self-medication safe as to any of the diseases named above, [the]

board shall by regulation authorize the advertisement of drugs having curative or therapeutic effect for such disease, subject to such conditions and restrictions as the board may deem necessary in the interests of public health; provided, that this subsection shall not be construed as indicating that self-medication for diseases other than those named herein is safe or efficacious.

C. In the case of any dangerous drug distributed or offered for sale in this state by a manufacturer, packer, distributor or retailer, all advertisement with respect to that drug shall contain a true statement of the established or official name, together with any trade or brand name; the formula as represented on the label, in the same order of listing and with all listed warnings and cautions; the dosage form and strength; such other information in brief summary relating to its use, side effects, contraindications and the name of the manufacturer, packer or distributor; provided, that no advertisement prepared in accordance with Section 502(n) of the federal act and disseminated only to practitioners and dispensers shall be in violation of this subsection.

**History:** 1953 Comp., § 54-6-37, enacted by Laws 1967, ch. 23, § 12.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "advertisement", *see* 26-1-2 Q NMSA 1978.

For the definition of "federal act", *see* 26-1-2W NMSA 1978.

## 26-1-13. Packaging and labeling requirements; proprietary preparations.

A. The principal display panel of an over-the-counter packaged drug or device shall bear as one of its principal features a statement of the identity of the commodity. The statement shall include the established name of the drug or the common name of the device and an accurate statement of the general pharmacological category of the drug or the principal intended action of the drug or device in terms meaningful to the layman.

B. In the case of an over-the-counter drug that is a mixture with no established name, a conspicuous enumeration of each active ingredient that is a mixture with no established name and a conspicuous enumeration of each active ingredient immediately followed by an accurate statement of the general pharmacological category of the ingredients or of its principal intended action in terms that are meaningful to the layman.

C. This section shall not apply to any drug or class of drugs exempted by regulations promulgated under the federal Fair Packaging and Labeling Act.

D. The label of an over-the-counter packaged drug or device shall bear a declaration of the net quantity of its contents.

E. Dangerous drugs or over-the-counter preparations subject to the federal Poison Prevention Packaging Act of 1970 shall meet the safety closure standards and regulations promulgated pursuant to the federal Poison Prevention Packaging Act of 1970.

**History:** 1953 Comp., § 54-6-38, enacted by Laws 1972, ch. 84, § 47.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1972, ch. 84, § 47 repealed 54-6-38, 1953 Comp., relating to depressant, stimulant and hallucinogenic drugs, and enacted a new section.

**Cross references.** — For the federal Fair Packaging and Labeling Act, *see* 15 U.S.C. § 1451 et seq.

For the federal Poison Prevention Packaging Act of 1970, *see* 15 U.S.C. § 1471.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Liability of manufacturer or seller for injury or death allegedly caused by failure to warn regarding danger in use of vaccine or prescription drug, 94 A.L.R.3d 748.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product-caused injury, 94 A.L.R.3d 1080.

Strict products liability: liability for failure to warn as dependent on defendant's knowledge of danger, 33 A.L.R.4th 368.

## 26-1-14. New drugs and devices; prerequisites to sale, delivery or giving away; exceptions.

A. No person shall sell, deliver, offer for sale, hold for sale or give away any new drug or device unless:

(1) an application has been approved for the drug and approval has not been withdrawn under Section 505 of the federal act;

(2) when the drug is not subject to the federal act, the drug has been tested and has been found to be safe for use under the conditions prescribed, recommended or suggested in the labeling, and, prior to selling or offering for sale, there has been filed

with the board an application setting forth full reports of investigations which have been made to show whether or not the drug is safe for use; a full list of the articles used as components of the drug; a full statement of the composition of the drug; a full description of the methods used in and the facilities and controls used for the manufacture, processing and packing of the drug; such samples of the drug and of the articles used as components of the drug as the board may require; and specimens of the labeling proposed to be used for the drug; or

(3) the device has met the requirements of classification, performance standards and premarket approval, where applicable, under Sections 513 through 520 of the federal act.

B. An application provided for in Paragraph (2) of Subsection A of this section shall become effective on the one hundred eightieth day after filing except that if the board finds, after due notice to the applicant and giving him an opportunity for a hearing, that the drug is not safe for the use under the conditions prescribed, recommended or suggested in the proposed labeling, it shall, prior to the effective date of application, issue an order refusing to permit the application to become effective.

C. An order refusing to permit an application under this section to become effective may be revoked by the board.

D. This section shall not apply:

(1) to a drug intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety of drugs, provided the drug is plainly labeled in compliance with the regulations issued by the board or pursuant to Section 505(i) or 507(d) of the federal act;

(2) to any drug which is subject to Subsection I of Section 26-1-11 NMSA 1978;

(3) to any device for use pursuant to the order of an individual practitioner qualified by law in this state to use or prescribe the device, which device:

(a) is not generally available in finished form for purchase or for dispensing upon prescription and is not offered through labeling or advertising by the manufacturer for commercial distribution;

(b) is intended for use by an individual patient named in the order of the prescribing practitioner and is to be made in a specific form for the patient or is intended to meet the special needs of the practitioner in the course of the practitioner's professional practice; and

(c) is not generally available to or generally used by other practitioners; or

(4) is exempt under Section 520(g) of the federal act for investigational use by experts qualified by scientific training and experience to test the safety and effectiveness of the device by controlled investigation and evaluation.

**History:** 1953 Comp., § 54-6-39, enacted by Laws 1967, ch. 23, § 14; 1977, ch. 117, § 2; 1987, ch. 270, § 5.

**ANNOTATIONS**

**Cross references.** — For definition of "new drug", *see* 26-1-2 NMSA 1978.

For the definition of "federal act", *see* 26-1-1W NMSA 1978.

For Sections 505, 507 and 513 through 520 of the federal act, *see* 21 U.S.C. §§ 355, 357 and 360c to 360j.

**The 1987 amendment,** effective June 19, 1987, inserted "or device" near the beginning of Subsection A; in Subsection A(1) deleted "with respect thereto" following "an application" and inserted "for the drug"; added Subsection A(3); in Subsection B inserted "Paragraph (2) of" near the beginning; in Subsection D(2) substituted "is subject to Subsection I of Section 26-1-11 NMSA 1978" for "is subject to Section 11I of the New Mexico Drug and Cosmetic Act"; added Subsections D(3) and (4); and made minor stylistic changes throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** What is "new drug" within meaning of § 201(p) of Federal Food, Drug, and Cosmetic Act (21 USCS § 321(p)), 133 A.L.R. Fed. 229.

## 26-1-15. Dangerous drugs; veterinary use; limitations.

A. A dangerous drug intended for veterinary use which is not safe for animal use except under the direct supervision of a licensed veterinarian and for which adequate directions for use cannot be prepared, shall bear the legend "CAUTION: federal law restricts this drug to use by or on the order of a licensed veterinarian" and the label shall meet the requirements of the federal act. Such drugs may be sold or distributed by a person possessing a limited license issued by the board under Subsection B of Section 61-11-14 NMSA 1978, on the order of a licensed veterinarian, provided adequate records of receipt and distribution are kept as required in the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act].

B. Drugs which are exempted by the federal act for veterinary use without a prescription shall be labeled to indicate that the drug is for veterinary use and the label shall meet the requirements of the federal act.

**History:** 1953 Comp., § 54-6-40, enacted by Laws 1972, ch. 84, § 48; 1973, ch. 217, § 1.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Repeals and reenactments.** — Laws 1972, ch. 84, § 48, repealed 54-6-40, 1953 Comp., relating to enumeration of dangerous drugs, and enacted a new 26-1-15 NMSA 1978.

**Cross references.** — For definition of dangerous drugs under the New Mexico Drug, Device and Cosmetic Act, *see* 26-1-2F NMSA 1978.

For definition of federal act, *see* 26-1-2W NMSA 1978.

## 26-1-16. Dangerous drugs; conditions for sale; prescription refilling; limitations.

A. It is unlawful for a person to sell, dispose of or possess any dangerous drugs, except:

(1) manufacturers, wholesalers or distributors, their agents or employees licensed by the board to ship dangerous drugs into the state; or

(2) distributors, wholesalers, hospitals, nursing homes, clinics or pharmacies and other authorized retailers of dangerous drugs in this state licensed by the board, and appropriate records of dangerous drugs receipt and disposition are kept. These records shall be open to inspection by any enforcement officer of this state.

B. Practitioners licensed in this state may prescribe, provide samples of and dispense any dangerous drug to a patient where there is a valid practitioner-patient relationship. A record of all such dispensing shall be kept showing the date the drug was dispensed and bearing the name and address of the patient to whom dispensed. It is the duty of every licensed physician, dentist, veterinarian, pharmacist or person holding a limited license issued under Subsection B of Section 61-11-14 NMSA 1978, when dispensing any dangerous drug, to mark on the dispensing container the name of the patient, the date dispensed, the name and address of the person dispensing the drug, the name and strength of the drug, expiration date where applicable, adequate directions for use and the prescription number when applicable. All official compendium requirements for the preservation, packaging, labeling and storage of dangerous drugs are applicable where drugs are held for dispensing to the public, whether by a pharmacy, clinic, hospital or practitioner.

C. Pharmacists are prohibited from selling or dispensing a dangerous drug except on prescription or drug order of a practitioner and except as such sale or possession is

authorized under Subsection A of this section. It is the duty of all pharmacists to keep an accurate record of all disposals, which record shall be open to inspection by an enforcement officer of this state.

D. No enforcement officer having knowledge by virtue of office of a prescription, order or record shall divulge such knowledge except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party.

E. It is unlawful, except as otherwise authorized under Subsection A of this section or the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] and except for the college of pharmacy of the university of New Mexico or a public health laboratory, for a person to possess any dangerous drug unless such substance has been dispensed to the person either directly by a practitioner or on a prescription.

F. All records required to be kept under the provisions of the New Mexico Drug, Device and Cosmetic Act shall be preserved for a period of three years, provided that records requirements do not apply to the administration of a drug to a patient upon whom the practitioner personally attends, and provided that records of controlled substances shall be kept in accordance with the provisions of the Controlled Substances Act.

G. A prescription shall not be filled:

(1) as a refill if it is marked by the issuing practitioner to indicate that the prescription is not to be refilled;

(2) except in compliance with the provisions of the Controlled Substances Act if the drug is a controlled substance;

(3) unless the fill is made in accordance with the provisions of this section; and

(4) when the practitioner does not indicate fill instructions on the original prescription calling for a dangerous drug, unless:

(a) the practitioner is contacted orally, by telephone or other means of communication for instruction; and

(b) if authorization to fill is given the pharmacist, the following information will be immediately transferred to the original prescription: 1) date; 2) name of person authorizing the fill; 3) pharmacist's initials; and 4) amount dispensed if different from the amount indicated on the original prescription.

H. Nothing in this section shall prevent the owner of livestock or the owner's consignee or their employees to be in possession of drugs for their use in performing routine, accepted livestock management practices in the care of livestock belonging to the owner, and the drugs are labeled as being restricted to animal use only; provided, that if such drugs bear the legend: "CAUTION: federal law restricts this drug to use by or on the order of a licensed veterinarian", the drugs may be used or distributed only as provided in Subsection A of Section 26-1-15 NMSA 1978.

I. When, on the original prescription calling for a dangerous drug that is not a controlled substance, a practitioner indicates a specific number of fills or a specific period of time during which a prescription may be filled, a drug may be filled the number of times or for the period of time that the prescription indicates if the following information is provided with the prescription:

(1) the date of fill;

(2) the initials of the pharmacist filling the prescription; and

(3) the amount of drug dispensed, if it differs from the amount called for on the original prescription.

J. A pharmacist may dispense a quantity not to exceed a ninety-day supply of a dangerous drug by combining valid fills when:

(1) an indication on the prescription or label does not specifically prohibit a combined fill; and

(2) the dangerous drug to be filled is not a controlled substance.

K. When the practitioner indicates on the original prescription calling for dangerous drugs that it may be filled "prn", the pharmacist may fill it within the limits of the dosage directions for a period of twelve months, provided the date of filling and the initials of the pharmacist are recorded on the original prescription. At the expiration of the twelve-month period, the practitioner must be contacted for a new prescription; provided that this is not to be construed to apply to those drugs regulated by the Controlled Substances Act.

L. The board may adopt and promulgate regulations to permit the use of computer systems for the storage and retrieval of prescriptions, records for the purpose of filling prescriptions, receipt records, drug distribution records, drug withdrawals from stock, drug compounding records, drug disposition records and drug disposal records.

M. As used in this section, "fill" means a dispensing of a drug for the first time or as a refill.

**History:** 1953 Comp., § 54-6-41, enacted by Laws 1967, ch. 23, § 16; 1972, ch. 84, § 49; 1973, ch. 217, § 2; 1979, ch. 41, § 1; 1987, ch. 270, § 6; 2005, ch. 152, § 3; 2013, ch. 157, § 2.

## ANNOTATIONS

**Cross references.** — For definition of "dangerous drugs", *see* 26-1-2 NMSA 1978.

**The 2013 amendment,** effective June 14, 2013, allowed pharmacists to fill a practitioner's drug order; in Subsection C, in the first sentence, after "prohibited from selling or", deleted "disposing of any" and added "dispensing a"; and added Subsections G through M.

**The 2005 amendment,** effective June 17, 2005, added wholesalers to the list of persons who may lawfully sell, dispose of or possess dangerous drugs in Subsections A(1) and (2); changed "physician" to "practitioner" in Subsection B; and authorized the board to adopt rules and regulations to permit the use of computers for the storage and retrieval of receipt records, drug distribution records drug withdrawals from stock, drug compounding records drug disposition records and drug disposal records Subsection G(5).

**The 1987 amendment,** effective June 19, 1987, rewrote Subsection B; deleted former Subsection F, relating to the duty of persons dispensing dangerous drugs to mark certain information on the dispensing container; redesignated subsequent subsections accordingly; in Subsection F inserted "Device" near the beginning and added the proviso at the end of the subsection; and made minor stylistic changes throughout the section.

**Denial of equal protection not substantiated.** — Since there are no New Mexico drug manufacturers, there is no factual basis for the claim that Subsection A(1) denies state residents equal protection. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Applicability of article.** — This article applies to legitimate handlers of controlled drugs, but also to others similarly situated who are not involved in the authorized use of such substances. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd in part*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

**Licensing of detailmen allowed.** — Reviewing courts overturn the administrative interpretation of statute by appropriate agencies only if they are clearly incorrect. Since detailmen handle controlled drugs and are part of the interstate drug shipment operation, even though they do not ship drugs themselves, the interpretation by the board of pharmacy of this section to allow licensing of detailmen is not clearly erroneous and will not be overturned by a reviewing court. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Methaqualone.** — The legislature has not specifically designated methaqualone (the generic name for quaalude) as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd in part*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

Section 30-31-22 NMSA 1978, and not this section, is the appropriate legislation under which defendants are to be prosecuted for allegedly unauthorized distribution of quaalude. *State v. Reams*, 98 N.M. 215, 647 P.2d 417 (1982).

**Requirements applicable to providing drug "samples".** — This section should not be construed as allowing a physician to provide a drug "sample" without complying with the recordkeeping and labeling requirements that apply to "dispensing". 1988 Op. Att'y Gen. No. 88-50.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Right of medical patient to obtain, or physician to prescribe, laetrile for treatment of illness - State cases, 5 A.L.R.4th 219.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

## 26-1-16.1. Opioids; requiring practitioners to obtain and review reports from the prescription monitoring program.

A. For purposes of this section:

(1) "opioid" means the class of drugs that includes the natural derivatives of opium, which are morphine and codeine, and related synthetic and semi-synthetic compounds that act upon opioid receptors;

(2) "practitioner" does not include a pharmacist, veterinarian or euthanasia technician;

(3) "prescription monitoring program" means a program that includes a centralized system to collect, monitor and analyze electronically, for Schedule II through V controlled substances, prescribing and dispensing data submitted by dispensers; and

(4) "Schedule II through V controlled substance" means a substance listed in Schedule II, III, IV or V pursuant to the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] or the federal controlled substances regulation, pursuant to 21 U.S.C. 812.

B. Before a practitioner prescribes or dispenses an opioid for the first time to a patient, the practitioner shall obtain and review a report from the state's prescription monitoring program for such patient for the previous twelve calendar months. If the

practitioner has access to a similar report from an adjacent state for the patient, the practitioner shall also obtain and review that report. The provisions of this subsection shall not apply to the prescription or dispensing of an opioid for a supply of four days or less.

C. A practitioner shall obtain and review a report from the state's prescription monitoring program and similar reports from an adjacent state, if any, no less than once every three months for each established patient for whom the practitioner continuously prescribes or dispenses opioids.

D. A practitioner shall document the receipt and review of reports required by this section in the patient's medical record.

E. Nothing in this section shall be construed to prevent a practitioner from obtaining and reviewing a report regarding a practitioner's patient from the state's prescription monitoring program or a similar report from another state with greater frequency than that required by this section, in accordance with the practitioner's professional judgment.

F. Nothing in this section shall be construed to require a practitioner to obtain a prescription monitoring report when prescribing an opioid to a patient in a nursing facility or in hospice care.

G. The professional licensing board of each category of practitioner that is licensed or otherwise authorized to prescribe or dispense an opioid shall promulgate rules to implement the provisions of this section. Nothing in this section shall be construed to prevent a professional licensing board from requiring by rule that practitioners obtain prescription monitoring program reports with greater frequency than that required by this section.

**History:** Laws 2016, ch. 46, § 1.

**ANNOTATIONS**

**Effective dates. —** Laws 2016, ch. 46, § 2 makes Laws 2016, ch. 46, § 1 effective January 1, 2017.

## 26-1-17. Testing laboratory.

The college of pharmacy of the university of New Mexico shall serve as the testing laboratory for samples collected for examination pursuant to the provisions of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act].

**History:** 1953 Comp., § 54-6-42, enacted by Laws 1967, ch. 23, § 17.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

## 26-1-18. Promulgating regulations; procedure.

A. The board may promulgate regulations for the efficient enforcement of the New Mexico Drug, Device and Cosmetic Act. The board shall conform the regulations promulgated under the New Mexico Drug, Device and Cosmetic Act, insofar as practical, with regulations promulgated under the federal act as defined in Section 26-1-2 NMSA 1978.

B. The board shall, by regulation, declare a substance a "dangerous drug" when necessary, and notification shall be sent to all registered pharmacies in the state within sixty days of the adoption of the regulation.

C. The board shall promulgate the requirements for a pedigree.

D. All regulations promulgated by the board shall be in accordance with the Uniform Licensing Act.

**History:** 1953 Comp., § 54-6-43, enacted by Laws 1972, ch. 84, § 50; 2005, ch. 152, § 6.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1972, ch. 84, § 50, repealed 54-6-43, 1953 Comp., relating to procedure for promulgating regulations, and enacted a new section.

**Cross references.** — For the definition of federal act, *see* 26-1-2 NMSA 1978 and notes thereto.

For the definition of "dangerous drug", *see* 26-1-2 NMSA 1978.

**The 2005 amendment,** effective June 17, 2005, added Subsection C to require the board to promulgate requirement for pedigree as defined in Section 26-1-2AA NMSA 1978.

**Due process not violated.** — The regulations propounded under this section and Section 30-31-11 NMSA 1978 of the Controlled Substances Act do not violate due process since New Mexico has a legitimate interest in the control of dangerous drugs sold or distributed in the state and New Mexico has not brought within the orbit of state power matters unrelated to any local interests. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Commerce clause not violated.** — Although the regulations adopted pursuant to this section and Section 30-31-11 NMSA 1978 of the Controlled Substances Act include a license fee to cover administrative costs, their primary purpose is the protection of the public from dangerous drugs, a purpose within the traditional definition of police power; and where the burden of a small fee does not outweigh the substantial state benefit derived from the control, and the regulations do not discriminate against interstate commerce since there are no drug manufacturers within the state, there is no violation of the commerce clause. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Licensing of detailmen allowed.** — Reviewing courts overturn the administrative interpretation of statute by appropriate agencies only if they are clearly incorrect. Since detailmen handle controlled drugs and are part of the interstate drug shipment operation, even though they do not ship drugs themselves, the interpretation by the board of pharmacy of Section 26-1-16 NMSA 1978 to allow licensing of detailmen is not clearly erroneous and will not be overturned by a reviewing court. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**In propounding regulations board of pharmacy need not make formal findings.** The only requirements which it must meet are that the public and the reviewing courts are informed as to the reasoning behind the regulation. The comments of the one board member suffice in this regard. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

**Methaqualone.** — The legislature has not specifically designated methaqualone as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd in part*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Right of medical patient to obtain, or physician to prescribe, laetrile for treatment of illness - State cases, 5 A.L.R.4th 219.

## 26-1-18.1. Prescription drug prior authorization protocols.

A. After January 1, 2014, a prescribing practitioner seeking prior authorization from a health insurer may use the uniform prior authorization form developed pursuant to Sections 2 [59A-2-9.8 NMSA 1978] and 3 [61-11-6.2 NMSA 1978] of this 2013 act.

B. As used in this section:

(1) "health insurer" means a health insurer; a nonprofit health service provider; a health maintenance organization; a managed care organization; or a provider service organization. "Health insurer" does not include:

(a) a person that delivers, issues for delivery or renews an individual policy intended to supplement major medical group-type coverages such as medicare supplement, long-term care, disability income, specified disease, accident-only, hospital indemnity or other limited-benefit health insurance policy;

(b) a physician or a physician group to which a health insurer has delegated financial risk for prescription drugs and that does not use a prior authorization process for prescription drugs; or

(c) a health insurer or its affiliated providers if the health insurer owns and operates its pharmacies and does not use a prior authorization process for prescription drugs; and

(2) "prescribing practitioner" means a person that is licensed or certified to prescribe and administer drugs that are subject to the New Mexico Drug, Device and Cosmetic Act.

**History:** Laws 2013, ch. 170, § 4.

**ANNOTATIONS**

**Effective dates.** — Laws 2013, ch. 170 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2013, 90 days after the adjournment of the legislature.

## 26-1-19. Power to make inspections and secure samples.

The board or its duly authorized agent shall have free access at all reasonable hours to any factory, warehouse or establishment in which drugs, devices or cosmetics are manufactured, processed, packed or held for introduction into commerce, or to enter any vehicle being used to transport or hold such drugs, devices or cosmetics in commerce, for the purpose of inspecting such factory, warehouse, establishment or vehicle to determine if any of the provisions of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] are being violated, and to secure samples or specimens of any drug, device or cosmetic after paying or offering to pay for such sample. It shall be the duty of the board to make or cause to be made examinations of samples secured under the provisions of this section to determine whether or not any provision of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] is being violated.

**History:** 1953 Comp., § 54-6-44, enacted by Laws 1967, ch. 23, § 19.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

## 26-1-20. Personnel.

The board shall employ such personnel for the administration and enforcement of the provisions of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] as may be necessary.

**History:** 1953 Comp., § 54-6-45, enacted by Laws 1967, ch. 23, § 20.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

## 26-1-21. Power of board to publish reports and disseminate information.

A. The board may cause to be published from time to time reports summarizing all judgments, decrees and court orders which have been rendered, including the nature of the charge and the disposition thereof.

B. The board may also cause to be disseminated such information regarding drugs, devices and cosmetics as the board deems necessary in the interest of the public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the board from collecting, reporting and illustrating the results of the investigations of the board.

**History:** 1953 Comp., § 54-6-46, enacted by Laws 1967, ch. 23, § 21.

**ANNOTATIONS**

**Generally.** — A statute such as this one authorizes or permits the pharmacy board to make public, through the pharmaceutical association drug store "El Boticario," an item pertaining to the sale of a legendary drug to a nondrug store, if a conviction or convictions have been obtained in the courts of the state of New Mexico, but not otherwise. 1953 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

The board is permitted and authorized to disseminate all reports and other information, and the fact that the firms, persons or agencies named in said item are published in an outside publication would not incriminate the board or agency mentioned in all cases where conviction or convictions have been obtained in the courts of this state, but not otherwise. 1953 Op. Att'y Gen. No. 53-5865 (opinion rendered under former law).

## 26-1-22. Unlawful means of obtaining dangerous drugs enumerated.

It shall be unlawful for any person to obtain or attempt to obtain any dangerous drug or to procure or attempt to procure the administration of any dangerous drugs other than a controlled substance:

A. by fraud, deceit, misrepresentation or subterfuge; or

B. by forgery or alteration of a prescription or of any written order; or

C. by the concealment of a material fact; or

D. by the use of a false name or the giving of a false name or the giving of a false address.

**History:** 1953 Comp., § 54-6-47, enacted by Laws 1967, ch. 23, § 22; 1972, ch. 84, § 51.

**ANNOTATIONS**

**Cross references.** — For definition of "dangerous drugs", *see* 26-1-2 NMSA 1978.

## 26-1-23. False statements; false pretenses; forgery of labels or prescriptions prohibited.

It shall be unlawful for any person to:

A. willfully make a false statement in any prescription, order, report or record required by the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act];

B. falsely assume the title of or represent himself to be a manufacturer, wholesaler, pharmacist, physician, dentist, veterinarian or other authorized person for the purpose of obtaining any of the dangerous drugs;

C. make or utter any false or forged label to a package containing any of the dangerous drugs; or

D. make or utter any false or forged prescription or false or forged written order for dangerous drugs other than controlled substances.

**History:** 1953 Comp., § 54-6-48, enacted by Laws 1967, ch. 23, § 23; 1972, ch. 84, § 52.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "prescription", *see* 26-1-2I NMSA 1978.

For definition of "label", *see* 26-1-2M NMSA 1978.

## 26-1-24. Cosmetics; misbranding.

A cosmetic shall be deemed to be misbranded:

A. if its labeling is false or misleading in any particular;

B. if in package form unless it bears a label containing:

(1) the name and place of business of the manufacturer, packer or distributor; and

(2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count; provided, that reasonable variations shall be permitted, and exemptions made for information pertaining to weight, measure or numerical count as to small packages, shall be established by regulations prescribed by the board;

C. if any word, statement or other information required by or under the authority of the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act] to appear on the label or labeling is not prominently placed thereon with such conspicuousness as compared with other words, statements, designs or devices, in the labeling, and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of the purchase and use;

D. if its container is so made, formed or filled as to be misleading; or

E. if it is a color additive, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive prescribed under the provisions of the federal act. This section shall not apply to packages of color

additives which, with respect to their use for cosmetics, are marketed and intended for use only in or on hair dyes bearing required label.

**History:** 1953 Comp., § 54-6-49, enacted by Laws 1967, ch. 23, § 24.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1987, ch. 270, § 8 provided that references to the New Mexico Drug and Cosmetic Act shall be construed as references to the New Mexico Drug, Device and Cosmetic Act.

**Cross references.** — For definition of "misbranded", *see* 26-1-2 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

## 26-1-25. Cosmetics; adulteration.

A cosmetic shall be deemed to be adulterated:

A. if it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling or advertisements thereof, or under such conditions of use as are customary or usual; provided, that this provision shall not apply to coal-tar dye, the label of which bears the following legend conspicuously displayed thereon: "CAUTION: This product contains ingredients which may cause skin irritations on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness," and the labeling of which bears adequate directions for such preliminary testing. For the purpose of this paragraph and Subsection E the term "hair dye" shall not include eyelash dyes or eyebrow dyes;

B. if it consists in whole or in part of any filthy, putrid or decomposed substance;

C. if it has been produced, prepared, packed or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

D. if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or

E. if it is not a hair dye, and it bears or contains a color additive which is unsafe within the meaning of the federal act.

**History:** 1953 Comp., § 54-6-50, enacted by Laws 1967, ch. 23, § 25.

**ANNOTATIONS**

**Cross references.** — For definition of "contaminated with filth", *see* 26-1-2 NMSA 1978.

For definition of "color additive", *see* 26-1-2 NMSA 1978.

For definition of "federal act", *see* 26-1-2 NSMA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Products liability: perfumes, colognes, or deodorants, 46 A.L.R.4th 1197.

2 C.J.S. Adulteration § 2.

## 26-1-26. Penalties.

A. Any person who knowingly violates any of the provisions of Subsection A, B, C, F, G or H of Section 26-1-3, Section 26-1-14, 26-1-16, 26-1-22 or 26-1-23 NMSA 1978 is guilty of a fourth degree felony and shall be punished by a fine of not less than one thousand dollars ($1,000) or more than five thousand dollars ($5,000) or by imprisonment for not less than one year or both.

B. Except as provided in Subsection A of this section, any person violating any of the provisions of the New Mexico Drug, Device and Cosmetic Act is guilty of a misdemeanor for the first offense and for second and subsequent offenses is guilty of a fourth degree felony.

**History:** 1953 Comp., § 54-6-51, enacted by Laws 1967, ch. 23, § 26; 1971, ch. 245, § 4; 1972, ch. 84, § 53; 1987, ch. 270, § 7.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, in Subsection A, updated the statutory references, deleted "a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for not more than one year for the first offense and for second and subsequent offenses is guilty of" following "is guilty of," and added the language at the end of the subsection following "fourth degree felony"; and, in Subsection B, inserted "Device," deleted "petty" preceding "misdemeanor," and made a minor stylistic change.

**Methaqualone.** — The legislature has not specifically designated methaqualone as a "controlled substance" or "dangerous drug" under either the Controlled Substances Act or this article, but has authorized the board of pharmacy to add this substance by administrative regulation to the list of substances controlled under these acts. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd in part*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

# ARTICLE 2
# Drug Abuse (Repealed, Recompiled.)

## 26-2-1 to 26-2-4. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1999, ch. 270, § 10 repealed 26-2-1 to 26-2-4 NMSA 1978, as enacted by Laws 1971, ch. 244, §§ 1 to 3 and as amended by Laws 1987, ch. 265, § 4, relating to the Drug Abuse Act, effective July 1, 1999. For provisions of former sections, *see* the 1998 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* 9-7-6.1 to 9-7-6.3 NMSA 1978.

## 26-2-4.1. Recompiled.

**ANNOTATIONS**

**Recompilations.** — Laws 1999, ch. 270, § 9 recompiled 26-2-4.1 NMSA 1978, relating to the substance abuse education fund, as 9-7-17 NMSA 1978, effective July 1, 1999.

## 26-2-5 to 26-2-14. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1999, ch. 270, § 10 repealed 26-2-5 to 26-2-14 NMSA 1978, as enacted by Laws 1971, ch. 244, §§ 5 to 12, Laws 1971, ch. 296, § 1 and Laws 1972, ch. 10, § 1, and as amended by Laws 1972, ch. 84, § 54, relating to drug abuse services, effective July 1, 1999. For provisions of former sections, *see* the 1998 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, see 9-7-6.1 to 9-7-6.3 NMSA 1978.

# ARTICLE 2A
# Controlled Substances Therapeutic Research

## 26-2A-1. Short title.

Sections 1 through 7 [26-2A-1 to 26-2A-7 NMSA 1978] of this act may be cited as the "Controlled Substances Therapeutic Research Act".

**History:** 1953 Comp., § 54-15-1, enacted by Laws 1978, ch. 22, § 1.

## 26-2A-2. Purpose.

The legislature finds that recent research has shown that the use of marijuana may alleviate the nausea and ill-effects of cancer chemotherapy, and, additionally, may alleviate the ill-effects of glaucoma. The legislature further finds that there is a need for further research and experimentation with regards to the use of marijuana under strictly controlled circumstances. It is for this purpose that the Controlled Substances Therapeutic Research Act is hereby enacted.

**History:** 1953 Comp., § 54-12-2, enacted by Laws 1978, ch. 22, § 2.

## 26-2A-3. Definitions.

As used in the Controlled Substances Therapeutic Research Act:

A. "administrator" means the secretary, or his designee, of health and environment;

B. "marijuana" means marijuana, tetrahydrocannabinols or a chemical derivative of tetrahydrocannabinol; and

C. "practitioner" means a physician licensed to prescribe and administer drugs which are subject to the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978].

**History:** 1953 Comp., § 54-12-3, enacted by Laws 1978, ch. 22, § 3.

**ANNOTATIONS**

**Compiler's notes.** — Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health. Laws 1991, ch. 25, § 4 created the department of environment. Under 9-7-5 NMSA 1978, the administrative head of the department of health is the secretary of health. Under 9-7A-5 NMSA 1978, the administrative head of the department of environment is the secretary of environment.

## 26-2A-4. Lynn Pierson therapeutic research program established; participation.

A. There is established in the health and environment department [department of health] the "Lynn Pierson therapeutic research program". The program shall be administered by the administrator. The department shall promulgate rules and regulations necessary for the proper administration of the Controlled Substances Therapeutic Research Act. In such promulgation, the department shall take into consideration those pertinent rules and regulations promulgated by the drug enforcement administration, food and drug administration and the national institute on drug abuse.

B. Except as provided in Subsection C of Section 5 [26-2A-5 NMSA 1978] of the Controlled Substances Therapeutic Research Act, the Lynn Pierson therapeutic research program shall be limited to cancer chemotherapy patients and glaucoma patients, who are certified to the patient qualification review board by a physician as being involved in a life-threatening or sense-threatening situation and who are not responding to conventional controlled substances or where the conventional controlled substances administered have proven to be effective but where the patient has incurred severe side effects.

**History:** 1953 Comp., § 54-12-4, enacted by Laws 1978, ch. 22, § 4; 1979, ch. 11, § 1.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 MNSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

## 26-2A-5. Patient qualification review board; composition; powers and duties.

A. The administrator, upon the recommendation of the New Mexico medical society, shall appoint a patient qualification review board to serve at his pleasure. The patient qualification review board shall be comprised of:

(1) a physician licensed to practice medicine in New Mexico and certified by the American board of ophthalmology;

(2) a physician licensed to practice medicine in New Mexico and certified by the American board of internal medicine and also certified in the subspecialty of medical oncology; and

(3) a physician licensed to practice medicine in New Mexico and certified in psychiatry by the American board of psychiatry and neurology.

Members of the board may be reimbursed for their attendance at meetings at the rate of forty dollars ($40.00) per day.

B. The patient qualification review board shall review all applicants for the Lynn Pierson therapeutic research program and their licensed physicians and certify their participation in the program.

C. The patient qualification review board may include other disease groups for participation in the Lynn Pierson therapeutic research program after pertinent medical data have been presented by a physician to both the administrator and the board and

after receiving the necessary approval of the food and drug administration, the drug enforcement administration and the national institute on drug abuse.

**History:** 1953 Comp., § 54-12-5, enacted by Laws 1978, ch. 22, § 5; 1979, ch. 11, § 2.

## 26-2A-6. Lynn Pierson therapeutic research program; distribution.

A. The administrator shall obtain marijuana through whatever means he deems most appropriate, consistent with regulations promulgated by the national institute on drug abuse, the food and drug administration and the drug enforcement administration and pursuant to the provisions of the Controlled Substances Therapeutic Research Act.

B. The administrator shall cause such marijuana to be transferred to a certified state-operated licensed pharmacy for distribution to the certified patient pursuant to the Controlled Substances Therapeutic Research Act.

**History:** 1953 Comp., § 54-12-6, enacted by Laws 1978, ch. 22, § 6; 1979, ch. 11, § 3.

## 26-2A-7. Report.

The administrator, in conjunction with the patient qualification review board, shall each year report his findings and recommendations to the governor and the legislature regarding the effectiveness of the Lynn Pierson therapeutic research program.

**History:** 1953 Comp., § 54-12-7, enacted by Laws 1978, ch. 22, § 7; 1979, ch. 11, § 4.

**ANNOTATIONS**

**Compiler's notes.** — Laws 1979, ch. 11, § 5, effective March 7, 1979, repealed Laws 1978, ch. 22, § 10, which would have repealed the Controlled Substances Therapeutic Research Act (26-2A-1 to 26-2A-7 NMSA 1978) effective July 1, 1979.

# ARTICLE 2B
# Lynn and Erin Compassionate Use Act

## 26-2B-1. Short title.

Chapter 26, Article 2B NMSA 1978 may be cited as the "Lynn and Erin Compassionate Use Act" in honor of Lynn Pierson and Erin Armstrong.

**History:** Laws 2007, ch. 210, § 1; 2019, ch. 247, § 2.

**ANNOTATIONS**

**Severability.** — Laws 2007, ch. 210, §11 provided for the severability of the Lynn and Erin Compassionate Use Act if any part or application thereof is held invalid.

**The 2019 amendment,** effective June 14, 2019, changed "Sections 1 through 7 of this act" to "Chapter 26, Article 2B NMSA 1978".

## 26-2B-2. Purpose of act.

The purpose of the Lynn and Erin Compassionate Use Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments.

**History:** Laws 2007, ch. 210, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2007, ch. 210, § 12 made the Lynn and Erin Compassionate Use Act effective July 1, 2007.

**Severability.** — Laws 2007, ch. 210, §11 provided for the severability of the Lynn and Erin Compassionate Use Act if any part or application thereof is held invalid.

## 26-2B-3. Definitions.

As used in the Lynn and Erin Compassionate Use Act:

A. "adequate supply" means an amount of cannabis, in any form approved by the department, possessed by a qualified patient or collectively possessed by a qualified patient and the qualified patient's primary caregiver that is determined by rule of the department to be no more than reasonably necessary to ensure the uninterrupted availability of cannabis for a period of three months and that is derived solely from an intrastate source;

B. "cannabis":

(1) means all parts of the plant Cannabis sativa L. containing a delta-9-tetrahydrocannabinol concentration of more than three-tenths percent on a dry weight basis, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or its resin; and

(2) does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, fiber, oil or cake; the sterilized seed of the plant that is incapable of germination; the weight of any other

ingredient combined with cannabis to prepare topical or oral administrations, food, drink or another product; or hemp;

C. "cannabis consumption area" means an area within a licensed premises approved by the department where cannabis may be consumed that complies with rule as established by the department;

D. "cannabis courier" means a person that is licensed by the department to transport usable cannabis and cannabis products within the state from a cannabis establishment to:

(1) a qualified patient;

(2) a primary caregiver; or

(3) another cannabis establishment;

E. "cannabis establishment" means:

(1) a licensed cannabis courier;

(2) a licensed cannabis testing facility;

(3) a licensed cannabis manufacturer;

(4) a licensed cannabis producer; or

(5) such other person that the department may by rule approve for participation in the medical cannabis program;

F. "cannabis manufacturer" means a person that is licensed by the department to:

(1) manufacture cannabis products;

(2) package, transport or courier cannabis products;

(3) have cannabis products tested by a cannabis testing facility;

(4) purchase, obtain, sell and transport cannabis products to other cannabis establishments; and

(5) prepare products for personal production license holders;

G. "cannabis producer" means a person that is licensed by the department to possess, produce, dispense, distribute and manufacture cannabis and cannabis

products and sell wholesale or by direct sale to qualified patients and primary caregivers;

H. "cannabis product":

(1) means a product that contains cannabis, including edible or topical products that may also contain other ingredients; and

(2) does not include the weight of any other ingredient combined with cannabis or cannabis extract to prepare topical or oral administrations, food, drink or another product;

I. "cannabis testing facility" means a person that is licensed by the department to perform tests of cannabis products to analyze the strength or purity of the items and to collect cannabis samples and transport cannabis products to the cannabis testing facility from cannabis establishments;

J. "debilitating medical condition" means:

(1) cancer;

(2) glaucoma;

(3) multiple sclerosis;

(4) damage to the nervous tissue of the spinal cord, with objective neurological indication of intractable spasticity;

(5) seizure disorder, including epilepsy;

(6) positive status for human immunodeficiency virus or acquired immune deficiency syndrome;

(7) admitted into hospice care in accordance with rules promulgated by the department;

(8) amyotrophic lateral sclerosis;

(9) Crohn's disease;

(10) hepatitis C infection;

(11) Huntington's disease;

(12) inclusion body myositis;

(13) inflammatory autoimmune-mediated arthritis;

(14) intractable nausea or vomiting;

(15) obstructive sleep apnea;

(16) painful peripheral neuropathy;

(17) Parkinson's disease;

(18) posttraumatic stress disorder;

(19) severe chronic pain;

(20) severe anorexia or cachexia;

(21) spasmodic torticollis;

(22) ulcerative colitis; or

(23) any other medical condition, medical treatment or disease as approved by the department;

K. "department" means the department of health;

L. "hemp" means the plant cannabis sativa L. and any part of the plant, whether growing or not, containing a delta-9-tetrahydrocannabinol concentration of no more than three-tenths percent on a dry weight basis;

M. "license" means a license issued pursuant to the Lynn and Erin Compassionate Use Act;

N. "licensee" means a person that holds a license;

O. "licensee representative" means an owner, director, officer, manager, employee, agent or other representative of a licensee, to the extent that person acts in a representative capacity;

P. "manufacture" means to prepare a cannabis product;

Q. "medical cannabis program" means the program established pursuant to the Lynn and Erin Compassionate Use Act for authorization and regulation of the medical use of cannabis in the state;

R. "personal production license" means a license issued to a qualified patient or to a qualified patient's primary caregiver participating in the medical cannabis program to

permit the qualified patient or the qualified patient's primary caregiver to produce cannabis for the qualified patient's use at an address approved by the department;

S. "practitioner" means a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act;

T. "primary caregiver" means a resident of New Mexico who is at least eighteen years of age and who has been designated by the patient's practitioner as being necessary to take responsibility for managing the well-being of a qualified patient with respect to the medical use of cannabis pursuant to the provisions of the Lynn and Erin Compassionate Use Act;

U. "produce" means to engage in any activity related to the planting or cultivation of cannabis;

V. "qualified patient" means a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received written certification and a registry identification card pursuant to the Lynn and Erin Compassionate Use Act on the basis of having been diagnosed, in person or via telemedicine, by a practitioner as having a debilitating medical condition; provided that a practitioner may only issue a written certification on the basis of an evaluation conducted via telemedicine if the practitioner has previously examined the patient in person;

W. "reciprocal participant" means an individual who holds proof of authorization to participate in the medical cannabis program of another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo;

X. "registry identification card" means a document that the department issues:

(1) to a qualified patient that identifies the bearer as a qualified patient and authorizes the qualified patient to use cannabis for a debilitating medical condition; or

(2) to a primary caregiver that identifies the bearer as a primary caregiver authorized to engage in the intrastate possession and administration of cannabis for the sole use of a qualified patient who is identified on the document;

Y. "safety-sensitive position" means a position in which performance by a person under the influence of drugs or alcohol would constitute an immediate or direct threat of injury or death to that person or another;

Z. "telemedicine" means the use of telecommunications and information technology to provide clinical health care from a site apart from the site where the patient is located, in real time or asynchronously, including the use of interactive simultaneous audio and

video or store-and-forward technology, or off-site patient monitoring and telecommunications in order to deliver health care services;

AA. "THC" means delta-9-tetrahydrocannabinol, a substance that is the primary psychoactive ingredient in cannabis; and

BB. "written certification" means a statement made on a department-approved form and signed by a patient's practitioner that indicates, in the practitioner's professional opinion, that the patient has a debilitating medical condition and the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient.

**History:** Laws 2007, ch. 210, § 3; 2019, ch. 247, § 3; 2020, ch. 4, § 1.

## ANNOTATIONS

**The 2020 amendment,** effective February 20, 2020, limited the definition of "qualified patient," as used in the Lynn and Erin Compassionate Use Act, to residents of New Mexico; and in Subsection V, after "means a", deleted "person" and added "resident of New Mexico".

**The 2019 amendment,** effective June 14, 2019, defined certain terms related to medical cannabis and medical cannabis programs as used in the Lynn and Erin Compassionate Use Act; added new Subsections B through I and redesignated former Subsections B and C as Subsections J and K, respectively; in Subsection J, in Paragraph J(5), after the paragraph designation, added "seizure disorder, including", added new Paragraphs J(8) through J(22) and redesignated former Paragraph J(8) as Paragraph J(23); deleted Subsection D, which defined "licensed producer"; added new Subsections L through R and redesignated former Subsections E and F as Subsections S and T, respectively; added new Subsection U and redesignated former Subsection G as Subsection V; in Subsection V, after "means a", deleted "resident of New Mexico" and added "person", and after "Lynn and Erin Compassionate Use Act", deleted "and" and added "on the basis of having been diagnosed, in person or via telemedicine, by a practitioner as having a debilitating medical condition; provided that a practitioner may only issue a written certification on the basis of an evaluation conducted via telemedicine if the practitioner has previously examined the patient in person"; added new Subsections W through AA and redesignated former Subsection H as Subsection BB; and in Subsection BB, after "means a statement", deleted "in a patient's medical records or a statement" and added "made on a department-approved form and", and after "health risks for the patient", deleted "A written certification is not valid for more than one year from the date of issuance".

**Temporary provisions.** — Laws 2019, ch. 247, § 15 provided that a licensed producer, as defined in the Lynn and Erin Compassionate Use Act prior to the enactment of Laws 2019, ch. 247 shall be considered to be a cannabis producer, as defined by Laws 2019, ch. 247.

**Written certification is the functional equivalent of a prescription.** — Under the Lynn and Erin Compassionate Use Act, the written certification required by a person licensed in New Mexico to prescribe and administer controlled substances is the functional equivalent of a prescription as defined in the Worker's Compensation Act, 52-1-1 NMSA 1978 et seq. *Maez v. Riley Industrial*, 2015-NMCA-049.

## 26-2B-4. Exemption from criminal and civil penalties for the medical use of cannabis.

A. A qualified patient or a qualified patient's primary caregiver shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed an adequate supply; provided that a qualified patient or the qualified patient's primary caregiver may possess that qualified patient's harvest of cannabis.

B. A reciprocal participant shall not be subject to arrest, prosecution or penalty in any manner for the possession of or the medical use of cannabis if the quantity of cannabis does not exceed the limit identified by department rule.

C. The following conduct is lawful and shall not constitute grounds for detention, search or arrest of a person or for a violation of probation or parole, and cannabis products that relate to the conduct are not contraband or subject to seizure or forfeiture pursuant to the Controlled Substances Act or the Forfeiture Act [31-27-1 to 31-27-8 NMSA 1978]:

(1) a qualified patient or primary caregiver possessing or transporting not more than an adequate supply or a reciprocal participant possessing or transporting not more than the limit identified by department rule;

(2) a qualified patient or primary caregiver purchasing or obtaining not more than an adequate supply from a lawful source or a reciprocal participant purchasing or obtaining not more than the limit identified by department rule;

(3) a qualified patient using or being under the influence of cannabis; provided that the qualified patient is acting consistent with law;

(4) a qualified patient or primary caregiver transferring, without financial consideration, to a qualified patient or primary caregiver not more than two ounces of cannabis; or

(5) with respect to cannabis cultivated under a personal production license, a qualified patient or primary caregiver possessing, planting, cultivating, harvesting, drying, manufacturing or transporting cannabis plants or cannabis products as allowed by department rule; provided that a qualified patient or primary caregiver who possesses a personal production license shall not manufacture cannabis products using an oil extractor solvent that is stored under pressure unless the qualified patient or

primary caregiver holds a separate license from the department permitting the person to manufacture cannabis products using an oil extractor solvent that is under pressure.

D. Subsection A of this section shall not apply to a qualified patient under the age of eighteen years, unless:

(1) the qualified patient's practitioner has explained the potential risks and benefits of the medical use of cannabis to the qualified patient and to a parent, guardian or person having legal custody of the qualified patient; and

(2) a parent, guardian or person having legal custody consents in writing to:

(a) allow the qualified patient's medical use of cannabis;

(b) serve as the qualified patient's primary caregiver; and

(c) control the dosage and the frequency of the medical use of cannabis by the qualified patient.

E. A qualified patient or a primary caregiver shall be granted the full legal protections provided in this section if the qualified patient or primary caregiver is in possession of a registry identification card. If the qualified patient or primary caregiver is not in possession of a registry identification card, the qualified patient or primary caregiver shall be given an opportunity to produce the registry identification card before any arrest or criminal charges or other penalties are initiated.

F. A practitioner shall not be subject to arrest or prosecution, penalized in any manner or denied any right or privilege for recommending the medical use of cannabis or providing written certification for the medical use of cannabis pursuant to the Lynn and Erin Compassionate Use Act.

G. A licensee or licensee representative shall not be subject to arrest, prosecution or penalty, in any manner, for the production, possession, manufacture, distribution, dispensing or testing of cannabis pursuant to the Lynn and Erin Compassionate Use Act. Conduct by a licensee or a licensee representative that is allowed pursuant to a license and conduct by a person that allows property to be used by a licensee or a licensee representative for conduct allowed pursuant to a license is lawful, is not a violation of state or local law and is not a basis for seizure or forfeiture of property or assets under state or local law.

H. Any property interest that is possessed, owned or used in connection with the medical use of cannabis, or acts incidental to such use, shall not be harmed, neglected, injured or destroyed while in the possession of state or local law enforcement officials. Any such property interest shall not be forfeited under any state or local law providing for the forfeiture of property except as provided in the Forfeiture Act. Cannabis, paraphernalia or other property seized from a qualified patient or primary caregiver in

connection with the claimed medical use of cannabis shall be returned immediately upon the determination by a court or prosecutor that the qualified patient or primary caregiver is entitled to the protections of the provisions of the Lynn and Erin Compassionate Use Act, as may be evidenced by a failure to actively investigate the case, a decision not to prosecute, the dismissal of charges or acquittal.

I. state or local government shall not impose a criminal, civil or administrative penalty on a licensee or a licensee representative, or on a person that allows property to be used by a licensee or a licensee representative pursuant to a license, solely for conduct that is allowed pursuant to a license.

J. A person shall not be subject to arrest or prosecution for a cannabis-related offense for simply being in the presence of the medical use of cannabis as permitted under the provisions of the Lynn and Erin Compassionate Use Act.

**History:** Laws 2007, ch. 210, § 4; 2019, ch. 247, § 4

**ANNOTATIONS**

**The 2019 amendment,** effective June 14, 2019, revised provisions related to the exemption of the medical use of cannabis from criminal and civil penalties; in Subsection A, after "qualified patient", added "or a qualified patient's primary caregiver", and after "adequate supply;", added "provided that a qualified patient or the qualified patient's primary caregiver may possess that qualified patient's harvest of cannabis"; deleted former Subsection B, added new Subsections B and C and redesignated former Subsections C through G as Subsections D through H, respectively; in Subsection E, added "qualified" preceding each occurrence of "patient" and added "primary" preceding each occurrence of "caregiver"; in Subsection G, after "A", deleted "licensed producer" and added "licensee or licensee representative", after "possession", added "manufacture", after "dispensing", added "testing", and added the last sentence; and added a new Subsection I and redesignated former Subsection H as Subsection J.

## 26-2B-5. Prohibitions, restrictions and limitations on the medical use of cannabis; criminal penalties.

A. Participation in a medical use of cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from:

(1) criminal prosecution or civil penalties for activities not authorized in the Lynn and Erin Compassionate Use Act;

(2) liability for damages or criminal prosecution arising out of the operation of a vehicle while under the influence of cannabis; or

(3) criminal prosecution or civil penalty for possession or use of cannabis:

(a) in the workplace of the qualified patient's or primary caregiver's employment; or

(b) at a public park, recreation center, youth center or other public place.

B. A person who makes a fraudulent representation to a law enforcement officer about the person's participation in a medical use of cannabis program to avoid arrest or prosecution for a cannabis-related offense is guilty of a petty misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

C. If a licensee or the licensee's representative sells, distributes, dispenses or transfers cannabis to a person not approved by the department pursuant to the Lynn and Erin Compassionate Use Act or obtains or transports cannabis outside New Mexico, the licensee or the licensee's representative shall be subject to arrest, prosecution and civil or criminal penalties pursuant to state law.

**History:** Laws 2007, ch. 210, § 5; 2019, ch. 247, § 5; 2019, ch. 247, § 5; 2019, ch. 261, § 2.

## ANNOTATIONS

**2019 Multiple Amendments.** – Laws 2019, ch. 247, § 5 and Laws 2019, ch. 261, § 2, both effective June 14, 2019, enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2019, ch. 261, § 2, as the last act signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2019, ch. 247, § 5 and Laws 2019, ch. 261, § 2 are described below. To view the session laws in their entirety, *see* the 2019 session laws on *NMOneSource.com*.

The nature of the difference between the amendments is that Laws 2019, ch. 247, § 5, removed certain restrictions related to the use or possession of cannabis, and Laws 2019, ch. 261, § 2, removed certain restrictions related to the use or possession of cannabis.

**Laws 2019, ch. 247, § 5,** effective June 14, 2019, removed certain restrictions related to the use or possession of cannabis; in Subsection A, Paragraph A(3), deleted Subparagraphs A(3)(a) and A(3)(b) and redesignated former Subparagraphs A(3)(c) and A(3)(d) as Subparagraphs A(3)(a) and A(3)(b), respectively; and in Subsection C, after "If a", deleted "licensed producer" and added "licensee or the licensee's representative", and after "outside New Mexico", deleted "in violation of federal law, the licensed producer" and added "the licensee or the licensee's representative".

**Laws 2019, ch. 261, § 2,** effective June 14, 2019, removed certain restrictions related to the use or possession of cannabis; and in Subsection A, Paragraph A(3), deleted Subparagraphs A(3)(a) and A(3)(b) and redesignated former Subparagraphs A(3)(c) and A(3)(d) as Subparagraphs A(3)(a) and A(3)(b), respectively.

## 26-2B-6. Advisory board created; duties.

The secretary of health shall establish an advisory board consisting of nine practitioners knowledgeable about the medical use of cannabis. The members shall be chosen for appointment by the secretary from a list proposed by the New Mexico medical society, the New Mexico nurses association, the New Mexico academy of family physicians, the New Mexico academy of physician assistants, the New Mexico pharmacists association or the New Mexico Hispanic medical association. A quorum of the advisory board shall consist of five members. The advisory board shall:

A. review and recommend to the department for approval additional debilitating medical conditions that would benefit from the medical use of cannabis;

B. accept and review petitions to add medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis;

C. convene at least twice per year to conduct public hearings and to evaluate petitions, which shall be maintained as confidential personal health information, to add medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis;

D. issue recommendations concerning rules to be promulgated for the issuance of the registry identification cards;

E. recommend quantities of cannabis that are necessary to constitute an adequate supply for qualified patients and primary caregivers;

F. recommend formulation or preparations of cannabis or cannabis products; and

G. recommend quantities of cannabis that a reciprocal participant may obtain and possess.

**History:** Laws 2007, ch. 210, § 6; 2019, ch. 247, § 6.

**ANNOTATIONS**

**The 2019 amendment,** effective June 14, 2019, increased the number of members of the advisory board, provided that additional entities may propose members to be appointed to the advisory board, and required the advisory board to recommend formulation or preparations of cannabis and to recommend quantities of cannabis that a reciprocal participant may obtain and possess; in the introductory paragraph, after "consisting of", deleted "eight" and added "nine", after "practitioners", deleted "representing the fields of neurology, pain management, medical oncology, psychiatry, infectious disease, family medicine and gynecology. The practitioners shall be nationally board-certified in their area of specialty and", after "New Mexico medical

society,", added "the New Mexico nurses association, the New Mexico academy of family physicians, the New Mexico academy of physician assistants, the New Mexico pharmacists association or the New Mexico Hispanic medical association", and after "shall consist of", deleted "three" and added "five"; and added new Subsections F and G.

## 26-2B-6.1. Program regulation and administration; fees; limitations; rulemaking; licensure; issuance; reporting.

A. The department shall:

(1) regulate and administer the medical cannabis program; and

(2) collect fees from licensees; provided that the department shall not charge a fee relating to the medical cannabis registry.

B. By December 20, 2019, the secretary of health shall adopt and promulgate rules to establish fees for licenses for cannabis producers, cannabis manufacturers, cannabis couriers, cannabis testing facilities or any other cannabis establishments whose operations are authorized pursuant to the Lynn and Erin Compassionate Use Act.

C. The department shall establish application and licensing fees applicable to licenses for activity related to the medical cannabis program.

D. The department shall administer licensure for medical cannabis program activity provided for in the Lynn and Erin Compassionate Use Act, which shall include personal production licenses and licenses for:

(1) cannabis couriers;

(2) cannabis manufacturers;

(3) cannabis producers;

(4) cannabis testing facilities; and

(5) any other activity or person as deemed necessary by the department.

E. The department shall not issue any other license provided for in this section to a cannabis testing facility licensee.

F. In consultation with qualified patients and primary caregivers, the department shall produce an assessment report annually, which shall be published to the public and that includes at a minimum an evaluation of:

(1) the affordability of and accessibility to medical cannabis pursuant to the Lynn and Erin Compassionate Use Act; and

(2) the needs of qualified patients who live in rural areas, federal subsidized housing or New Mexico Indian nations, tribes or pueblos.

G. The department shall allow for the smoking, vaporizing and ingesting of cannabis products within a cannabis consumption area on the premises if:

(1) access is restricted to qualified patients and their primary caregivers;

(2) cannabis consumption is not visible from any public place or from outside the cannabis consumption area; and

(3) qualified patients who consume cannabis on the premises have a designated driver or other means of transportation consistent with current law.

**History:** Laws 2019, ch. 247, § 8

**ANNOTATIONS**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 26-2B-7. Registry identification cards; department rules; duties; reciprocity.

A. After consultation with the advisory board, the department shall promulgate rules in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978] to implement the purpose of the Lynn and Erin Compassionate Use Act. The rules shall:

(1) govern the manner in which the department will consider applications for registry identification cards and for the renewal of identification cards for qualified patients and primary caregivers;

(2) define the amount of cannabis that is necessary to constitute an adequate supply, including amounts for topical treatments;

(3) identify criteria and set forth procedures for including additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis. Procedures shall include a petition process and shall allow for public comment and public hearings before the advisory board;

(4) set forth additional medical conditions, medical treatments or diseases to the list of debilitating medical conditions that qualify for the medical use of cannabis as recommended by the advisory board;

(5) identify requirements for the licensure of cannabis producers and cannabis production facilities, cannabis couriers, cannabis manufacturers, cannabis testing facilities and any other cannabis establishments that the department may license and set forth procedures to obtain licenses;

(6) develop a distribution system for the medical cannabis program that provides for:

(a) cannabis production facilities within New Mexico housed on secured grounds and operated by licensees; and

(b) distribution of cannabis to qualified patients or their primary caregivers to take place at locations that are designated by the department and that are not within three hundred feet of any school, church or daycare center that were in existence in that location before the licensee distributing medical cannabis nearby was licensed; provided that this distance requirement shall not apply to distribution at the home of the qualified patient or primary caregiver;

(7) identify requirements for testing and labeling of cannabis and cannabis products for quality assurance. The department shall adopt and promulgate rules pursuant to this paragraph by December 20, 2019;

(8) determine additional duties and responsibilities of the advisory board; and

(9) be revised and updated as necessary.

B. The department shall issue registry identification cards to a patient and to the primary caregiver for that patient, if any, who submit the following, in accordance with the department's rules:

(1) a written certification;

(2) the name, address and date of birth of the patient;

(3) the name, address and telephone number of the patient's practitioner; and

(4) the name, address and date of birth of the patient's primary caregiver, if any.

C. The department shall verify the information contained in an application submitted pursuant to Subsection B of this section and shall approve or deny an application within thirty days of receipt. The department may deny an application only if the applicant did

not provide the information required pursuant to Subsection B of this section or if the department determines that the information provided is false. A person whose application has been denied shall not reapply for six months from the date of the denial unless otherwise authorized by the department.

D. The department shall issue a registry identification card within five days of approving an application, and a card shall expire three years after the date of issuance.

E. A registry identification card shall contain:

(1) the name and date of birth of the qualified patient and primary caregiver, if any;

(2) the date of issuance and expiration date of the registry identification card; and

(3) other information that the department may require by rule.

F. A person who possesses a registry identification card shall notify the department of any change in the person's name, qualified patient's practitioner, qualified patient's primary caregiver or change in status of the qualified patient's debilitating medical condition within ten days of the change.

G. Possession of or application for a registry identification card shall not constitute probable cause or give rise to reasonable suspicion for a governmental agency to search the person or property of the person possessing or applying for the card.

H. The department shall maintain a confidential file containing the names and addresses of the persons who have either applied for or received a registry identification card. Individual names on the list shall be confidential and not subject to disclosure, except:

(1) to authorized employees or agents of the department as necessary to perform the duties of the department pursuant to the provisions of the Lynn and Erin Compassionate Use Act;

(2) to authorized employees of state or local law enforcement agencies, but only for the purpose of verifying that a person is lawfully in possession of a registry identification card; or

(3) as provided in the federal Health Insurance Portability and Accountability Act of 1996.

I. By March 1, 2020, the secretary of health shall adopt and promulgate rules relating to medical cannabis program reciprocity. The department may identify

requirements for the granting of reciprocity, including provisions limiting the period of time in which a reciprocal participant may participate in the medical cannabis program.

J. A reciprocal participant:

(1) may participate in the medical cannabis program in accordance with department rules;

(2) shall not be required to comply with the registry identification card application and renewal requirements established pursuant to this section and department rules;

(3) shall at all times possess proof of authorization to participate in the medical cannabis program of another state, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo and shall present proof of that authorization when purchasing cannabis from a licensee; and

(4) shall register with a licensee for the purpose of tracking sales to the reciprocal participant in an electronic system that is accessible to the department.

**History:** Laws 2007, ch. 210, § 7; 2019, ch. 247, § 7.

**ANNOTATIONS**

**Cross references.** — For the Federal Health Insurance Portability and Accountability Act of 1996, *see* 42 U.S.C. § 300gg et seq.

**The 2019 amendment,** effective June 14, 2019, provided additional duties for the department of health; in the section heading, added "reciprocity"; in Subsection A, in the introductory paragraph, deleted "No later than October 1, 2007, and", in Paragraph A(5), after "licensure of", added "cannabis", and after "production facilities", added "cannabis couriers, cannabis manufacturers, cannabis testing facilities and any other cannabis establishments that the department may license", in Paragraph A(6), after "medical cannabis", added "program", in Subparagraph A(6)(b), after "daycare center", added "that were in existence in that location before the licensee distributing medical cannabis nearby was licensed; provided that this distance requirement shall not apply to distribution at the home of the qualified patient or primary caregiver", added a new Paragraph A(7) and redesignated former Paragraphs A(7) and A(8) as Paragraphs A(8) and A(9), respectively; in Subsection D, after "shall expire", deleted "one year" and added "three years"; added new subsection designation "E." and redesignated former Subsections E through G as Subsections F through H, respectively; and added Subsections I and J.

## 26-2B-7.1. Registry identification card; registration; renewal; written certification.

The department shall require a qualified patient to reapply for a registry identification card no sooner than two years and eleven months from the date the patient's current registry identification card is issued; provided that, in order to remain eligible for participation in the medical cannabis program established pursuant to the Lynn and Erin Compassionate Use Act, a qualified patient shall submit annually to the department a statement from a practitioner indicating that:

A. the practitioner has examined the qualified patient during the preceding twelve months;

B. the qualified patient continues to have a debilitating medical condition; and

C. the practitioner believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the qualified patient.

**History:** Laws 2019, ch. 247, § 9.

**ANNOTATIONS**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 26-2B-8. THC content; no limitation.

The department shall not limit the amount of THC concentration in a cannabis product; provided that the department may by rule adopt requirements for apportionment and packaging of cannabis products.

**History:** Laws 2019, ch. 247, § 10.

**ANNOTATIONS**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

## 26-2B-9. Employment protections.

A. Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, it is unlawful to take an adverse employment action against an applicant or an employee based on conduct allowed under the Lynn and Erin Compassionate Use Act.

B. Nothing in this section shall:

(1) restrict an employer's ability to prohibit or take adverse employment action against an employee for use of, or being impaired by, medical cannabis on the premises of the place of employment or during the hours of employment; or

(2) apply to an employee whose employer deems that the employee works in a safety-sensitive position.

**History:** Laws 2019, ch. 247, § 11.

**ANNOTATIONS**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

**Medical marijuana is not an accommodation that must be provided for by employer.** — Where plaintiff filed a complaint with the New Mexico human rights division alleging unlawful discrimination by defendant tractor supply company, and where evidence at trial established that plaintiff applied for a management position with defendant, and where, during the interview process, plaintiff advised defendant's hiring manager of his diagnosis of HIV/AIDS and of his participation in the medical cannabis program, and where, after being hired for the job, defendant was required to report to a testing facility to undergo a drug test, the results of which indicated a positive test for cannabis metabolites, and where defendant discharged plaintiff on the basis of the positive drug test, defendant's motion to dismiss was granted because the Lynn and Erin Compassionate Use Act, §§ 26-2B-1 through § 26-2B-10 NMSA 1978, which authorizes New Mexico's medical cannabis program, combined with the New Mexico Human Rights Act, §§ 28-1-1 through § 28-1-14 NMSA 1978, does not provide a cause of action for plaintiff, as medical marijuana is not an accommodation that must be provided for by the employer. *Garcia v. Tractor Supply Company*, 154 F.Supp.3d 1225 (D.N.M. 2016).

## 26-2B-10. Persons under state supervision; protections.

A person who is serving a period of probation or parole or who is in the custody or under the supervision of the state or a local government pending trial as part of a community supervision program shall not be penalized for conduct allowed under the Lynn and Erin Compassionate Use Act.

**History:** Laws 2019, ch. 247, § 12.

**ANNOTATIONS**

**Effective dates.** — Laws 2019, ch. 247 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 14, 2019, 90 days after the adjournment of the legislature.

# ARTICLE 3
# Drug Product Selection

## 26-3-1. Short title.

Sections 26-3-1 through 26-3-3 NMSA 1978 may be cited as the "Drug Product Selection Act."

**History:** 1953 Comp., § 54-6-28.1, enacted by Laws 1976, ch. 60, § 2.

## 26-3-2. Purpose.

It is the purpose of the Drug Product Selection Act to assure that all New Mexico citizens continue to receive high quality drugs at a reasonable cost.

**History:** 1953 Comp., § 54-6-28.2, enacted by Laws 1976, ch. 60, § 3.

**ANNOTATIONS**

**Cross references.** — For provisions relating to the New Mexico Drug Device and Cosmetic Act, *see* 26-1-1 NMSA 1978.

## 26-3-3. Drug and biological product selection permitted; conditions; exception for prohibition; labeling.

A. Upon receipt of a prescription written by a licensed practitioner who may prescribe drugs or biological products for a drug or biological product for which one or more multiple-source drugs or interchangeable biological products are recognized, listed as final determinations and published in the federal register by the federal department of health and human services, a pharmacist may dispense any one of the drugs or interchangeable biological products that satisfies the final determinations so recognized and listed by the federal department of health and human services and is sold at a lower cost than the drug or biological product listed in the prescription.

B. Upon receipt of a prescription written by a licensed practitioner for a drug or biological product that appears on the federal food and drug administration's approved prescription drug products with therapeutic equivalence evaluation list as supplemented, or for a biological product that is listed as interchangeable on the lists of the federal food and drug administration's lists of licensed biological products with reference product exclusivity and biosimilarity or interchangeability evaluations, as supplemented, a pharmacist may dispense any of the listed therapeutically equivalent drugs or interchangeable biological products that is lower in cost than the prescribed drug or biological product.

C. Drug and biological product selection shall be permitted only under circumstances and conditions set forth in Subsections A and B of this section unless the licensed practitioner prescribing prohibits drug or biological product selection. A licensed practitioner shall prohibit drug or biological product selection by making an entry that is electronically accessible that includes the words "no substitution" or the diminution "no sub" on a prescription.

D. If drug or biological product selection occurs as permitted in Subsections A and B of this section, the pharmacist shall indicate on the label of the dispensed container the brand of drug or the specific biological product prescribed and the name of the drug or interchangeable biological product dispensed.

E. A pharmacist who selects an interchangeable biological product shall inform the patient or the patient's representative.

F. A pharmacist shall not select a therapeutically equivalent drug or interchangeable biological product unless the substitution is in accordance with the provisions of Subsection A of this section.

G. Within five business days following the dispensing of a biological product, the dispensing pharmacist or the pharmacist's designee shall make an entry of the specific product provided to the patient, including the name of the product and the manufacturer. The communication shall be conveyed by making an entry that is electronically accessible to the prescriber through:

(1) an interoperable electronic medical records system;

(2) an electronic prescribing technology;

(3) a pharmacy benefit management system; or

(4) a pharmacy record.

H. Entry into an electronic medical records system pursuant to Subsection G of this section is presumed to provide notice to the prescriber. Otherwise, the pharmacist shall communicate to the prescriber what biological product was dispensed, using facsimile, telephone, electronic transmission or other prevailing means; provided that communication shall not be required when:

(1) there is no interchangeable biological product that has been approved by the federal food and drug administration for the product prescribed; or

(2) a refill prescription is not changed from the product dispensed on the prior filling of the prescription.

I. The board shall maintain a link on its website to the current lists of all biological products that the federal food and drug administration has determined to be interchangeable biological products.

J. For purposes of this section:

(1) "multiple-source drug" means a drug marketed or sold by two or more manufacturers, formulators or labelers; and

(2) "therapeutically equivalent" means drug products that have the same amount of the active drug in the same dosage form that when administered can be expected to provide the same therapeutic effect.

**History:** 1953 Comp., § 54-6-28.3, enacted by Laws 1976, ch. 60, § 4; 1982, ch. 26, § 1; 2005, ch. 152, § 4; 2017, ch. 48, § 2.

## ANNOTATIONS

**The 2017 amendment,** effective June 16, 2017, provided for the regulation of biosimilar products, including authorizing pharmacists to substitute biosimilar and interchangeable biosimilar biologic products for another biologic product that has been prescribed by a physician, placed certain duties on pharmacists who select an interchangeable biological product, required the board of pharmacy to maintain a link on its website to the current lists of all biological products that the federal food and drug administration has determined to be interchangeable biological products, and redefined "therapeutically equivalent"; added "and biological", "or biological", "or biological products" and "or interchangeable biological products" throughout the section; in the catchline, added "and biological"; in Subsection B, after "supplemented", added "or for a biological product that is listed as interchangeable on the lists of the federal food and drug administration's lists of licensed biological products with reference product exclusivity and biosimilarity or interchangeability evaluations, as supplemented", after "a pharmacist may dispense any of the", added "listed", after "that", deleted "appears on that list and which", after "lower in cost than the", added "prescribed", and after the next occurrence of "drug", deleted "listed in the prescription"; in Subsection C, after "product selection by", deleted "writing with his hand" and added "making an entry that is electronically accessible that includes", and after "'no sub' on", deleted "the face of"; in Subsection D, after "brand of drug", added "or the specific biological product"; deleted former Subsection E; added new Subsections E through I, and redesignated former Subsection F as Subsection J; in Subsection J, added the paragraph designation "(1)", and added Paragraph J(2); and deleted former Paragraph G, which defined "therapeutically equivalent".

**The 2005 amendment,** effective June 17, 2005, deleted Subsection E, which required a pharmacist to notify the prescribing practitioner if the pharmacist changes the drug dispensed after the drug selection has occurred and relettered the subsequent subsections.

# ARTICLE 4
# Wholesale Prescription Drug Importation

## 26-4-1. Short title.

This act [26-4-1 to 26-4-10 NMSA 1978] may be cited as the "Wholesale Prescription Drug Importation Act".

**History:** Laws 2020, ch. 45, § 1.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-2. Definitions.

As used in the Wholesale Prescription Drug Importation Act:

A. "Canadian supplier" means a manufacturer, wholesale distributor or pharmacy that is appropriately licensed or permitted under Canadian federal or provincial laws and rules to manufacture, distribute or dispense prescription drugs;

B. "committee" means the prescription drug importation advisory committee;

C. "department" means the department of health;

D. "eligible prescription drug" means a drug eligible for importation that:

(1) meets the United States federal food and drug administration's standards related to safety, effectiveness, misbranding and adulteration;

(2) does not violate federal patent laws;

(3) is expected to generate cost savings; and

(4) is not a controlled substance;

E. "program" means the wholesale prescription drug importation program; and

F. "state drug wholesaler" means a licensed wholesale drug distributor that contracts with the state to import eligible prescription drugs from a Canadian supplier.

**History:** Laws 2020, ch. 45, § 2.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-3. Advisory committee created; membership; duties.

A. The "prescription drug importation advisory committee" is created as an interagency advisory committee of the department. The committee consists of:

(1) the secretary of health, who shall serve as the chair of the committee;

(2) the executive director of the board of pharmacy;

(3) the superintendent of insurance;

(4) the secretary of human services; and

(5) the secretary of general services.

B. Members may appoint designees.

C. The committee shall advise the department in developing and implementing the program. The committee shall consult with interested stakeholders and appropriate federal officials as necessary in shaping its advice to the department. The department shall hold a public hearing on the proposed program prior to submitting the program for federal approval.

**History:** Laws 2020, ch. 45, § 3.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-4. Wholesale prescription drug importation program created.

The department, in consultation with the committee, shall design a "wholesale prescription drug importation program" that complies with the applicable requirements of 21 U.S.C. Section 384, including the requirements regarding safety and cost savings. The department shall explore all potential mechanisms, to the extent allowable under law, for the importation of eligible prescription drugs. The program design shall:

A. contract with one or more state drug wholesalers to seek federal certification and approval to import safe, eligible prescription drugs from Canadian suppliers and provide significant prescription drug cost savings to New Mexico consumers;

B. allow the importation of eligible prescription drugs sold by Canadian suppliers;

C. ensure that only eligible prescription drugs meeting the United States food and drug administration's safety, effectiveness and other standards are imported by or on behalf of the state;

D. import only those eligible prescription drugs expected to generate substantial savings for New Mexico consumers;

E. ensure that, with respect to eligible prescription drugs to be imported pursuant to the program, the program and the state drug wholesaler comply with the tracking, tracing, verification and identification requirements of 21 U.S.C. Sections 360eee and 360eee-1;

F. prohibit the distribution, dispensing or sale of eligible prescription drugs imported pursuant to the Wholesale Prescription Drug Importation Act outside the exterior boundaries of the state;

G. recommend a charge per prescription or another method of support to ensure that the program is funded adequately in a manner that does not jeopardize significant consumer savings; and

H. include an audit function.

**History:** Laws 2020, ch. 45, § 4.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-5. Monitoring for anti-competitive behavior.

The department shall consult with the attorney general to identify the potential, and to monitor, for anti-competitive behavior in industries that would be affected by the program.

**History:** Laws 2020, ch. 45, § 5.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-6. Federal compliance.

On or before December 15, 2020, the department shall submit a formal request to the secretary of the United States department of health and human services for certification of the state's program.

**History:** Laws 2020, ch. 45, § 6.

**ANNOTATIONS**

**Emergency clauses. —** Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-7. Implementation.

Upon certification of approval by the secretary of the United States department of health and human services, the department shall begin implementing the program and begin operating the program within six months of that approval. As part of the implementation process, the department shall:

A. enter into contracts in accordance with the Procurement Code [13-1-28 to 13-1-199 NMSA 1978] with one or more state drug wholesalers and New Mexico licensed drug distributors and contract with one or more approved Canadian suppliers;

B. consult with interested stakeholders, including the committee, the legislature, health insurance plans, employers, pharmacies, health care providers and consumers;

C. develop a registration process for health insurance plans, pharmacies and prescription drug administering health care providers who choose to participate in the program;

D. make a list of imported eligible prescription drugs and their prices and make that list available to all participating entities and the general public;

E. create an outreach and marketing plan to generate program awareness;

F. create and staff a helpline to answer questions and address the needs of consumers, employers, health insurance plans, pharmacies, health care providers and other affected sectors;

G. require annual and special audits of the program; and

H. carry out other duties in accordance with the Wholesale Prescription Drug Importation Act that the department, in consultation with the board of pharmacy, determines to be necessary for successful implementation of the program.

**History:** Laws 2020, ch. 45, § 7.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-8. Annual reporting.

Annually, after implementation, the department shall report to the governor and the legislature regarding the operation of the program during the previous year, including:

A. which eligible prescription drugs and Canadian suppliers are included in the program;

B. the number of participating pharmacies, health care providers and health insurance plans;

C. the number of prescriptions dispensed through the program;

D. the estimated savings to consumers, health plans, employers and the state during the previous year and to date;

E. information regarding implementation of the audit plan and the correction plans for audit findings; and

F. any other information requested by the governor or the legislature or that the secretary of health deems relevant.

**History:** Laws 2020, ch. 45, § 8.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-9. Wholesale prescription drug importation fund.

The "wholesale prescription drug importation fund" is created as a nonreverting fund in the state treasury. The fund consists of money received by the state through the implementation of the program pursuant to the Wholesale Prescription Drug Importation Act and appropriations, gifts, grants, donations to the fund and income from investment of the fund. The department shall administer the fund, and money in the fund is subject to appropriation by the legislature and shall be expended only as provided in the appropriation. Expenditures shall be by warrant of the secretary of finance and administration pursuant to vouchers signed by the secretary of health or the secretary's authorized representative.

**History:** Laws 2020, ch. 45, § 9.

**ANNOTATIONS**

**Emergency clauses. —** Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.

## 26-4-10. Countries other than Canada allowed by federal law.

The provisions of the Wholesale Prescription Drug Importation Act may be extended to any other country allowed by federal law to import prescription drugs into the United States, at the discretion of the department.

**History:** Laws 2020, ch. 45, § 10.

**ANNOTATIONS**

**Emergency clauses. —** Laws 2020, ch. 45, § 11 contained an emergency clause and was approved March 4, 2020.