

To: Bob Hubbard



American Optometric Association
243 N. Lindbergh Blvd. • St. Louis, MO 63141 • (314) 991-4100
FAX: (314) 991-4101

BULLETIN

From The

STATE GOVERNMENT RELATIONS CENTER

VOLUME NO. 61

BULLETIN NO. 43

April 7, 2003

SUBJ: Arkansas Enacts Second Positive Contact Lens Prescription Verification Law

TO: Affiliated State Association Presidents, Presidents-Elect, Executive Directors, Leg Chairs, Attorneys, Legislative Counsel; Optometry Board Presidents, Secretaries, Executive Directors, Attorneys

FROM: State Government Relations Center

DIST: O, T, Group/Center/Section Chairs, SGRC, FRC, ARBO-EC, Optometric Legislators, ED, DED/WO, DED/STL, Group/Center Directors, Section Administrative Directors, Ms. DuChateau, Ms. Cooper, Mr. Carslick, E, NE, GC, ILAMO, WO Library

On March 31, 2003, Arkansas Governor Mike Huckabee (R) signed into law HB2286 "An Act to Amend Provisions of the Arkansas Code Pertaining to the Practice of Optometry; and For Other Purposes," establishing the second ever statutory positive verification requirement for contact lens prescriptions. With a bill also establishing positive verification of contact lens prescriptions on the Governor's desk in New Mexico awaiting his signature, the enactment of positive verification laws by the state associations has clearly become a national trend.

In addition to establishing a requirement for positive verification, the Arkansas law provides for the release of a contact lens prescription to a patient. The release will be upon the request of a patient at the conclusion of a fitting period. Contact lens prescriptions will have an expiration date of one year after the completion of the fitting unless a medical reason warrants a shorter expiration date. Also, out-of-state contact lens sellers will now be required to register with the state board of optometry prior to dispensing lenses to Arkansas residents. The optometry board will define by regulation what constitutes positive verification. A copy of the Act is attached to this Bulletin.

Patients in 34 states now have the right to obtain a copy of their contact lens prescription. These states include:

- | | | | | |
|---------------|--------------|----------------|---------------|------------|
| ALABAMA | ARIZONA | ARKANSAS | CALIFORNIA | COLORADO |
| DELAWARE | FLORIDA | GEORGIA | INDIANA | IOWA |
| KANSAS | KENTUCKY | LOUISIANA | MAINE | MARYLAND |
| MASSACHUSETTS | MINNESOTA | NEBRASKA | NEW HAMPSHIRE | NEW JERSEY |
| NEW MEXICO | NEW YORK | NORTH CAROLINA | OHIO | OKLAHOMA |
| OREGON | SOUTH DAKOTA | TEXAS | UTAH | VERMONT |
| VIRGINIA | WASHINGTON | WISCONSIN | WYOMING | |

APR 10

The Arkansas Act represents the second positive verification law for the confirmation of a contact lens prescription by a seller when that seller does not have a paper copy of the prescription. We are strongly encouraging the adoption of this type of law in every state in order to protect the ocular health of the public. In December 2002 the AOA State Government Relations Center distributed suggested language for positive verification of contact lens prescriptions and Arkansas is the second state to adopt similar legislation (see Bulletin Vol. 61, No. 24, of December 9, 2002). Kentucky was the first to enact positive verification language on March 6, 2003 (see Bulletin Vol. 61, No. 38, March 10, 2003).

Since the enactment of the first positive verification law for contact lens prescriptions we have had conversations with several state association Executive Directors and/or leaders regarding this recommendation. We have been asked why and whether this type of law is necessary or even a good idea?

As you know, until recently the concept of "negative" or "passive" verification of a contact lens prescription did not exist. And originally we thought that to codify "positive verification" was to confirm that passive or negative verification actually does in fact exist. However, as the entire profession has become acutely aware, passive or non-affirmative verification of a prescription is the business practice of some contact lens retail sellers and, unfortunately, the terminology has been used so often with so many legislators and regulators that it now has taken on a life of its own.

Ironically, the terminology and concept is used only with contact lens prescriptions, but not with prescriptions for either drugs or other medical devices. Similarly, a year or so ago, banks and other financial institutions began a new marketing tactic where they sent out unsolicited credit cards to people with a notice that unless the bank received official refusal, the credit card would be activated and made "good." This is clearly a version of passive verification. The federal government quickly stopped this practice. The point is that the concept of passive or negative verification only seems to apply in common vernacular to contact lens prescriptions, while it is abhorred in most other areas of law.

The fact that passive or negative verification in reference to contact lens prescriptions is considered viable can be seen from the recent changes to the U.S. Food and Drug Administration's Center for Devices and Radiological Health consumer information Web site on "Buying Contact Lenses on the Internet, by Phone, or by Mail: Questions and Answers." This recently modified site added information telling contact lens patients: "State laws vary greatly concerning the kind of verification that is required. Internet sites should comply with applicable State requirements concerning verification of prescriptions for contact lenses." (See <http://www.fda.gov/cdrh/consumer/buycontactqa.html>.) The problem with passive or negative verification is that it carries an unnecessary risk that the patient will have a wrong or expired prescription filled.

The reason we distributed suggested positive verification language and strongly encouraged the enactment of positive verification laws by the states was because of the changes by the FDA described above in its Web site and the introduction of contact lens prescription release legislation in Congress last year. While no federal legislation has been introduced so far this year, if legislation similar to that proposed in 2002 is ever enacted making a legal distinction between the requirement for a prescription and the process for verifying the information in that prescription, states will not be able to assume that positive verification of prescriptions will be mandatory. If the legal separation of a prescription and verification is established as a federal concept, states will need to affirmatively address positive verification separately in order to ensure that negative verification does not become the norm. It will not be enough that your law, or federal law, requires a prescription, written or otherwise, to dispense contact lenses. You will need a second law that addresses verification and essentially says "no we really mean it" (a positive verification law).

You can discuss the merits of the above reasoning behind our recommendation, but the reality of the situation is that we must play by the rules as they are sometimes written by other players, and because

the AOA believes that the eye health of patients should not be placed in unnecessary jeopardy, the AOA strongly encourages states to pursue positive verification laws in order to protect the ocular health of the public.

Positive verification laws are not easy to enact. They will be bitterly opposed by many sellers of contact lenses. This opposition will seriously tax your grassroots and public relations capabilities. We know that compromise is often necessary in the legislative process in order to achieve passage of a bill. However, we note that the laws enacted in Kentucky and Arkansas last month were achieved without compromise with the opposition lobby. In order to undertake positive verification legislation, you need to be well prepared and capable of dealing with significant opposition from groups with lots of money to spend on lobbying. These factors must be considered carefully before introducing a bill. For further information and assistance please contact Lance Plunkett (LRPlunkett@AOA.org) or Sherry Cooper (SLCooper@AOA.org) in the St. Louis office at 1-800-365-2219.

ATTACHMENT

SGRC/G:RxLaws/Arkansas Positive Verification Law Bulletin April 2003

Copyright (C) 2003 State Net. All rights reserved.
2003 AR H.B. 2286 (SN)
2003 Arkansas House Bill No. 2286, Arkansas 2003 Regular Session - 84th General
Assembly (FULL TEXT - STATE NET)

ARKANSAS BILL TEXT

State of Arkansas
84th General Assembly
A Bill
Act 866 of 2003
Regular Session, 2003

HOUSE BILL 2286

By: Representatives Bradford, S. Prater, Creekmore, Martin, J. Johnson, Sumpter, Matayo
For An Act To Be Entitled

VERSION: Enacted
March 31, 2003
Bradford

AN ACT TO AMEND PROVISIONS OF THE ARKANSAS CODE PERTAINING TO THE PRACTICE OF
OPTOMETRY; AND FOR OTHER PURPOSES.
Subtitle

AN ACT TO AMEND PROVISIONS OF THE ARKANSAS CODE PERTAINING TO THE PRACTICE OF
OPTOMETRY.

TEXT:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Section 17-90-108(a), concerning the requirements for optometrists and
ophthalmologists to provide eyeglass prescriptions to patients, is amended to read as follows:

(a)(1) At the completion of an ophthalmic examination by any licensed optometrist or by any physician
who practices as an ophthalmologist <<- or oculist ->> in this state if, as a result of the examination,
the practitioner recommends that the patient needs eyeglasses of common availability within the state,
then the optometrist or physician practicing as an ophthalmologist <<- or oculist ->> shall upon request
of the patient provide to the patient a complete and accurate written prescription at no additional charge.

<<- (2) Contact lenses are specifically excluded from this requirement. ->>

<<+ (2)(A) Contact lens prescriptions, written and signed, shall be released without additional charge
upon request of the patient after the completion of the fitting and upon payment being made for the
examination and fitting. +>>

<<+ (B) Contact lens prescriptions released and filled shall be dispensed, sold, and supplied after positive
verification only in accordance with the laws of the State of Arkansas and the rules and regulations
promulgated and administered by the State Board of Optometry. +>>

<<+ (3) A written contact lens prescription shall expire one (1) year after the date of the completion of
the contact lens fitting, unless there is a medical reason that warrants a prescription for less than one (1)

year. +>>

SECTION 2. Arkansas Code Title 17, Chapter 90, Subchapter 1, is amended by adding additional sections to read as follows:

<<+ 17-90-109. (a) No person, firm, corporation, or other legal entity located outside the State of Arkansas shall fill, ship, mail, or deliver through electronic mail, the Internet, alternative channels or other means, contact lenses or prescriptions for contact lenses to a resident of Arkansas without first having:
+>>

<<+ (1) Registered and paid all applicable fees required by the State Board of Optometry; +>>

<<+ (2) Possession of a positively verified written, signed, and unexpired contact lens prescription issued, dispensed, sold, or supplied by a licensed optometrist or ophthalmologist in compliance with the laws of the State of Arkansas and all rules and regulations promulgated by the State Board of Optometry; and +>>

<<+ (3) Registered to do business with the Secretary of State and designated a registered agent for service of process. +>>

<<+ (b) If a nonresident person, firm, corporation, or legal entity fails to comply with the requirements of Section 17-90-109(a), service of process may be perfected in accordance with the provisions of Section 17-90-106; or alternatively, the optometrist or ophthalmologist dispensing, selling, or supplying the contact lenses shall be deemed a valid agent for service of process for the nonresident person, firm, corporation, or legal entity. +>>

<<+ 17-90-110. Any optometrist or ophthalmologist who releases a contact lens prescription in accordance with Section 17-90-108(a)(2) shall not be liable for any damages for injury resulting from the purchasing, manufacturing, or dispensing of the contact lenses unless the contact lens seller and the contact lens prescriber are the same person. +>>

APPROVED: 3/31/2003
2003 AR H.B. 2286 (SN)
END OF DOCUMENT

SGRC/6:StateLaws/AR-CLRxReleaseLaw2003