

MEMORANDUM

To: Oklahoma Academy of Physician Assistants

From: Glenn Coffee & Associates, PLLC

Date: October 31, 2022

Re: SB 1322 taking effect on November 1, 2022, relating to Physician Assistants
prescribing authority

This informal legal memorandum is to provide our brief analysis on three questions:

- (1) What does SB 1322 actually say?
- (2) Can physician assistants prescribe Schedule II drugs?
- (3) How does the Oklahoma State Board of Pharmacy Rules affect a physician assistant's authority to prescribe Schedule II drugs?
- (4) How does the Oklahoma Board of Medical Licensure and Supervision Rules affect a physician assistant's authority to prescribe Schedule II drugs?

Please note that this informal memorandum represents a brief attempt at compiling our research but should not be considered a full legal memorandum on these issues. As always, our conclusions are based on the facts as we understand them, and a change in the facts may change our conclusion. Another attorney or court may reach a different conclusion.

1. What does SB 1322 actually say?

SB 1322, codified at 63 O.S. § 2-312(E) provides:

A physician assistant who is recognized to prescribe by the State Board of Medical Licensure and Supervision under the medical direction of a supervising physician, pursuant to ~~subsection D~~ of Section 519.6 of Title 59 of the Oklahoma Statutes, and who has complied with the registration requirements of the Uniform Controlled Dangerous Substance Act, in good faith and in the course of professional practice only, may prescribe and administer Schedule II through V controlled dangerous substances.

This statute, which takes effect on November 1, 2022, allows a physician assistant to **prescribe and administer** Schedule II through V controlled dangerous substances under the medical direction of a supervising physician. The physician assistant must be recognized to prescribe by the State Board of Medical Licensure and Supervision. By removing "subsection D" from the statute, the Legislature resolved a potential conflict between 63 O.S. § 2-312(E) and 59 O.S. § 519.6(E).

2. How does 59 O.S. § 519.6(E) work with the change to 63 O.S. § 2-312(E)?

59 O.S. § 519.6(E) provides:

1. A physician assistant under the direction of a delegating physician may prescribe written and oral prescriptions and orders. The physician assistant may prescribe drugs, including controlled medications in Schedules II through V pursuant to Section 2-312 of Title 63 of the Oklahoma Statutes, and medical supplies and services as delegated by the delegating physician and as approved by the State Board of Medical Licensure and Supervision after consultation with the State Board of Pharmacy on the Physician Assistant Drug Formulary.
2. A physician assistant may write an order for a Schedule II drug for immediate or ongoing administration on site. Prescriptions and orders for Schedule II drugs written by a physician assistant must be included on a written protocol determined by the delegating physician and approved by the medical staff committee of the facility or by direct verbal order of the delegating physician. Physician assistants may not dispense drugs, but may request, receive, and sign for professional samples and may distribute professional samples to patients.

It is our opinion that 59 O.S. § 519.6(E)(1) and (2) does not limit Schedule II order to immediate or ongoing administration onsite. A plain reading of Sections (E)(1) and (2) together, shows the two sections are not mutually exclusive of each other; in fact, they provide instances where a physician assistant may prescribe Schedule II drugs, including prescribing written and oral prescriptions and orders of Schedule II drugs under the direction of a delegating physician, and for immediate or ongoing administration on site if included on a written protocol that has been approved or by direct verbal order of the delegating physician.

The plain words of 59 O.S. § 519.6(E)(2), given their ordinary interpretation, do not exclude all other situations in which a physician assistant can prescribe Schedule II drugs, but they do not allow the dispensing of drugs other than samples. It is our opinion that if the Legislature meant to exclude all other situations in which a physician assistant can prescribe Schedule II drugs, appropriate words for that purpose would have been used, just as they were used when stating “[p]hysician assistants may not dispense drugs” in the same section.

3. How does the Oklahoma State Board of Pharmacy Rules effect a physician assistant’s authority to prescribe Schedule II drugs?

The guidance provided in the Pharmacy Law Book Rules on Appendix E incorrectly states "C-II's are limited to orders for immediate or ongoing administration on-site pursuant to an Oklahoma supervising physician and on-site facility approved written protocol." Not only is this interpretation incorrect as stated above, but it also does not allow for a direct verbal order of the delegating physician in lieu of an approved written protocol as authorized by statute.

OAPA has been in contact with the Oklahoma State Board of Pharmacy and requested that the agency amend its rules to properly reflect 59 O.S. § 519.6(E)(2) and a physician assistant’s prescribing authority. The Oklahoma State Board of Pharmacy has agreed. OAPA has further

requested that the agency notify pharmacies that prescriptions for Schedule II drugs written by physician assistants are valid and should be filled.

It is a well settled principal of law that statutes have supremacy over administrative rules. A state agency cannot usurp the Legislature's authority to enact statutes by the promulgation of contrary rules or the failure to amend or repeal rules without an enabling statute authorizing said rule. Nevertheless, the current administrative rules cause some legal uncertainty that will not be resolved until the administrative rules and associated guidance are amended.

4. How does the Oklahoma Board of Medical Licensure and Supervision Rules affect a physician assistant's authority to prescribe Schedule II drugs?

The Oklahoma Board of Medical Licensure and Supervision's PA Advisory Committee proposed rules that would remove the current drug formulary, and instead replace it with language finding that the Drug Formulary is consistent with categories classified in the American Hospital Formulary Service Information Book. The proposed rules were sent to public comment, and a hearing was held on October 5, 2022. The Oklahoma Board of Medical Licensure and Supervision has not yet ruled on whether they will adopt the rules.

If the rules are adopted, there are likely no limitations on physician assistant prescribing ability. If the rules are rejected, the Oklahoma Board of Medical Licensure and Supervision will propose new rules that will need to go through the public hearing process as well.

CONCLUSION

We believe that 59 O.S. § 519.6(E)(1) and (2), as well as the November 1, 2022 clarification of 63 O.S. § 2-312(E), authorizes physicians assistants to prescribe Schedule II drugs under certain circumstances as detailed in the statute. Unfortunately, the state's administrative rules do not yet reflect this authority. Until administrative rules and associated guidance are amended, some legal uncertainty will remain.