Published on *The National Law Review* https://natlawreview.com

No Surprises in Initial No Surprises Act Regulations

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This post provides an update to our previous publication summarizing the federal No Surprises Act and is part one of two in a series on new interim regulations implementing certain requirements of the No Surprises Act.

The recently issued interim final rule governing one aspect of the No Surprises Act—the treatment of out-of-network (OON) and uninsured patients during emergencies and where services are provided at in-network facilities regardless of emergent status—largely reflects the statute but commits the adopting federal agencies (HHS, Labor and the Treasury) to expansive readings in favor of limiting patient liability where possible.

In an emergency (defined using the prudent layperson standard), if the health plan (broadly defined) covers emergency services at all, it must provide coverage for such services at any facility or provider without prior approval and without any conditions not applicable to in-network providers. Billing by the OON facility or provider is limited in such circumstances and generally will be tied to the Qualifying Payment Amount (based on the median negotiated rate, subject to arbitration), which will be discussed in part two of this blog post. Notably, post-stabilization services remain an emergency and cannot be treated as OON if the services are a result of an unforeseen, urgent medical need that arises when a service is otherwise provided. However, if the following conditions are met, the prohibition on balance billing does not apply, as the services provided are not considered "emergency services": (i) the patient is able to travel to an available participating provider or facility, (ii) the patient's consent is obtained after being notified of the cost and alternative in-network providers, (iii) the patient is in a condition to receive the information and provide consent, and (iv) the provider complies with any additional requirements or prohibitions as may be imposed under state law. If the patient does not consent, OON billing is improper. Patients will be advised of their rights to challenge an OON bill. Providers and facilities are required to notify the plan of any post-stabilization services for which they are billing OON and that the requirements for such billing have been met. There are penalties for failing to treat post-stabilization patients as OON in accordance with these complex rules (and to emphasize the point, facilities and providers are required to retain records for 7 years).

In most non-emergent circumstances at in-network facilities, providers are required to provide notice and to obtain consent prior to providing the service. However, the prohibition on OON billing is

absolute for (and the notice and consent provisions do not apply to) (i) specific ancillary services, including items and services related to emergency medicine, anesthesiology, pathology, radiology and neonatology, (ii) services provided by hospitalists, intensivists and assistants at surgery, (iii) diagnostic services, including radiology and laboratory services and (iv) items and services provided by an OON provider if there is no in-network provider at the facility. The consent document is subject to technical requirements and the interim final rule provides that the regulators will provide a template form that is suggested for use but not required.

All providers and facilities are required to provide notice of the balance billing rules under this rule and State law, and appropriate federal and State agency contacts for complaints by posting on the facility/provider website, prominently on the premises and by mail. Notice is not required if the provider does not furnish services “in connection with” (undefined) a visit to a health care facility.

The requirements for OON billing apply to catastrophic plans.

The interim final rule is set to take effect beginning on January 1, 2022.

National Law Review, Volumess XI, Number 188