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

Mexico Drafts Remote Work Health and Safety Regulations

Article By:

David A. King

Joshua D. Arters

Five months ago, in *TMA v. HHS, et al.* ("*TMA*"),[1] a federal court in Texas struck down portions of a controversial interim final rule ("Rule") jointly issued by three federal executive agencies ("Departments") intended to implement the independent dispute resolution ("IDR") process of the No Surprises Act ("NSA"). These portions of the Rule sought to give extra weight to one of the several factors to be considered by a neutral ("IDR entity") in determining the appropriate rate for certain out-of-network ("OON") services furnished by hospitals and other hospital-based providers. The court was not asked to address the nearly identical portions of the Rule applicable to air ambulance services. Thereafter, an air ambulance provider filed suit in the same court seeking the same relief. On Tuesday, July 26, 2022, this court followed its previous ruling and struck down the similar provisions of the Rule applicable to air ambulance services. The decision was issued in *LifeNet v. HHS, et al.* ("*LifeNet*"),[2] linked here. Like the *TMA* decision, the court's ruling in *LifeNet* applies nationwide and not just to the named plaintiff in the case.

As we discussed in our previous client alert following the *TMA* decision, linked here, Congress set forth specific factors under the NSA that IDR entities "shall" consider when determining appropriate OON rates during the IDR process. Congress chose not to impose any more or less weight to any of these factors. However, the Rule the Departments issued conflicted with the NSA by requiring IDR entities to apply a "rebuttable presumption" that the "appropriate" OON rate is the plan's "QPA" (generally speaking, the plan's median in-network rate). In other words, the Rule as drafted permitted IDR entities to consider the other statutory factors only when such factors "clearly demonstrate[] that the [QPA] is materially different from the appropriate [OON] rate." The *TMA* court found that this agency created "QPA presumption" "rewrites clear statutory terms," and was therefore unlawful and must be stricken from the Rule. *LifeNet*, slip op. at 3 (citing *TMA*, 2022 WL 542879, at *9).

Despite the *TMA* decision, the Departments continued to apply the QPA presumption to air ambulance providers. The Departments did so on the ground that the specific portions of the Rule at issue in the *TMA* case were located in the sections of the Rule applicable to hospitals and other hospital-based providers but not directly applicable to air ambulance providers. So, the Departments continued to apply the identical "QPA presumption" found in different sections of the Rule that were expressly applicable to air ambulance providers, prompting the plaintiff in *LifeNet* to file suit in the same federal court that issued the *TMA* decision.

In response to the plaintiff's complaint, the Departments attempted to put up various procedural roadblocks. The Departments first asked the court to transfer the case to a different federal court in Washington D.C. handling similar litigation previously instituted by the Association of Air Medical Services.[3] The court rejected this request, finding that transferring the case would "waste judicial resources," "delay the resolution of [the *LifeNet*] case," and could result in "piecemeal resolution of issues that call for a uniform result." *Id.* at 7–12 (citations omitted). The Departments also asserted that the plaintiff lacked standing to bring the suit, similar to their position in the *TMA* case, alleging the plaintiff suffered no direct injury from the Rule. The court also rejected this argument, finding that the plaintiff would suffer an injury because the Rule "deprives it of the arbitration established by the [NSA]" by putting "a substantial 'thumb on the scale' in favor of the QPA." *Id.* at 15 (quoting *TMA*, 2022 WL 542879, at *4). Furthermore, the court found that the plaintiff would have suffered financial harm if the Rule was implemented as drafted based on the plaintiff's showing that the QPA presumption "'will drive [OON] reimbursement rates to the QPA as a de facto benchmark'" causing "LifeNet's compensation to decrease significantly." *Id.* at 16.

After the court rejected the Departments' unsuccessful procedural arguments, it determined that the portions of the Rule at issue were unlawful because they do "exactly what the Court ruled unlawful in *TMA*[.]" *Id.* at 6. The court concluded that the portions of the Rule applicable to air ambulance providers "'rewrite[] clear statutory terms'" by "'requiring [IDR entities] to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption.'" *Id.* at 19 (quoting *TMA*, 2022 WL 542879, at *8). As in the *TMA* decision, the court also found the Rule unlawful because the Departments improperly and without justification bypassed the required "notice and comment" process under the Administrative Procedure Act when issuing the Rule, which, according to the court, would have "almost certainly changed—even if in small part—the Rule's complex arbitration process." *Id.* at 20. Having concluded that the portions of the Rule applicable to air ambulance providers were unlawful, the court decided to strike down these portions of the Rule instead of remanding to the Departments to establish further justification for the Rule. The court reasoned that the Departments "cannot justify the challenged portion of the Rule on remand" and the "'remaining portions of the Rule and the [NSA] itself provide sufficient framework' for all interested parties to resolve payment disputes." *Id.* at 22 (quoting *TMA*, 2022 WL 542879, at *14).

The *LifeNet* decision comes ahead of the anticipated release of a Final Rule implementing the NSA's IDR process, which is currently being reviewed for clearance by the White House Office of Management and Budget ("OMB") as of the date of this alert. OMB must review the Final Rule before it is issued, and there is no timeline for the review period.

For more information and questions related to the NSA, please contact David King or Josh Arters.

FOOTNOTES

[1] *Texas Medical Association, et al. v. United States Department of Health and Human Services, et al.*, No. 6:21-cv-425-JDK, --- F.Supp.3d ---, 2022 WL 542879 (E.D. Tex. Feb. 23, 2022).

[2] *LifeNet, Inc. v. United States Department of Health and Human Services, et al.*, No. 6:22-cv-00162-JDK, slip op. (E.D. Tex. July 26, 2022).

[3] *See Association of Air Medical Services v. United States Department of Health & Human Services*, 1:21-cv-03031-RJL (D.D.C.).

National Law Review, Volume XII, Number 209