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Blog Post

Surprised Providers Seek Changes to Latest Provisions of the No Surprises Act

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Effective January 1, 2022, new billing protections went into effect that have the goal of providing greater protections for patients against surprise medical bills. As we discussed in our prior blog, the Departments of Health and Human Services, Labor, and Treasury, and the Office of Personnel Management (collectively, the Departments) implemented these additional protections that are part of the No Surprises Act as an interim final rule with comment period (Interim Rule). Unfortunately, many healthcare providers are concerned the new provisions unfairly protect group health plans and health insurance issuers (collectively, Plans) to the detriment of patients and out-of-network physicians and facilities (Out-of-Network Providers).

The majority of the criticism against the Interim Rule focuses on the creation of a federal Independent Dispute Resolution (IDR) process. The IDR process provides a method for Plans and Out-of-Network Providers to determine the out-of-network rate for applicable items or services after an unsuccessful open negotiation. Once an IDR entity is selected, the parties must each submit to the IDR entity their offers for payment along with supporting documentation. The IDR entity uses that information to determine the appropriate out-of-network amount.

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The **IDR entity is required to begin with the presumption that the qualifying payment amount (QPA) is the appropriate amount**. In general, the QPA is the Plan's median contracted rate for the same or similar service in the specific geographic area. This presumption is the basis of the controversy as the Out-Of-Network Providers deem a Plan's median contracted rate to be an inappropriate starting point.

The American Hospital Association, the American Medical Association, and other co-plaintiffs (collectively, the Plaintiffs) filed a complaint in the United States District Court for the District of Columbia on December 9, 2021, arguing that the IDR process deviates from the original law. The Plaintiffs support the goal behind the IDR, which was to bring both parties to the table and allow them to present relevant information to support their payment offers. The lawsuit challenges the way the Interim Rule "undermines the independence of the IDR process and the fairness of the No Surprises Act by severely tilting the scales towards the QPA." The Plaintiffs ask the court to set aside the requirement that the arbitrators use a presumption in favor of the QPA, arguing that the requirement is contrary to law and in excess of the Departments' statutory authority. On January 7, 2022, the Physician Advocacy Institute, 16 state medical associations, and nine national medical specialty societies, filed an amicus brief supporting the Plaintiffs' lawsuit.

Others are also pushing back against the Interim Rule. On November 5, 2021, a bipartisan group of 152 House members wrote the Secretaries of the Departments, urging them to amend the IDR process. The letter provides: **"This directive establishes a de-facto benchmark rate, making the median in-network rate [the QPA] the default factor considered in the IDR process.** This approach is contrary to statute and could incentivize insurance companies to set artificially low payment rates, which would narrow provider networks and jeopardize patient access to care – the exact opposite of the goal of the law. It could also have a broad

impact on reimbursement for in-network services, which could exacerbate existing health disparities and patient access issues in rural and urban underserved communities."

There certainly is more to come on this as the lawsuit moves forward. Out-of-Network Providers must remember that, for the time being, the IDR process must be followed in accordance with the Interim Rule. To assist Out-of-Network Providers who feel the presumption in favor of the QPA will unfairly harm them and patients, we outline the factors the Interim Rule details as those that will be considered by the IDR entity when deciding whether the QPA is the appropriate out-of-network amount.

The IDR entity will consider the following credible information when determining if the information submitted by an Out-of-Network Provider clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate for the item or service:

- **The QPA failed to take into account the experience or level of training of the Out-of-Network Provider that was necessary to provide the items or services to the patient**;

- **The Plan has a majority of the market share in the geographic region where the items or services were provided** (e.g., a Plan having the majority of the market share in a geographic region may establish that the QPA is unreasonably low, as Plans with a large market share could drive down rates);

- **The patient acuity or the complexity of furnishing the item or service to the individual is an outlier** because the intensity of care exceeded what is typical for the particular service code or modifier, thereby helping to establish that the QPA does not adequately take the case's complexity into account;

- **The teaching status, case mix, and scope of services of the out-of-network facility was critical to the delivery of the item or service** (e.g., a hospital's trauma level certification may be considered when the item or service involves trauma care that could not be performed at a lower-level hospital, but only if the QPA does not already account for this factor);

- **The Out-of-Network Provider made good-faith efforts to enter into a network agreement with the Plan and, if applicable, the contracted rates between the Out-of-Network Provider and the Plan during the previous four Plan years** (e.g., the IDR entity may consider what the contracted rate might have been had the Out-of-Network Provider and the Plan entered into a network agreement);

- **Any additional information submitted by the Out-of-Network Provider, to the extent the information is credible and relates to the offer submitted by either party**.

We are available to Out-Of-Network Providers seeking guidance regarding adhering to the IDR process.
