

Blog Post

Stop – Go – Stop Again – Now GO... Surprised by the No Surprises Act?

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We are not surprised by the continued stop-and-go regarding guidance surrounding the No Surprises Act. Most recently, a Texas court vacated portions of the No Surprises Act’s updated final rule (the final rules were discussed in our [most recent blog](#) on the subject). This created a domino effect, leading to the Departments of the Treasury, Labor, and Health and Human Services (the Departments) to inform certified independent dispute resolution (IDR) entities to halt, and then semi-halt, and then re-start payment determinations.

The U.S. District Court for the Eastern District of Texas issued a [Memorandum Opinion and Order](#) on February 6, 2023, that granted summary judgment for the plaintiffs: the Texas Medical Association, Tyler Regional Hospital, LLC, and Dr. Adam Corley. As a reminder, the latest final rules had revised the IDR process to make it clear that “certified IDR entities should [instead] select the offer that best represents the value of the item or service under dispute after considering the [qualifying payment amount] QPA and all permissible information submitted by the parties.” The Departments had hoped the latest final rule would alleviate many concerns from unhappy providers and facilities. However, the updated final rule was met with opposition from groups such as the plaintiffs in the February lawsuit.

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The Texas court agreed with the plaintiffs, finding that the challenged provisions of the final rule conflict with the No Surprises Act and must be set aside. Rules implementing a statute must be consistent with the statute and cannot deviate from the concepts of the statute. The court held that the Departments abandoned the “rebuttable presumption” term, but are still privileging the QPA in favor of insurers and lowering payments to out-of-network providers. Therefore, the court determined that the proper remedy is to vacate the challenged provisions and remand to the Departments for “further consideration in light of this opinion.”

The court decision led the Departments to issue a notice on February 10, 2023, instructing certified IDR entities that they should:

- Hold all payment determinations until further guidance is issued, and
- Recall any payment determinations issued after February 6, 2023.

But then, (not surprisingly) the Departments revised the first notice on February 24, 2023, instructing IDR entities to:

- ***Resume*** processing payment determinations on February 27, 2023, for disputes involving items or services furnished ***before October 25, 2022*** (IDR entities are instructed to see here for guidance for these items or services), but
- Hold all payment determinations ***that involve items or services furnished on or after October 25, 2022***, until the Departments issue further guidance.

The Departments AGAIN revised the above guidance on March 17, 2023, instructing IDR entities to:

- ***Resume*** making payment determinations ***that involve items or services furnished on or***

after October 25, 2022.

Guidance for items and services furnished on or after October 25, 2022, is posted [here](#) for certified IDR entities' payment determinations and [here](#) for disputing parties.

For informational purposes, note that the Departments asked parties to make note of the email address, auto-reply-federalidrquestions@cms.hhs.gov, because beginning March 17, 2023, disputing parties will receive a majority of their payment determination notices from this email address for notifications being sent by the IDR portal.

We are available to assist parties seeking guidance regarding adherence to the No Surprises Act as these changes continue to develop.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.