

Blog Post

Surprise... No Surprises Act Arbitration is Too Expensive

August 28, 2023

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Providers finally obtained court ordered relief to the \$350 administrative fee each party was required to pay as part of the Federal Independent Dispute Resolution (IDR) Process under the No Surprises Act. Until the Departments of Health and Human Services, Labor, and the Treasury (collectively, the Departments) set a new administrative fee amount, the administrative fee for disputes initiated on or after August 3, 2023, will be \$50 per party per dispute.

In December of 2022, the Departments had increased the fee from \$50 to \$350, effective January 1, 2023, to address “the rising volume of disputes and additional expenditures associated with the Departments’ enhanced role in 2023 in conducting pre-eligibility reviews to address the backlog of disputes.” Thereafter, the Texas Medical Association (TMA) brought suit against the Departments arguing that the \$350 administrative fee was prohibitive for providers with small-value claims. On August 3, 2023, the U.S. District Court for the Eastern District of Texas found in favor of TMA (See [Opinion and Order](#)). The court concluded that the IDR fee violates the Administrative Procedure Act (APA), which requires agencies to undergo a “notice-and-comment” procedure when issuing substantive rules, unless an exception applies. The court also found that the Departments’ [October 7,](#)

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2021 Rule regarding the batching criteria (directing the manner in which parties submit payment) also violated the APA.

In response to the court's decision, the Departments announced on August 11, 2023, that the administrative fee amount for any disputes initiated on or after August 3, 2023, will be \$50 per party per dispute. However, for disputes initiated on or after January 1, 2023 through August 2, 2023, where a party had "*paid*" the administrative fee to a certified IDR entity, the administrative fee remains \$350 and refunds will not be issued.

A party is considered to have "paid" the administrative fee to the certified IDR entity and; therefore, is not eligible for a refund, if they took either of the following actions, regardless of whether the administrative fee was reflected in the certified IDR entity's accounts before August 3, 2023:

- Sent a paper check via mail postmarked *before August 3, 2023*; or
- Electronically submitted payment, including by electronic check, *before August 3, 2023*.

However, a party may receive a refund if they sent a paper check via mail postmarked *on or after August 3, 2023*, or electronically submitted payment *on or after August 3, 2023*. When either of these scenarios occur, certified IDR entities are instructed to immediately cancel invoices to parties for open disputes initiated on or after January 1, 2023, through and including August 2, 2023. Certified IDR entities must then reissue invoices to those parties reflecting the \$50 administrative fee. The Departments acknowledge the disparity that may exist if one party to a dispute is deemed to be eligible for a refund while the other one is not, but does not address equalizing any such disparity.

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.