

HHS Gives Guidance to Providers on the No Surprises Act in Interim Final Rule

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Overview

On July 1, 2021, the Department of Health and Human Services (HHS), along with other federal agencies, released an interim final rule implementing certain provisions of the No Surprises Act.^[1] The No Surprises Act aims to protect health plan participants and beneficiaries from surprise medical bills when they receive items and services in certain settings from out-of-network providers and health care facilities.

The rule will be enforced beginning January 1, 2022. The rule includes requirements applicable to: (1) group health plans and health insurance issuers that offer group or individual health insurance coverage; (2) certain types of health care providers; and (3) health benefit plans offered by carriers under the Federal Employees Health Benefits Act. This article will focus on provider requirements under the new rule.

Provider Requirements Under the Interim Final Rule

Under the No Surprises Act, nonparticipating providers, facilities, and air ambulance providers are prohibited from balance billing individuals. This means that the nonparticipating provider, facility, or air ambulance provider may not bill an individual for a dollar amount that exceeds the individual's in-network cost-sharing obligations. A nonparticipating provider is any physician or other health care provider acting within the



scope of their licensure under applicable state law and who does not have a contractual relationship with the health plan or health insurance issuer.

The balance billing prohibition applies to the following health care services: (1) emergency services provided by a nonparticipating

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provider or nonparticipating emergency facility; (2) non-emergency services provided by a nonparticipating provider at a participating health care facility; and (3) air ambulance services furnished by a nonparticipating air ambulance service provider. For purposes of the balance billing prohibition for non-emergency services provided by a nonparticipating provider at a participating health facility, a participating health care facility is a hospital, hospital outpatient department, critical access hospital or ambulatory surgical center that has a direct or indirect contractual relationship with the health plan or health insurance issuer with respect to the item or service furnished.

Any participants, beneficiaries, or enrollees in a group health plan or group or individual health insurance coverage offered by an issuer, including Federal Employees Health Benefits beneficiaries, are covered by the rule's protections.

Disclosure Requirements

The No Surprises Act requires providers, facilities, plans and issuers to disclose the patient protections against balance billing to individuals. Per the interim final rule, the disclosure must: (1) contain clear and understandable language of the protections, including how to contact federal and state agencies for suspected violations; (2) be provided within the required time frame, and (3) comply with federal civil rights laws regarding communication and language barriers. Air ambulance service providers are exempt from the disclosure requirements. For providers and facilities, the deadline for providing disclosure depends on the circumstances. If an appointment is scheduled at least 72 hours before the date of the appointment, then disclosure must be made no later than 72 hours prior to the date of appointment. If an appointment is scheduled within 72 hours of the appointment, disclosure must be provided on the same date as, and at least three hours prior to, the appointment.

Disclosure must be provided via three channels:

- **Public location.** Providers must post the required disclosure in a prominent, central location where services are provided, such as near a scheduling or check-in desk.
- **Public website.** The public website disclosure must be searchable and accessible free of charge and without any login or personal information inputting requirements. Providers and facilities that do not have a website are exempt from this requirement.
- **One-page notice.** Individuals must be provided with a one-page notice of the disclosure. The notice must have a minimum of 12-point font, and it may be double-sided.



Provider Exception

To prevent duplicate disclosure notices to individuals, HHS created an exception to the disclosure requirement for providers. If a provider furnishes items or services covered by the plan or coverage at a facility, including hospital emergency departments and independent freestanding emergency departments, it satisfies the disclosure requirements if the facility agrees in writing to provide the required disclosure on behalf of the provider. This is available regardless of whether the provider and facility bill jointly or separately. If the facility fails to provide proper disclosure under the written agreement, the facility, not the provider, is in violation of the rule.

Notice and Consent Exception

Under the No Surprises Act, the prohibition on balance billing does not apply if notice is given to an individual, and the individual consents to waiving balance billing protections with respect to the providers and/or facilities named in the notice.

What to Include

Providers and facilities are required to use the standard notice and consent forms that will be issued by HHS for this exception to apply. These forms must be tailored to include certain specific information, including (1) the out-of-network providers and/or facilities to which it applies, and (2) a good-faith cost estimate for the applicable items or services. The notice, and subsequent consent, will only be valid for those providers and/or facilities named in the notice.

How to Provide Notice

The notice and consent documents must be given to the individual together, and they must be physically separate from, and not attached or incorporated into, any other documents. The documents may be given electronically if the individual so chooses.

Additional Details

Like the disclosure requirements, the notice and consent forms must meet language access and timing requirements specified by the rule. The individual may revoke their consent at any time prior to the furnishing of the relevant items or services by notifying the provider/facility in writing. Providers and facilities may refuse to treat individuals who do not consent, subject to other state and federal laws.

Exceptions to the Exception

In the following circumstances, the notice and consent exception is unavailable, and the balance billing prohibition always applies:

- Where notice is received by the individual, but consent is either not given or is revoked;

- Emergency services;
- Post-stabilization services, unless certain conditions are met;
- Air ambulance services;
- Items or services furnished as a result of unforeseen, urgent medical needs that arise at a time an item or service is furnished for which notice and consent was received; and
- Ancillary services, such as anesthesiology, pathology, radiology, and neonatology, whether provided by a physician or a non-physician practitioner.

Penalties

HHS may impose civil monetary penalties of up to \$10,000 per violation on providers and facilities that violate the balance billing prohibition requirements. However, these penalties may be waived if a provider or facility unknowingly violates the statute and should not have reasonably known that it did so, and within 30 days withdraws the bill in violation and reimburses the plan or individual for the difference between the amount billed and the correct billable amount, plus interest.

Conclusion

The final interim rule makes clear that beginning January 1, 2022, providers and facilities must address the disclosure and balance billing prohibitions in the No Surprises Act. While this article is not meant to encompass all of the details, it offers providers an overview of what these expectations are and what measures must be taken to comply with the rule. If you have questions regarding the No Surprises Act, please contact the authors or any member of Dorsey's Health Transactions and Regulations practice group.

[1] Office of Personnel Mgmt. et al., Requirements Related to Surprise Billing; Part I, at *2 (2021).

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