Departments Issue No Surprises Act FAQ and Clarify Independent Dispute Resolution Process

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The U.S. Departments of Health and Human Services, Labor, and the Treasury (the "Departments") recently released final rules regarding the No Surprises Act. The rules specifically address required independent dispute resolution (IDR) of certain claims and expenses and finalize prior interim final rules relating to information that group health plans must disclose.

Federal IDR Process

The No Surprises Act required regulators to develop an IDR process to resolve conflicts between payers and providers regarding out-of-network expense amounts. Any disputes unresolved after 30 days of negotiating can be referred by either side to binding arbitration from a certified IDR entity. The IDR entity will consider the qualified payment amount (QPA) – the insurance plan's median contracted rate for the same or similar service in an area – and other relevant submitted information, and then select one side's suggested payment amount.

Under interim final rules issued in October 2021, certified IDR entities were to select the offer closest to the QPA, unless the certified IDR entity decided that additional credible information submitted by the parties showed the QPA to be materially different from the appropriate out-of-network rate. A federal District Court vacated this requirement in 2022, so the final rules remove the concept that the arbitrator is supposed to presume that the QPA is the most appropriate rate.

The final rules specify that certified IDR entities should select the offer that best represents the value of the item or service under dispute after considering the QPA *and* all permissible information submitted by the parties. So, certified IDR entities must consider the QPA and then must consider all additional permissible information submitted by each party to determine which offer best reflects the appropriate out-of-network rate.

The interim final rules required plans and issuers to disclose the QPA for each item or service to providers and facilities with each initial claim payment or denial notice. Also, when a plan or issuer changes a provider or

facility's service code to one of lesser value, the plan or issuer must now provide additional information for this process which is known as "downcoding."

The new rule states that if a QPA is downcoded, the plan or issuer has to issue with payment or denial a statement that the payer downcoded the service code or modifier billed by the provider, facility, or provider of air ambulance services. This statement also must explain the downcoding and disclose what the QPA would have been had the downcoding not occurred.

Written IDR Determinations

The interim final rules also required certified IDR entities to explain their payment determinations and reasoning in writing. The final rule requires an IDR entity to detail the information upon which it deemed the amount it selected is the that best represents the value of the out-of-network item or service. The certified IDR entity must also explain why it felt the QPA did not reflect any additional information used to select an offer.

Plan Transparency Disclosure Rules

The No Surprises Act requires plans and issuers to post a notice about patient protections and balance billing requirements on their websites. Plans and insurers must also disclose this information on explanations of benefits for covered items or services. The FAQs confirm group health plan sponsors without their own public health plan website can satisfy this requirement if a TPA or insurer agrees in writing to post the information on its website.

The FAQs also clarify that a group health plan sponsor can satisfy the related transparency in coverage requirement to post machine-readable files (MRF) regarding plan costs and allowed charges if a service provider agrees in writing to post the information on its website on behalf of the plan. If a plan maintains a public website, it must still post a link back to the provider's website.

Plans and insurers must make price comparison information and cost-sharing estimates available through an internet-based self-service tool for 500 specific items and services as of January 1, 2023, and all covered items and services as of January 1, 2024. Regulators will update the list of items and service codes quarterly and allow ample time for plans and insurers to update their tools.

Air Ambulance Providers

The FAQs affirm that the No Surprises Act does not mandate that plans and insurers covering only emergency air ambulance services also cover air ambulance services for non-emergencies like transporting a patient between two facilities. If a plan covers services for air ambulance, the No Surprises Act requires the same out-of-network services to be covered, but it does not require non-emergency services to be covered.

The FAQs further state that patients are protected from out-of-network bills from air ambulance companies even with a non-U.S. pickup point. Plans and insurers must use a reasonable method to determine the geographic region, including by basing the geographic region on the border point of entry to the United States after patient pickup.

Behavioral Health Facilities

The FAQs also state the No Surprises Act covers emergency services rendered at an out-of-network behavioral health facility during a behavioral health crisis. The new rule provides that such services are captured by the law if provided at a facility licensed by the applicable state to provide such services, regardless of whether it is licensed as an emergency department or facility.

Conclusion

As the No Surprises Act continues to evolve, certain processes – like IDR – will no doubt expand and change. Further, the number of disputes processed through IDR will continue to grow and provide insights into whether the requirements are working to streamline coverage and payment. The new rules are based in part on federal officials' analysis of about 45,000 disputes. The Departments promise to continue this analysis and will provide additional guidance as they deem warranted. We will continue to monitor the results and related guidance and will provide necessary updates.