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New Guidance on the No Surprises Act and IDR Process

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On October 6, 2023, the Departments of Labor, the Treasury, and Health and Human Services (“HHS”) (collectively, “the Departments”) issued updated guidance in response to court decisions that vacated some of the regulations governing the independent dispute resolution (“IDR”) process under the No Surprises Act (“NSA”).

The Departments issued FAQ Part 62 which modifies prior guidance on:

- the proper methodology to determine the qualifying payment amount (“QPA”); and
- plan or issuer disclosure requirements of the initial payment or notice of denial of payment to out-of-network (“OON”) air ambulance service providers.

Additionally, it was announced that the federal IDR portal has reopened for the initiation of new single disputes.

Background

The NSA, enacted as part of the Consolidated Appropriations Act, 2021, and subsequent guidance generally limit OON cost sharing and prohibit balance billing when participants in a group medical plan receive (1) emergency services from an OON healthcare provider, (2) non-emergency services from an OON healthcare provider at an in-network medical facility, or (3) OON air ambulance services.

Unless a state law or the All-Payer Model Agreement applies, a participant’s cost-sharing and how much the plan will pay to the provider for these services is generally based on the lesser of the provider’s billed charge or a QPA. The QPA is the median of the contracted rates for a particular item or service plus an inflation adjustment; the rules for calculating the QPA are complicated.

The federal IDR process may be used when the provider receives an initial payment (or denial notice) from the group health plan for NSA-eligible items or services, and the plan and provider do not agree on a payment amount through an open negotiation process. There are provisions for batching items and services, which allow multiple qualified items and services for IDR disputes to be considered jointly as a single determination by the IDR entity.

Court Decisions

The IDR rules were challenged in multiple courts on various grounds. In these cases, the courts vacated portions of the IDR guidance, including (1) those dealing with batching claims, (2) those related to the methodology for calculating QPAs, and (3) certain provisions pertaining to air ambulance disputes, including the timeframe for sending an initial payment or notice of denial of payment to the provider. In response to these rulings, HHS temporarily suspended all federal IDR process operations effective August 25, 2023, in order to make changes necessary to comply with the Court's opinions and orders.

As of September 21, 2023, the federal IDR process was open to single and bundled disputes initiated on or before August 3, 2023 (but not batched disputes). The IDR portal has remained unavailable for all new disputes.

Recent Developments

On October 6, 2023, the Departments issued additional guidance in response to the Court's decisions, as summarized below.

[FAQ About Consolidated Appropriations Act, 2021, Implementation Part 62](#)

Methodology to Determine QPA and Enforcement Discretion

The Departments disagree with the court's decision to vacate some of the provisions of the methodology for calculating QPAs, and plan to appeal. However, in the meantime, they maintain that plans and issuers must determine the QPA in a good faith and reasonable interpretation of the remaining portions of the guidance. This is because the court's decision did not create a standardized QPA process for issuers and plans to follow for NSA compliance.

Because this lack of certainty may create additional compliance complications for plans and issuers, the Departments will exercise enforcement discretion until May 1, 2024 (the first day of the calendar month that is 6 months after the issuance of these FAQs) for an entity that uses a QPA calculated in accordance with the methodology guidance in effect immediately prior to the court's decision for purposes of:

- patient cost sharing;
- providing required disclosures with an initial payment or notice of denial of payment; and
- providing required disclosures and submissions pursuant to the federal IDR process.

HHS will extend this enforcement discretion to providers, facilities, or providers of air ambulance services that bill or hold liable a participant, beneficiary or enrollee for a cost-sharing amount based on a QPA determined using the methodology that was before the court's decision. HHS also encourages states that enforce these NSA provisions to adopt a similar enforcement approach regarding QPAs.

Certified IDR entities can continue to rely on alternative non-prohibited information and factors to decide which party's offer best represents an appropriate value for the item or service at issue.

Disclosures to OON Air Ambulance Providers

Plans and issuers are still required to determine whether OON air ambulance services are covered and provide an initial payment or notice of denial of payment within 30 calendar days of receipt of the bill for the ambulance services.

Plans and issuers subject to ERISA are also reminded to follow the ERISA claims procedure regulation and the ACA internal claims and appeal regulations, which include the option to request additional information from the claimant if necessary to complete the claim's processing. If a plan or issuer is unable to determine coverage within the 30-calendar-day timeframe, a notice of benefit denial due to an adverse benefit determination should be provided, disclosing that the denial was due to insufficient information.

The Departments reiterate that an adverse benefit determination due to insufficient information does not allow OON providers of air ambulance services to balance bill a participant, beneficiary, or enrollee. Instead, such providers will need to resubmit or appeal a claim to the plan or issuer, since balance billing would violate the NSA.

No Surprises Act (NSA) Independent Dispute Resolution (IDR) Partial Reopening of Dispute Initiation Frequently Asked Questions (FAQs)

As of October 6, 2023, the Departments reopened the federal IDR portal for the initiation of most new single disputes, including single disputes involving bundled payment arrangements.

However, the federal IDR portal still remains temporarily unavailable for:

- new disputes involving air ambulance services, and
- batched disputes (regardless of whether new or previously initiated).

The Departments say they are working quickly to issue updated guidance and make system changes that would allow the federal IDR portal to become available for these items. Updates will be provided to the public at www.cms.gov/nosurprises as they become available.

Employer Action

For fully insured group medical plans, the insurance carrier or HMO is responsible for complying with the final rules.

For self-funded group medical plans, the third-party administrator (“TPA”) should be handling compliance with the final rules, although employers or other plan sponsor are ultimately liable for any noncompliance. Employers should work with their TPAs to make sure they are processing claims in accordance with this latest guidance. Importantly, claims that go through the IDR process will likely experience further delays, given the opening/closing/reopening of the process and the various changes required to the system. Employers with self-funded plans will want to discuss this issue with their TPAs and stop loss carriers to ensure sufficient coverage for claims that are caught up in delays related to the IDR process.