ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

JAMES GELFAND
Executive Vice President, Public Affairs

September 7, 2021

The Honorable Xavier Becerra
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue SW
Washington, D.C. 20201

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, D.C. 20220

The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Secretaries Becerra, Yellen, and Walsh,

The ERISA Industry Committee (ERIC) commends the Administration for protecting patients, families, and retirees from exorbitant out-of-network charges by launching implementation of the *No Surprise Act*, with the release of the Interim Final Rule "*Requirements Related to Surprise Billing; Part I"*. Surprise medical billing has plagued American workers and families with unwarranted costs, and has added more than $40 billion a year in unnecessary spending for those with employer-sponsored insurance.[1] We write to applaud the provisions included in the Interim Final Rule (IFR) that will safeguard patients from surprise medical bills in a way that lowers costs, reduces excessive spending in the health care system, and strengthens employer-sponsored health insurance for millions of employees and their families.

The IFR addresses the main causes of surprise medical billing, and the Departments issued a comprehensive and thoughtful approach to benefit patients, their families, and the employers who offer them health insurance. ERIC thanks the Departments for banning surprise medical billing for emergency services, out-of-network charges for ancillary care at an in-network facility in all circumstances, and other out-of-network charges at an in-network facility without advance notice and consent. With the Departments' leadership, surprise medical billing is on track to be eliminated in January of 2022.

ERIC is a national nonprofit organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. ERIC's member companies voluntarily provide benefits that cover millions of active and retired workers and their families across the country. With member companies that are leaders in every sector of the economy, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans and to lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws, in addition to federal law.

[1] Zack Cooper, Hao Nguyen, Nathan Shekita, Fiona Scott Morton (December 2019). Health Affairs. Out-Of-Network Billing And Negotiated Payments For Hospital-Based Physicians.
https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2019.00507

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ERIC appreciates the opportunity to submit comments on the IFR, especially regarding the qualifying payment amount (QPA) for cost-sharing amounts as it greatly impacts health care savings for employees and large employers. We will also provide remarks on the timing of notices for scheduled appointments so that employees have complete information on out-of-network charges, and whether urgent care centers should be included in abiding by the IFR.

Qualifying Payment Amount

ERIC applauds the Departments for including in the IFR the calculation for cost-sharing amounts for services furnished by nonparticipating emergency facilities and nonparticipating providers at participating facilities. The inclusion of the qualifying payment amount (QPA) will lower costs for patients since the rates will be averaged at the contract level. This will ensure fair market payment and minimize the use of outside resources such as databases like state all-payer claims databases (APCDs). The rules' approach to geographic regions and insurance markets will also ensure that the QPA is determined using locally negotiated rates that reflect the market conditions where care was provided. We believe that this methodology is mathematically sound, administratively feasible, and likely to keep patient costs in check.

These interim final rules also permit sponsors of self-insured group health plans to allow their third-party administrators to determine the QPA for the sponsor by calculating the median contracted rate. We are further pleased that the Departments gave plan sponsors the option to calculate the median rate in their plan, or for their carrier to calculate a median rate based on all their plans in the geographic region. This allows plan sponsors to better utilize their resources and rely on experts in gathering sufficient information to calculate a median contracted rate for an item or service.

Urgent Care Centers

Because urgent care centers are governed by state law, it is up to the state to determine whether they are permitted to provide emergency services. As we understand the IFR, if a state allows urgent care centers to provide emergency services, then they are deemed as independent freestanding emergency departments for purposes of these interim final rules, and surprise medical billing protections would apply.

ERIC believes that most urgent care centers and retail clinics are unlikely to product the kind of charges that would qualify as a surprise medical bill. The Departments should consider whether these settings of care are likely to include out-of-network ancillary providers or specialists, common out-of-network services like labs or radiology, and the like. If so, it may be appropriate to designate all such facilities as emergency departments under the rule – and if not, then the current delineation makes sense.

Timing of Notice (Scheduled Appointments)

The Departments outlined in the IFR that patients who are seeing nonparticipating, non-ancillary providers at an in-network facility should receive notices that the patient is seeing an out-of-network provider (who may engage in balance billing) within 72 hours before the appointment date. If an appointment is made in less than 72 hours, however, then the notice should be provided on the same day, no later than three hours before the appointment time.

ERIC believes the Departments were thoughtful in their approach to protecting patients from abuse of the consent process and plan sponsors are grateful for the steps taken to protect patients who don't or can't immediately consent to surprise bills after being stabilized.

As the Departments continue subsequent rulemaking, it is critical to prevent misuse and abuse in the arbitration process so that patients are protected from inflationary costs. Congress clearly established the QPA as the primary consideration for arbitrators when determining the final payment for out-of-network care. Deviation from the QPA should be limited to extenuating circumstances that are not already reflected by calculation of prices for services in that market and merit additional consideration. The Departments should also closely review all received consent notices to determine if providers or provider groups are over utilizing signed consent forms to avoid the cost-sharing protections of the *No Surprises Act*.

Independent Dispute Resolution (IDR)

The IDR process should be used as a limited, last resort for disputes that cannot be negotiated, rather than an opportunity for inflating costs. Rampant misuse of the IDR process in states such as New York, Texas, and New Jersey, shows how bad actors take advantage of the IDR process to bolster bottom lines at the patients' expense.[2] This activity poses risks to patient access and affordability, and runs counter to the legislative intent Congress demonstrated in developing and passing the No Surprises Act.

The upcoming regulations will provide a vital incentive to expand access to in-network care and we urge the Departments to ensure the IDR process is predictable, consistent, and used sparingly, rather than as a business practice to maximize profits.

Conclusion

Thank you in advance for considering these comments. Please do not hesitate to contact us with any questions or if ERIC can serve as a resource on this very important issue.

James P Gelfand

Executive Vice President
Public Policy

[2] Texas Senate Bill 1264 2021 Midyear Report (July 2021) https://stopsurprisebillingnow.com/wp-content/uploads/2021/08/SB1264-2021-midyear-update23.pdf