

HHS Sets New Requirements to Limit Surprise Medical Bills from Out-of-Network Providers

By Jackie Selby and Basil H. Kim

April 2016

The U.S. Department of Health and Human Services (“HHS”) recently released a final rule titled “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2017” (“Final Rule”)¹ that sets policies and regulatory standards for health insurance exchanges and qualified health plan (“QHP”) offerings for the 2017 plan year. The Final Rule includes HHS’s policy to limit surprise bills for out-of-network services.

Under the Final Rule, certain QHP enrollees’ cost-sharing amounts for essential health benefit (“EHB”) services provided by out-of-network providers in an in-network setting will count toward an enrollee’s in-network annual limitation on cost sharing. However, this requirement (i) will not apply if the QHP gives appropriate notice to the enrollee, (ii) is slated to take effect in the 2018 benefit year but may see further modifications before then, and (iii) is not intended to preempt any state laws on this issue.

HHS requires each QHP that uses a provider network to count the cost sharing charged to an enrollee for an EHB delivered by an out-of-network ancillary provider (such as anesthesiology or radiology services) at an in-network facility toward that enrollee’s annual in-network cost sharing limit.

For providing notice to the enrollee that an out-of-network provider may be supplying services that could lead to additional costs, HHS is applying a timeframe of the longer of:

- (i) the issuer’s “prior authorization timeline” (i.e., when the issuer would typically respond to a timely prior authorization request), or

¹ 81 Fed. Reg. 12204 (March 8, 2016), available at <https://www.federalregister.gov/articles/2016/03/08/2016-04439/patient-protection-and-affordable-care-act-hhs-notice-of-benefit-and-payment-parameters-for-2017>.

- (ii) 48 hours before the scheduled service.

These conditions apply to QHPs both on and off the Federally Facilitated Marketplace and to QHPs with tiered networks, but they do not apply to QHPs that do not cover out-of-network services.

HHS limited the Final Rule to services delivered by an out-of-network ancillary provider rather than supplied by a primary provider to avoid consumers who had selected an out-of-network provider from deliberately seeking to have services provided at an in-network facility to reduce cost sharing.

Also, HHS is requiring that any notices sent to enrollees by QHPs simply be form notices (versus individualized ones) indicating that additional costs may be incurred for an EHB supplied by an out-of-network ancillary provider in an in-network setting. While HHS is not requiring customized information be offered in such circumstances—including whether an out-of-network ancillary provider is scheduled to perform services, information on available network providers, costs, and how a consumer could appeal a determination—HHS is strongly encouraging QHP issuers to furnish that information.

Stand-alone dental plans must also comply with these requirements as they are obligated to meet all QHP certification standards.

The intent in implementing this policy in 2018 is to afford HHS time to monitor ongoing efforts to address the issue of surprise out-of-network cost sharing and to permit HHS to amend the Final Rule, as necessary, to accommodate progress on this issue.

Many commenters supported this effort to address surprise out-of-pocket costs for consumers, but some asked that states be given the time and discretion to implement their own network adequacy standards. HHS explicitly noted that these policies are not intended to preempt any state laws on this issue, such as those that have been enacted in New York.² They also do not apply to emergency services, which are governed by other federal regulations.

It is not clear how the Final Rule will handle the determination of the balance bill amount (that is, the difference between the amount that the enrollee's QHP will allow and what the provider charges for services). There are also other concerns that the proposal may have unintended consequences, such as disincentivizing providers from contracting with issuers in order to be able to balance bill, or incentivizing consumers and out-of-network providers to elect to perform procedures at in-network facilities.

² See Epstein Becker Green *Client Alert* titled "New York's 'Emergency Medical Services and Surprise Bills' Law" (Oct. 22, 2014), available at <http://www.ebglaw.com/news/new-yorks-emergency-medical-services-and-surprise-bills-law/>.

Notwithstanding those concerns, the Final Rule, along with President Obama's Budget provision³ that seeks to eliminate surprise out-of-network health care charges by placing some of the surprise bill burden on hospitals and physicians, shows that surprise bill concerns for consumers are on the minds of legislators at a national level and sets the stage for increased transparency and patient protection.

* * *

This Client Alert was authored by Jackie Selby and Basil H. Kim. For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of: (i) avoiding any tax penalty, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

If you would like to be added to our mailing list or need to update your contact information, please contact Lisa C. Blackburn at lblackburn@ebglaw.com or 202-861-1887.

³ See Basil Kim and Jackie Selby, *Surprise Health Care Bill Protections Addressed in President Obama's 2017 Budget for Health and Human Services*, Health Law Advisor (blog), Feb. 24, 2016, <http://www.healthlawadvisor.com/2016/02/24/1344/>.

BALTIMORE

Helaine I. Fingold
Joshua J. Freemire
Thomas E. Hutchinson*
John S. Linehan

BOSTON

Emily E. Bajcsi
Barry A. Guryan

CHICAGO

Bradley S. Davidsen
Amy K. Dow
Mark A. Mosby
Kevin J. Ryan

HOUSTON

Mark S. Armstrong

LOS ANGELES

Adam C. Abrahms
Ted A. Gehring
Paul A. Gomez
J. Susan Graham

NEW YORK

Jeffrey H. Becker
Lindsay M. Borgeson
Michelle Capezza
Karen L. Cavalli
Aime Dempsey
Kenneth W. DiGia
Charles C. Dunham, IV
Jerrod I. Ehrlich
Gregory H. Epstein
Hanna Fox
James S. Frank
Arthur J. Fried
John F. Gleason
Robert D. Goldstein
Robert S. Groban, Jr.
Gretchen Harders
Carly Eisenberg Hoinacki
Jennifer M. Horowitz
Kenneth J. Kelly
Joseph J. Kempf, Jr.
Basil H. Kim
Stephanie G. Lerman
Leonard Lipsky
Purvi Badiani Maniar
Wendy G. Marcari
Shilpa Prem
Jackie Selby
Victoria M. Sloan
Steven M. Swirsky
Benjamin T. Tso
David E. Weiss
Alison M. Wolf*

NEWARK

John D. Barry
Christina Burke
Joan A. Disler
James P. Flynn
Diana M. Fratto
Gary W. Herschman
Laurajane B. Kastner
Daniel R. Levy
Theodora McCormick
Maxine Neuhauser
Anjana D. Patel
Victoria Vaskov Sheridan
Scheherazade A. Wasty
Jack Wenik
Sheila A. Woolson

PRINCETON

Anthony Argiropoulos
Thomas Kane
Andrew Kaplan
Jeffrey G. Kramer

SAN DIEGO

Kim Tyrrell-Knott

STAMFORD

Ted Kennedy, Jr.
David S. Poppick

WASHINGTON, DC

Alan J. Arville
Robert F. Atlas*
Kirsten M. Backstrom
Clifford E. Barnes
James A. Boiani
George B. Breen
Lee Calligaro
Tanya V. Cramer
Anjali N.C. Downs
Jason E. Christ
Steven B. Epstein
John W. Eriksen
Daniel C. Fundakowski
Brandon C. Ge
Stuart M. Gerson
Daniel G. Gottlieb
M. Brian Hall, IV
Philo D. Hall
Douglas A. Hastings
Jonathan K. Hoerner
Robert J. Hudock
Richard H. Hughes IV
William G. Kopit
Amy F. Lerman
Wenxi Li*
Christopher M. Locke
Katherine R. Lofft
Mark E. Lutes
Joseph E. Lynch
Teresa A. Mason
David E. Matyas
Colin G. McCulloch

Frank C. Morris, Jr.
Leslie V. Norwalk
René Y. Quashie
Jonah D. Retzinger
Serra J. Schlanger
Bonnie I. Scott
Erica F. Sibley
Lynn Shapiro Snyder
Adam C. Solander
James S. Tam
David B. Tatge
Daly D.E. Temchine
Bradley Merrill Thompson
Carrie Valiant
Patricia M. Wagner
Robert E. Wanerman
Meghan F. Weinberg
Constance A. Wilkinson
Kathleen M. Williams
Lesley R. Yeung

**Not Admitted to the Practice of Law*