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# Ironically, No Surprises Act catches providers and facilities off guard

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On December 27, 2020, the Consolidated Appropriations Act, 2021 was signed into law, which, among other provisions, included the No Surprises Act.[1] In July and October 2021, respectively, the Department of Health & Human Services, the Department of Labor, the Department of the Treasury, and the Office of Personnel Management (departments) issued two interim final rules implementing core aspects of the No Surprises Act (collectively, the NSA), including, but not limited to, prohibiting nonparticipating providers from balance billing individuals who receive services in participating facilities unless prior notice and consent is provided and obtained,[2] and requiring providers and facilities to provide good faith estimates (GFEs) to uninsured (or self-pay) individuals of expected charges prior to their scheduled services.[3]

As detailed below, these requirements (among the other NSA provisions) have resulted in providers and facilities scrambling to understand the complexities and nuances of the NSA, particularly as they apply to unique types of providers and facilities.[4] The NSA has also caused operational confusion as providers and facilities struggle to determine how to implement new processes to comply with the requirements, the majority of which became effective January 1, 2022, and the remainder of which become effective January 1, 2023. This has led to tremendous taxes on provider resources, and in some cases, has even resulted in litigation being filed to enjoin implementation of certain provisions of the regulations implementing the NSA.

## NSA balance billing requirements cause confusion for certain types of providers and facilities

The NSA provides that if a participant, beneficiary, or enrollee with benefits under a group health plan or group or individual health insurance coverage offered by a health insurance issuer (collectively, an "insured person," or IP) receives emergency services at an emergency department of a hospital or at an independent freestanding emergency department, a nonparticipating provider or a nonparticipating emergency facility may not balance bill the IP for any amount in excess of their in-network cost-sharing amount.[5] The NSA similarly provides that if an IP receives nonemergency services from a nonparticipating provider in connection with a visit at a

participating facility, a nonparticipating provider may not balance bill the IP in excess of the their in-network cost-sharing amount, *unless* the nonparticipating provider provides the IP with notice of their rights under the NSA and obtains the IP's consent to waive the balance billing protections in advance of the service (notice and consent).

The NSA also requires all facilities, and all providers that provide services to IPs either in a facility or as part of a visit to a facility, to physically post (in the physical location and on the website) a one-page disclosure notice advising IPs of their balance billing protections, which must also be handed to IPs no later than the date and time on which the provider or facility requests payment from them (the disclosure notice).[6] This disclosure notice must be provided to IPs in addition to any notice and consent to balance bill, which is required only if that a nonparticipating provider seeks to do so.

These requirements have caused considerable confusion for providers and facilities as they seek to determine if and when these requirements apply to them and how to implement them by January 1. One common question is, "If we never balance bill patients, do we have to do anything to comply with the NSA?" The simple answer is, yes. Providers and facilities that never balance bill are still obligated to post and provide the disclosure notice, as described above (as well as a separate disclosure related to a self-pay or uninsured individual's right to obtain a GFE, as described in greater detail below). These requirements are part of the policy aims of the law related to transparency, as opposed to strictly protections against balance billing. These obligations apply very broadly and to providers that may believe they are outside of the reaches of the NSA.

## What is a 'visit'?

Private physician groups have questioned whether the NSA, particularly the disclosure notice and notice and consent requirements, applies to them if they do not furnish services in a facility-type setting. However, the NSA applies to the provision of nonemergency services furnished by a nonparticipating provider *in connection* with a "visit" to a facility. A visit is defined broadly to include services furnished by a provider outside of the facility setting, including preoperative and postoperative services and telemedicine services.[7] For example, if a telemedicine provider anticipates providing nonemergency services to IPs as part of a visit to a facility where the facility is in network and the telemedicine provider is out of network, the telemedicine provider would be subject to the disclosure notice requirement (and the notice and consent requirement, should the telemedicine provider seek to balance bill). Due to the extremely broad nature of the NSA, it appears that most physician groups will be required, at a minimum, to post the disclosure notice, even if they do not intend to balance bill.

Providers have also raised questions about how often the disclosure notice must be provided. As noted above, such disclosures must be provided in connection with a visit to a facility, the definition of which is broad and does not include any exception or waiver process for instances in which an IP receives a series of treatments as part of a single course of treatment over a short period of time (e.g., daily radiation therapy treatments based on a cancer diagnosis). Therefore, based on a plain-language reading of the requirements under the NSA, a provider or facility may find itself in the position of providing multiple copies of a disclosure notice to the same patient within a short window of time, which may cause confusion and frustration.

## When can a nonparticipating provider balance bill?

The NSA prohibits balance billing for nonemergency services furnished by nonparticipating providers in in-network facilities unless notice and consent is provided and obtained. However, the notice and consent exception is not available for certain "ancillary" services, including pathology, radiology, anesthesiology, neonatology, and laboratory services, and thus IPs who receive such services from nonparticipating providers cannot be balance

billed.[8] This exception to the notice and consent exception of the NSA has also raised a significant amount of questions for providers, who struggle to understand exactly what types of services fall within these broad categories. As a result, the departments have sought additional comments from stakeholders to clarify what services should constitute an ancillary service for purposes of this balance billing prohibition.