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[DIV31] No Surprises Act - Update and Good News

16 messages

Skillings, Jared <JSkillings@apa.org> Thu, Dec 30, 2021 at 9:59 PM
Reply-To: "Skillings, Jared" <JSkillings@apa.org>
To: DIV31@lists.apa.org

Dear colleagues,

Thank you for the robust dialogue and rapid feedback about the federal No Surprises Act (NSA). I appreciate and empathize with the concerns that have been raised about this legislation. I share many of them. The most prominent issues that have been raised are: (a) why did the NSA feel like a surprise to psychologists?, (b) are psychologists are included in this legislation?, (c) what are the expected next steps for my practice?, and (d) what APA/APA Services (APASI) regulatory and legislative advocacy is needed? I will respond to all of these issues in this email below. I hope to offer some clarity and perhaps a bit of relief.

First, the NSA is voluminous and complicated. Katherine McGuire, APA's Chief Advocacy Officer, and I have personally continued to scrutinize the thousands of pages of NSA provisions even during the holidays. I am VERY pleased to say that we discovered a one-year period of "enforcement discretion" buried in the text, and we now believe that 2022 will be a grace period. Here is the language from the rule itself:

HHS [Health and Human Services Department] understands that it may take time for providers and facilities to develop systems and processes for providing and receiving the required information from others. Therefore, for good faith estimates provided to uninsured (or self-pay) individuals from January 1, 2022, through December 31, 2022, HHS will exercise its enforcement discretion in situations where a good faith estimate provided to an uninsured (or self-pay) individual does not include expected charges from other providers and facilities that are involved in the individual's care.

Q1: Why did the NSA feel like a surprise to psychologists?

The NSA was passed by Congress in December 2020 (one year ago) during the Trump administration. Its original purpose was to shield patients from surprise bills and establish an arbitration process to resolve billing disputes for out-of-network health services. Per standard protocol, the NSA legislation went through a rule-making process through the Health & Human Services (HHS) Department, whose strategies and staff were significantly modified and reshaped when the Biden administration took the reins in January 2021. APASI tracked this legislation and the rule-making progress and supported its general principles. However, once the rule-making was final in October 2021, the NSA regulations looked very different than the intent of the bill that passed Congress. Everyone was shocked by how different it was. In fact, in November 2021 (one month after the rule-making was finished) at the prompting of APA and a large coalition of medical associations and stakeholders, a bipartisan group of 152 U.S. Representatives – both Democrats and Republicans – wrote a formal letter identifying these problems and calling for the Biden Administration to reconsider its implementation of the NSA.

APASI has already joined efforts with medical associations and provider groups pressing Congress to engage on the point that the proposed interim final rule favors health insurance plans and deviates from the intent of the law as it was envisioned by Congress. It has long been an ethical standard of psychologists to be transparent about billing and compensation. The new version of the NSA misrepresents the principles of transparency and integrity that were originally intended by Congress and that APASI supported. There is no evidence that psychologists are part of the problem of surprise billing, and we are offended by this wrongheaded insinuation that is not supported by data.

Q2: Are psychologists included in the NSA legislation?

Yes, all licensed "providers" are included – that means all licensed psychologists. Those with a limited or provisional license are also likely included; more information is needed regarding trainees. In addition to APASI's own legal and policy review of the NSA, we took the extra step of soliciting an external policy review about whether psychologists are included in these regulations. That review was conducted by Lesley Yeung, an attorney at Epstein Becker Green who specializes in these matters. Her review is below in blue text, including yellow highlights she added to draw attention to key points. In summary = a number of the NSA provisions do not include psychologists such as air ambulance, etc. The good-faith estimate (GFE) provision does include all healthcare "providers," including psychologists, as defined in regulations. The GFE provision applies to all providers, not only to those who furnish services in a facility. As such, independent practitioners are included. See more details below.

Q3: Since psychologists are included in the NSA, what are the expected next steps for my practice?

Again, we believe there is an "enforcement discretion" grace period for 2022. APASI will continue our advocacy and engagement with policymakers and coalition partners to turn back the whole Act or work to eliminate or minimize any problematic impact for psychologists, including those in private practice. We will keep psychologists up-to-date about our advocacy strategies so that you can join this effort.

At the same time as we will be advocating to eliminate or change the NSA, APASI has a simultaneous duty to psychologists to offer guidance about how to manage the NSA as it currently stands. APASI's initial guidance was developed for that purpose, and it can be found online here: https://www.apaservices.org/practice/legal/managed/billing-disclosure-requirements. An FAQ is being developed and is expected early next week. APA will develop additional guidance and concrete resources by the end of the first quarter (i.e. March 2022) about steps psychologists can take in your practice. The guidance and resources will be shared freely.

Q4: What APA/APASI regulatory and legislative advocacy is needed?

APASI shares the serious concerns about the NSA as expressed in the U.S. Representatives' letter, "…This approach [reflected in the NSA regulations] is contrary to statute and could incentivize insurance companies to set artificially low payment rates, which would narrow provider networks and jeopardize patient access to care – the exact opposite of the goal of the law. It could also have a broad impact on reimbursement for in-network services, which could exacerbate existing health disparities and patient access issues in rural and urban underserved communities."

When Congress returns in January, APASI will turn our attention to elements of concern with the NSA that impact psychologists, including reporting requirements and discerning the interplay between the new federal law and established state regulations and laws. We estimate that 33 states have some form of relevant legislation/regulation.

In conclusion, we sincerely thank you for your significant engagement on division or SPTA listservs and directly with us. We will continue to fight for the profession of psychology and for the communities we serve. We will be in touch on these matters again soon. Until then, I hope the newly discovered grace period offers some solace. Have a restful and healthy New Year!

Best Regards,

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*Disclaimer: Legal issues are complex and highly fact-specific and state-specific. They require legal expertise that cannot be provided in an email or FAQ. Moreover, APA/APA Services attorneys do not, and cannot, provide legal advice to our members or state associations. The information in this article does not constitute and should not be relied upon as legal advice and should not be used as a substitute for obtaining personal legal advice and consultation prior to making decisions.

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Policy Review by Epstein Becker Green:

I have double checked the language in the statute and regulations, as well as recent guidance that CMS has put out regarding the requirement for providers and facilities to provide a good faith estimate. My reading of the statutory and regulatory language, and the recent guidance, is that the good faith estimate requirement applies to all providers who schedule services in advance, and it does not apply only to providers who furnish services in a facility.

Specifically, the balance billing prohibitions at Sec. 2799B-1 apply to emergency services furnished in an emergency department of a hospital or an independent freestanding emergency department. The balance billing prohibitions at Sec. 2799B-2 apply to non-emergency services performed by nonparticipating providers at a participating health care facility. Accordingly, both of these provisions apply to services that are furnished in a facility setting. However, the good faith estimate requirements at Sec. 2799B-6 apply to "each health care provider and health care facility". There is no language in the statute that limits the requirement to only those providers who furnish services in a health care facility (unlike in Secs. 2799B-1 and 2799B-2, which are clearly limited to services furnished in an applicable facility setting). *See* https://www.govinfo.gov/content/pkg/COMPS-8798/pdf/COMPS-8798.pdf.

Further, the regulatory language included in the Second Interim Final Rule related to the provision of the good faith estimate (e.g., at 45 C.F.R. §149.610) states that the requirement applies to "health care providers and health care facilities" … "upon request or upon scheduling an item or service." Throughout this section of the regulations, the language refers to a provider ***or*** facility, but there is no language stating that the good faith estimate requirement only applies when the provider furnishes the service in a facility. *See* https://www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21441.pdf.

CMS issued an FAQ document on Dec. 22 that mainly addresses the IDR process, but it also includes one question that discusses the good faith estimate requirements. Specifically, this FAQ distinguishes between providers who are subject to the balance billing protections (i.e., physicians who furnish services in connection with a visit to a health care facility or emergency facility) vs. all providers who are required to comply with the good faith estimate requirements. The FAQ reads as follows:

> Q: Which physician types do the No Surprises Act rules apply to?
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> A. Any physician or other health care provider who is acting within the scope of practice of that provider's license or certification under applicable State law may be subject to the rules, depending upon the rule. For example, a provider who never furnishes services in connection with a visit to a health care facility or emergency facility would generally not furnish items or services that fall within the balance billing protections. However, that same provider may need to

provide a good faith estimate of expected charges to uninsured or self-pay individuals. If you have further questions, please email provider_enforcement@cms.hhs.gov.

See https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Guidance-IDR-NC-FAQ.pdf.

CMS issued another FAQ document within the past few days that specifically addresses questions related to the good faith estimate requirements. There is an FAQ that discusses which providers are subject to the requirement. The FAQ reads as follows:

Q: Which providers and facilities are required to provide GFEs to uninsured (or self-pay) individuals?

A: Generally, all providers and facilities that schedule items or services for an uninsured (or self-pay) individual or receive a request for a GFE from an uninsured (or self-pay) individual must provide such individual with a GFE. No specific specialties, facility types, or sites of service are exempt from this requirement.

The terms "health care provider (provider)" and "health care facility (facility)" are defined in regulations for purposes of the GFE requirements for uninsured (or self-pay) individuals as:

- "Health care provider (provider)" means a physician or other health care provider who is acting within the scope of practice of that provider's license or certification under applicable State law, including a provider of air ambulance services;

- "Health care facility (facility)" means an institution (such as a hospital or hospital outpatient department, critical access hospital, ambulatory surgical center, rural health center, federally qualified health center, laboratory, or imaging center) in any State in which State or applicable local law provides for the licensing of such an institution pursuant to such law or is approved by the agency of such State or locality responsible for licensing such institution as meeting the standards established for such licensing.

There may be variations in practice patterns, such as whether a specific provider or facility furnishes services to uninsured (or self-pay) individuals, along with the types of items or services provided. There are some items or services that may not be included in a GFE because they are not typically scheduled in advance and not typically the subject of a requested GFE (such as urgent, emergent trauma, or emergency items or services); however, to the extent that such care is scheduled at least 3 days in advance, a provider or facility would be required to provide a GFE.

For example, individuals will likely not be able to obtain GFEs for emergency air ambulance services, as these are not generally scheduled in advance. However, making these requirements applicable to providers of air ambulance services helps to ensure that individuals can obtain a GFE upon request or at the time of scheduling non-emergency air ambulance services, for which coverage is often not provided by a plan or issuer and thus even individuals with coverage must self-pay.

See https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Guidance-Good-Faith-Estimates-FAQ.pdf.

Accordingly, CMS has clarified that the good faith estimate requirement is not limited to providers who furnish services in a facility, but rather, the requirement applies to all providers if services are scheduled in advance.

If it is helpful, HHS and CMS have both issued additional guidance regarding the good faith estimate requirements. HHS recently issued two guidance documents – one for patients and one for providers – on the good faith estimate and patient-provider dispute resolution process. These documents are available here:

https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Good-Faith-Estimate-Patient-Provider-Dispute-Resolution-Process-for-Uninsured-or-Self-Pay-Individuals.pdf

https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Guidance-Good-Faith-Estimate-Patient-Provider-Dispute-Resolution-Process-for-Providers-Facilities-CMS-9908-IFC.pdf

Additionally, CMS has issued a number of model forms related, a few of which provide information on the good faith estimate requirements. The forms are available here: https://www.cms.gov/files/zip/cms-10791.zip. The good faith estimate forms of interest include:

- HHS PRA Supporting Statement
- 1. Right to Receive a Good Faith Estimate of Expected Charges Notice
- 2. Good Faith Estimate Template
- 11. HHS – Appendix Good Faith Estimate Data Elements