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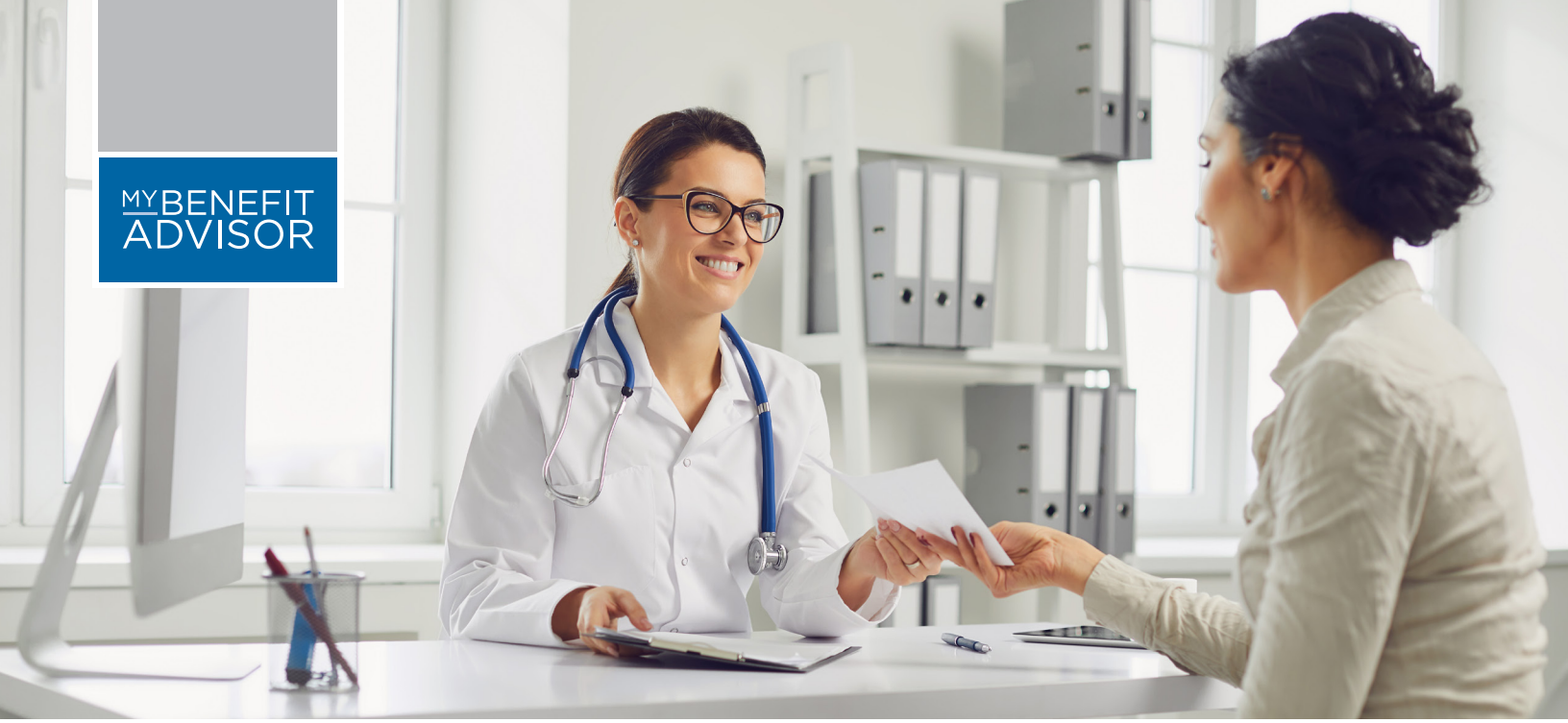

Surprise Medical Billing Guidance Clarifies IDR Process and Fees

Issued date: 10/14/21

On September 30, 2021, the Departments of Health and Human Services ("HHS"), Labor ("DOL"), and the Treasury (collectively, "the Departments") jointly published additional interim final rules implementing provisions of the No Surprises Act ("NSA"). This is the second set of regulations to address the NSA ("Part II Regulations").

Briefly, as related to group health plans, previously-released "Part I Regulations" addressed, among other things, the following:

1. Protections for group health plan participants to limit out-of-network ("OON") cost-sharing and "balance billing" as they relate to emergency services, OON providers of air ambulance services, and non-emergency services performed by OON providers at in-network facilities (with limited exceptions).

2. A prescribed formula to determine a participant's cost-sharing for these services. In some cases, a state law or the "All-Payer Model Agreement" ("APMA") will determine a recognized amount on which participant cost-sharing amounts are based. Otherwise, participant payments will be based on a recognized amount that is generally the lesser of a qualified payment amount ("QPA") or the OON provider's billed charge.

3. A methodology for determining how much the plan will pay to the OON provider for these services. In some cases, a state law or the APMA will determine plan payment amounts. Otherwise, plan payments will be based generally an amount agreed upon between the plan and the OON provider, or an amount determined in a Federal Independent Dispute Resolution ("Federal IDR") process.

As anticipated, the new Part II Regulations primarily provide guidance on a Federal IDR process. Additional guidance, also issued on September 30, 2021, provides information on fees related to the Federal IDR process for calendar year 2022.

Further, the Part II Regulations address how the NSA interacts with the external review process mandated under the Affordable Care Act and related regulations. This includes expanding claims eligible for external review with respect to NSA-related adverse benefit determinations, with examples, and directing the applicability of such determinations to grandfathered health plans.

Of particular note:

- The NSA rules take effect for plan years beginning on or after January 1, 2022, and apply to most group health plans (including grandfathered plans), with some exceptions.

- For fully insured group health plans, the carrier will be responsible for compliance.

- For self-funded group health plans, the plan sponsor is responsible and will need to work closely with third-party administrators ("TPAs") to comply with these rules, including implementation of an IDR process.

The Departments request comments on the Part II Regulations by December 6, 2021.

Part II Interim Final Rules

Plan/Provider Payment Process

As previously reported, the plan will determine whether the services are covered by the plan. Within 30 days of receipt of a "clean claim," the plan must send the provider an initial payment or notice of denial of the payment.

The total amount paid by a plan for items and services is referred to as the "OON Rate." Assuming state law and the APMA do not apply, the plan must make a total payment equal to one of the following amounts, less any cost sharing from the participant, beneficiary, or enrollee:

- if the plan and the provider or facility have agreed on a payment amount, the agreed-on amount; or

- if the parties (plan and provider) enter into the IDR process and do not agree on a payment amount before the date when the IDR entity makes a determination of the amount, the amount determined by the IDR entity.

If the initial payment or denial of payment is disputed, the parties will commence an open negotiation period of 30 business days, beginning on the day the plan sends the provider an initial payment or notice of denial of the payment.

Federal IDR Process

Under the Part II Regulations, the steps to the Federal IDR Process are as follows:

1. Following a failed 30-day open negotiation period, either party may initiate the Federal IDR process.

2. The parties then may jointly select a certified IDR entity to resolve the dispute, and such entity cannot have any conflict of interest with either party.

3. If the parties cannot make a joint selection, or there is a conflict of interest with a selected certified IDR entity, the Departments will select a certified IDR entity.

4. The parties will submit their offers for payment along with supporting documentation, to the selected certified IDR entity.

5. Both parties must pay an administrative fee to the Departments – $50 each for 2022.

6. Up front, both parties must pay a certified IDR entity fee to the certified IDR entity, which should be within the range of $200 to $500, though ultimately the fee will only be paid once.

7. The parties may reach a settlement before the certified IDR entity makes a payment determination, in which case each party will receive back one-half the party's certified IDR entity fee, unless the parties agree to an alternate allocation.

8. Absent an earlier settlement, the certified IDR entity will then issue a binding determination selecting one of the parties' offers as the OON payment amount.

9. The non-prevailing party is generally responsible for the certified IDR entity fee. Thus, the certified IDR entity will typically retain the fee paid by the non-prevailing party and return the fee paid by the prevailing party.

10. Note that a certified IDR entity must begin with the presumption that the QPA is the basis for the appropriate OON amount, and generally it must select the offer closest to the QPA. If a party submits additional permissible information, then the certified IDR entity must consider this information if it is credible. The IDR entity should deviate from the offer closest to the QPA only if submitted information clearly demonstrates that the value of the item or service is materially different from the QPA.

The table below provides further details on various deadlines in the Federal IDR process.

Open Negotiation and IDR Deadlines

Independent Dispute Resolution Action	Timeline
Initiate 30-business-day open negotiation period	30 business days, starting on the day of initial payment or notice of denial of payment
Initiate IDR process following failed open negotiation	4 business days, starting the business day after the open negotiation period ends
Mutual agreement on certified IDR entity selection	3 business days after the IDR initiation date
Departments select certified IDR entity in the case of no conflict-free selection by parties	6 business days after the IDR initiation date
Submit payment offers and additional information to certified IDR entity	10 business days after the date of certified IDR entity selection
Payment determination made	30 business days after the date of certified IDR entity selection
Payment submitted to the applicable party	30 business days after the payment determination

IDR Entity Certification Process

The rule includes details on how entities can become certified as independent IDR entities. To be certified by January 1, 2022, such entities should submit their applications by November 1, 2021. Such entities will be certified by the Departments on a rolling basis.

Certified IDR entities must meet monthly reporting requirements on payment determinations to ensure transparency in the IDR process.

Interaction of NSA with External Review Process

The Affordable Care Act, and accompanying regulations, require non-grandfathered group health plans to provide an external review process for disputing denied claims, which generally include the use of an "Independent Review Organization" (IRO). Such denied claims can occur, for example, when a plan administrator determines an item or service is not covered, is subject to restrictions on coverage, or is considered not medically necessary.

The Part II Regulations specifically provide that all plan coverage decisions pertaining to NSA protections in compliance with surprise billing and cost-sharing protections are eligible for external review. They also add several new examples to existing external review regulations, which address where external review would be available under various NSA-related plan determinations where higher cost-sharing was generally applied, including:

- Member's treatment did not involve emergency services
- Disregarding OON anesthesiology at in-network facility with no consideration of NSA applying
- Relying solely on a provider representation that member was in a condition to receive notice about NSA protections and gave informed consent to waive the protections
- No initial review of a proper medical code for certain services (routine post-natal versus neonatology), and possible error in applying informed consent to waive for ancillary services
- No review of in-surgery, OON anesthesiology services or possible error in applying informed consent to waive for ancillary services

The Part II Regulations also provide that grandfathered plans will be subject to external review requirements with respect for NSA-related coverage decisions.

Employer Action

Employers with self-funded group health plans should continue to review NSA requirements with their TPAs for compliance, effective with the first plan year that begins on or after January 1, 2022. That should include confirming that the TPA:

- Will be prepared to administer the Federal IDR process if and when necessary, and
- Can apply the plans' external review process, including working with an IRO, if and when there is a denied member claim relating to surprise billing and cost-sharing protections under the NSA. This includes grandfathered plans.

TPAs may pass costs associated with the IDR process on to plan sponsors.