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Health Policy in Transit

A Purchaser Viewpoint

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National Alliance of Healthcare Purchaser Coalitions
Driving Innovation, Health and Value

Surprise Billing included in $900 Billion COVID Relief and Appropriations Legislation

This week Congress approved and the President is expected to sign a bill to fund the federal government through the end of the current fiscal year (September 30, 2021). The agreement includes a $900 billion pandemic relief package that incorporates a federal legislative solution to the surprise billing issue the National Alliance, our members, and our sister organizations in DC have been working on for the past two years.

Surprise billing would be barred for out-of-network emergency care, for most out-of-network care at in-network facilities, and for air ambulances. Patients will be asked to pay only their in-network obligations for the care they received. There would initially be a 30-day period during which the payer and the health care providers could try to negotiate a payment for the out-of-network claims. If they do not reach an agreement, then arbitration would be the next step. Both sides would make an offer, and the arbiter would pick one based on the guidance stipulated in the bill, so-called "baseball style arbitration." The agreement does contain "guardrails" to the dispute resolution process by directing the arbitrator to consider the median in-network rate and prohibiting consideration of the providers' billed charges. However, the final legislation also explicitly prohibits arbitrators from considering Medicare and Medicaid rates in deciding the appropriate reimbursement amount. In non-emergency situations, providers may also bill patients for out of network services delivered at an in-network facility if they have notified the patient 72 hours in advance.

While the National Alliance supports the consumer protections against surprise bills, we must be clear that this is not a victory for the millions of people and their employers who struggle to afford health care. There is no reason to believe that using arbitration as the method to resolve disputes, that overall health care costs will not continue to rise. We will continue working to advocate for better and more transparent solutions that will help bring down health care costs in the future.

The 5,500+ page bill also includes several other health care provisions related to issues we have worked on this year. The legislation establishes a grant program to create and improve **state all-payer claims databases** and requires the U.S. Secretary of Labor to convene an advisory committee and develop a standardized format for voluntary reporting by self-funded group health plans. Also included are several provisions related to increasing flexibility in **account-based plans, such as FSAs**. The bill provides employers the option to amend their cafeteria plans and health and dependent care FSAs to allow employees to carryover unused amounts from the 2020 plan year to the 2021 plan year (and from the 2021 plan year to the 2022 plan year) or to provide a 12-month grace period at the end of the 2020 and/or 2021 plan years. Employers also have the option to amend their cafeteria plans and health and dependent care FSAs to allow employees to make prospective election changes for plan years ending in 2021, without regard to whether the employee experiences a change in status.

CASMB Official Statement

Despite out-of-network providers and private equity firms trying once again to dismantle and block vital surprise billing reforms, Congress is taking a first step to remove patients from the middle of abusive surprise billing practices. But American families and employees deserve a better surprise billing solution than arbitration. The experience in the states, including New York, New Jersey and Texas, demonstrates government-mandated arbitration is a costly and burdensome process prone to abuse from the very same private equity firms and out-of-network providers that caused and exploit the surprise billing crisis. By relying solely on arbitration – arguably the most complex and convoluted path to address surprise medical bills, Congress is foregoing a market-based solution that could have saved billions of dollars more for patients, families and taxpayers.

As this law is implemented, regulators should prioritize lowering consumers' health care costs and preventing private equity firms and lawyers from exploiting the new arbitration system.

The bill also includes language that **bans so-called "gag clauses"** between providers and health plans. Those clauses typically prevent enrollees, plan sponsors, or referring providers from seeing cost and quality data on providers. Finally, the agreement includes a number of **other new requirements for group health plans to promote transparency and provide patient protections**. The agreement also requires group health plans and health insurance issuers to conduct comparative analyses of the nonquantitative treatment limitations used for medical and surgical benefits as compared to mental health and substance use disorder benefits.

We will continue to analyze the details of the legislation over the coming days and weeks and will continue to provide more information as it becomes available.