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Surprise Billing Updates, October 2022

It has been a few weeks since our last update on Surprise Billing. Since then, multiple developments have taken place: legal battles continue to be fought over Surprise Billing regulations, the independent dispute resolution portal remains overwhelmed and a new study has come out on the effect of different approaches to rate setting.

Legal Battles in Surprise Billing

In our Surprise Billing Update in April, we discussed the Texas Medical Association (TMA) initiating a federal case to have aspects of the No Surprises Act rescinded. The TMA won that case, requiring the Centers for Medicare and Medicaid Services (CMS) to revise the arbitration process for billing disputes.

The TMA is going back to court on the grounds that the Interim Final Rule (IFR) released in August is not a significant improvement from before. They express concerns that arbitrators will continue placing too much emphasis on qualifying payment amounts (QPA) – which are essentially median in-network rates for a service in a given area.

The TMA and other physician advocate groups argue that the QPA is an unfair representation of fair-market rates produced by insurers. They would like to see regulation adjustments that diminish arbitrators' reliance on the QPA to determine rates, and a higher degree of influence for relevant factors such as patient acuity and complexity of service.

Similar arguments are being made by the American Hospital Association (AHA) and American Medical Association (AMA). Both groups concluded one legal battle and have begun another one arguing that the August 2022 IFR departs from congressional intent in much the same way as the September 2021 IFR did.

In general, advocates continue to assert that Surprise Billing legislation is still written in such a way that will inevitably result in underpayment for out-of-network services and unfair dispute resolutions.

Struggles in Independent Dispute Resolution

As part of implementing the No Surprises Act, the CMS opened an independent dispute resolution (IDR) portal where providers could submit claims for billing disputes to be resolved by neutral third parties. Upon opening, this portal was almost immediately overwhelmed as the number of cases submitted far outpaced early estimates.

On September 7th, the Departments of Labor, Health, and Human Services announced that arbitrators would be given an extension on the 30-business-day window that was originally proposed as the timeframe within which disputes were supposed to be resolved. The additional time for arbitrators to assess and determine eligibility of disputes is intended to accommodate additional complications in this process, including:

- State vs federal jurisdiction
- Accuracy in batching and bundling
- Ensuring disputes were submitted within the required timeframe
- Ensuring the full 30-day negotiating period was completed before submission

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It appears the delays in evaluating and processing these disputes will not subside anytime in the near future.

Differences in Rate-setting Approaches

Researchers with health insurer Elevance Health and Bentley University recently published a new study in *Health Affairs* evaluating the billed charges for out-of-network (OON) care in California. In 2017, California implemented its own Surprise Billing legislation which prohibited surprise billing and offered no arbitration process. Instead, it simply determined payment rates by using the median contracted rate for specific services in a given area, just like the QPA used in the federal regulations.

Using this approach, California saw a drop of 24% below trend in OON charges relative to states with no surprise billing legislation. That said, this comparison was limited to only seven states where Elevance Health's commercial plans are offered. More data from other states would be necessary to assert with confidence that the results of the study have implications for the nation more broadly.

Additionally, those researchers looked to New York as a counterexample. New York's model required arbitrators to consider additional factors for charges that fell within the 80th percentile – presumably to eliminate the undue influence of outliers. This section of the study found that there was a relative *increase* of 25% in OON charges relative to states with no surprise billing legislation.

The researchers suggested that this difference could be due to providers who "selectively increase charges for infrequently performed non-emergency codes to receive higher payments."

It should be noted that the researchers may have an incentive to find and publish results that support approaches to arbitration that benefit insurers. Nevertheless, it is possible this study may influence lawmakers' perception of approaches to dispute resolution and any adjustments made to surprise billing legislation moving forward.

As battles continue to be fought over the implementation and dispute resolution of Surprise Billing regulations, APS will provide periodic updates and keep our readers abreast of the situation. Please contact your Practice Manager with any questions as to how any of these developments might affect your practice.