

The No Surprises Act is a big challenge for doctors—and states

MAY 10, 2022

Andis Robeznieks

Senior News Writer

The No Surprises Act took effect in January, but its implementation is still playing out on several fronts, including the Biden administration’s development of federal regulations, court proceedings challenging some of those regulations, and in state legislatures where lawmakers are considering revising existing statutes or creating new ones that align more with the federal law.

The law is intended to protect patients from unexpected medical expenses when they receive emergency care at facilities outside their insurance network or from out-of-network physicians or other nonphysician clinicians at an in-network hospital, ambulatory surgery center or freestanding emergency department.

The AMA, American Hospital Association (AHA) and the Texas Medical Association (TMA) initiated legal actions when the administration issued rules governing the law’s independent dispute-resolution (IDR) process that didn’t match the law Congress passed and were skewed in favor of insurance companies.

“The AMA strongly supports protecting patients from unanticipated medical bills that can significantly raise out-of-pocket expenses and threaten access to quality care,” said Bobby Mukkamala, MD, chair of the AMA Board of Trustees, during an AMA Advocacy Insights webinar on the law’s out-of-network payment process.

Dr. Mukkamala, an otolaryngologist in Flint, Michigan, described how the AMA advocated a balanced process to fairly determine payment to physicians for out-of-network care.

But “regulations implementing the IDR process placed a thumb on the scale in favor of insurers by requiring the arbiter to consider the health plans’ median in-network rate, or QPA—the qualified payment amount—as the appropriate out-of-network rate in most situations, essentially predetermining the outcome of the process,” Dr. Mukkamala said during the webinar, a follow-up to a

January session on the law's implementation.

Physicians, hospitals go to court

Legal action soon followed. The TMA filed a lawsuit with the U.S. District Court for the Eastern District of Texas, which was followed by another filed jointly by the AMA and AHA with the U.S. District Court in Washington, D.C.

The lawsuits “argue that the administration stepped outside of their statutory authority in implementing this IDR process,” Dr. Mukkamala said. A Texas federal judge agreed with physicians and vacated the disputed QPA regulations, ruling that they were inconsistent with the statute. The Biden administration announced that it would appeal the decision, but then asked the court to pause the proceedings until after a new final rule is released. The court granted the request. Read up on the litigation.

The administration moved forward with its implementation and issued a memorandum stating that the invalidated portions of the rule would not be enforced, said Michael Kolber, a partner with Manatt Health and one of the webinar's presenters.

The AMA has created a toolkit to help physicians navigate the independent-dispute resolution process (PDF). It will be updated with Centers for Medicare & Medicaid Services (CMS) guidance released after the court decision that pertains to disputing parties (PDF) and certified IDR entities (PDF) and information on opening of a federal government-run online portal to manage the IDR process.

“In general, the federal law provides a baseline, and a state law can continue to apply as long as it is more stringent and provides better patient protections than apply to the federal law,” Kolber said.

State plans do not cover employer-funded health plans—though some states may create a mechanism for those plans to opt into the state system, he added. Complexity is developing as state officials work out where their laws overlap with the federal law and which elements take precedence.

Key questions for figuring this out include whether specified state law:

- Covers the particular plan involved in a dispute.
- Applies to the facility where the services were performed.
- Applies to the service.

Some states may only apply to emergency services, Kolber added. CMS has issued and posted guidance letters to each state. States are adopting myriad approaches, with Texas and Pennsylvania staking out positions on opposite ends of the spectrum.

Texas has its own comprehensive law that includes a nonbinding, voluntary mediation process. Pennsylvania does not have its own law, but will coordinate activity with CMS under a collaborative enforcement agreement, said Joel Ario, Manatt Health's managing director.

Ario also cited the example of Washington, where Gov. Jay Inslee signed into law a bill formally "harmonizing" its law with the federal law and adding a provision covering behavioral health emergencies treated outside of a hospital.

"This starts a trend," Ario said.