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Hospitals Walk Fine Line With Post-Stabilization in No Surprises Act

By Nina Youngstrom

Like other hospitals, Pomona Valley Hospital Medical Center in California has been wrestling with its obligations under the No Surprises Act for post-stabilization services. If patients are being treated out of network for an emergency, their commercial insurers may start calling when patients move to post-stabilization to transfer them to an in-network facility, said Compliance Officer Kathy Perkins. But patient consent related to post-stabilization “can’t be coerced” under the No Surprises Act, and it’s possible a state’s surprise medical billing law on post-stabilization could supersede the federal version. It’s a complicated calculus that’s causing some confusion.

“Patients are put in the middle and the clear goal of the No Surprises Act is to take them out of the middle,” she said.

Post-stabilization is a challenging area of the No Surprises Act because hospitals must determine whether their state law applies instead of the No Surprises Act and if it doesn’t, they must cross a high threshold to bill patients beyond what the out-of-network payer offers as reimbursement, said Brenna Jenny, former CMS legal officer. “There are a lot of open questions,” said Jenny, now with Sidley Austin LLP.

Lawyer: EMTALA Was Not Expanded

The No Surprises Act protects patients from large or unexpected bills from out-of-network providers when they’re treated at hospitals, ambulatory surgery facilities and other facilities, depending on the circumstances. The law limits patient liability for out-of-network services to no more than the in-network cost sharing and deductibles. In other words, balance billing isn’t allowed when patients receive emergency services (including post-stabilization services) at out-of-network hospitals or nonemergency services from out-of-network providers at certain in-network hospitals and other facilities.

Three regulations issued mainly by HHS and the departments of Labor and the Treasury implement the No Surprises Act: two interim final rules published July 13, 2021,^[1] and Oct. 7, 2021,^[2] and a proposed rule on enforcement issued Sept. 16, 2021.^[3]

Jenny said the definition of emergency services in the No Surprises Act, which are subject to the law’s prohibition on balance billing, includes:

- A medical screening examination and any treatment as required under the Emergency Medical Treatment and Labor Act (EMTALA), including ancillary services to evaluate an emergency condition; and
 - Services to stabilize the patient (even if they’re provided by medical staff outside the emergency department). Under the No Surprises Act, patients aren’t allowed to consent to balance billing for emergency services, although they may consent to balance billing for post-stabilization services if these criteria are met: (1) the patient can travel to an in-network provider using nonmedical transportation or nonemergency medical transportation within a reasonable distance; (2) the patient gives consent to go to
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the in-network facility (using the statutory process and informed consent under state law); and (3) other applicable state law requirements related to balanced billing are satisfied.

Jenny clarified that the No Surprises Act didn't expand provider obligations under EMTALA. The preamble to the July interim final rule notes that the "provider or facility may, subject to other state or federal laws, refuse to treat the individual if the individual does not consent" to balance billing. "The No Surprises Act doesn't prohibit transfers," Jenny explained. "It just says you can only balance bill patients for post-stabilization services if they could have consented to a transfer to an in-network facility."

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