Georgetown University Health Policy Institute
CENTER ON HEALTH INSURANCE REFORMS
PROTECTING PATIENTS FROM SURPRISE MEDICAL BILLS

Enforcement of Surprise Balance Billing Protections Under the No Surprises Act

The No Surprises Act (NSA) will protect patients from out-of-network surprise medical bills (also known as balance bills or surprise out-of-network bills). These bills arise when a consumer inadvertently or unknowingly receives care from a provider or at a facility that is not within their insurance plan's network. This might occur when a patient is taken to the closest emergency room, which happens to be in an out-of-network facility—or where the patient seeks care at an in-network hospital and with an in-network surgeon but is treated by an out-of-network anesthesiologist. Out-of-network providers and facilities typically charge a higher rate to insurers than an in-network provider, leading to higher cost sharing for consumers. And, if the insurer refuses to pay the out-of-network provider's billed charge, the provider may seek to recover the "balance" by billing the patient.

The NSA will protect patients from the most pervasive types of balance bills for emergency services, including some services after the patient is stabilized, and non-emergency services at in-network facilities (unless a patient consents to treatment by an out-of-network provider). Patients treated by an out-of-network provider will only be responsible for the same amount of cost sharing that they would have paid if the service had been provided by an in-network provider. And health care providers (including air ambulances) and facilities are banned from sending balance bills to patients to collect a higher amount (with only limited exceptions). The NSA also establishes a process to resolve payment disputes between insurers and out-of-network providers. This includes an open negotiation process with independent dispute resolution if negotiations fail.

The NSA's protections go into effect beginning on January 1, 2022. This resource summarizes the NSA's enforcement framework, potential state approaches to enforcement of existing state-level surprise bill protections, and key enforcement considerations for state policymakers.

Enforcement Under Federal Law

The NSA builds upon existing federal enforcement frameworks for insurers, group health plans, non-federal governmental plans, and the Federal Employee Health Benefits program. These requirements are summarized in the table below. The most significant change under the NSA is the extension of the enforcement framework to health care providers (including air ambulances) and facilities, making states the primary regulators of these entities with the option for federal enforcement if needed.

Entity	Example	Primary Regulator
Health insurance issuer offering group or individual health insurance coverage	Fully insured health insurance in the small group market	State department of insurance*
Group health plans	Employer-sponsored coverage by a multi-state employer	U.S. Department of Labor
Non-federal governmental plans	State and local employee health plans	U.S. Department of Health and Human Services
Federal Employee Health Benefits program	Coverage offered only to federal employees	U.S. Office of Personnel Management
Health care providers and facilities	Hospitals, free-standing emergency rooms, anesthesiologists, air ambulances	State entity (TBD)*

* The U.S. Department of Health and Human Services will enforce in states that decline or fail to substantially enforce.

Enforcement Against Insurers

The NSA makes no changes to the current enforcement framework for insurers, group health plans, non-federal governmental plans, and the Federal Employee Health Benefits program. These plans—apart from insurers—are all generally regulated and enforced by federal officials. With respect to insurers, the NSA maintains the long-standing enforcement framework first adopted under HIPAA in 1996 and codified in the Public Health Service Act.[1]

Under the Public Health Service Act, states are the primary regulators of federal health insurance requirements for health issuers offering group and individual coverage (i.e., fully insured health insurance products). Historically, state insurance departments have regulated these entities. However, if a state fails to substantially enforce federal requirements, the U.S. Department of Health and Human Services (HHS) must step in to enforce the law within that state.[2] Enforcement determinations are made on a provision-by-provision basis, meaning HHS could be responsible for enforcement of all or some of the NSA, or even a single provision of the NSA.[3]

Long-standing federal regulations govern the circumstances under which HHS will step in to enforce federal law.[4] In states with direct federal enforcement, HHS can impose steep civil monetary penalties against insurers. Although federal officials have discretion in calculating the amount, HHS can impose a penalty of up to $100 each day for each individual affected by the violation.

States can enter into "collaborative" enforcement arrangements with federal officials. This is a hybrid between direct state and direct federal enforcement for states that lack the statutory legal authority to enforce some or all federal laws. Under this model, state regulators conduct compliance checks and oversight, work to achieve voluntary compliance to correct a violation, and receive consumer complaints. If state officials cannot resolve a violation, the issue is referred to HHS for possible enforcement action.

(As noted above, the NSA makes no changes to the current enforcement framework for self-funded group health plans (which are regulated by the U.S. Department of Labor), non-federal governmental plans (which are regulated by HHS), and Federal Employee Health Benefits carriers (which are regulated by the Office of Personnel Management).)

Enforcement Against Health Care Providers and Facilities

The NSA adds a parallel provision to the Public Health Service Act to establish a similar framework for HHS's enforcement authority over health care providers (including air ambulances) and facilities.[5] Under this new provision, states can directly enforce the new standards against providers and facilities. Enforcement needs include ensuring that providers and facilities do not send balance bills

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[1] *See* Public Health Service Act § 2723 (codified at 42 U.S.C. § 300gg-22).
[2] This same framework is used for enforcement of other federal health insurance requirements, including the Mental Health Parity Act of 1996, the Newborns' and Mothers' Health Protection Act of 1996, the Women's Health and Cancer Rights Act of 1998, and the Affordable Care Act (ACA). HHS is currently enforcing the ACA in four states.
[3] There are a handful of new federal statutes added to the Public Health Service Act, meaning states generally have primary enforcement authority, that require regulated entities to report data and other information directly to HHS. Because states would not have access to the data submissions, HHS proposes to directly enforce these requirements, which include the reporting of air ambulance services data, agent and broker compensation, pharmacy benefits and drug cost data, and gag clause attestations. HHS intends to be the primary enforcer of these standards unless a state indicates its intent to enforce the provisions.
[4] *See* 45 C.F.R. § 150.101 et seq.
[5] *See* Public Health Service Act § 2799B-4 as added by Section 104 of the No Surprises Act.

or misuse waiver and consent exceptions. If a state fails to substantially enforce those requirements, HHS will step in to do so. HHS could impose civil monetary penalties of up to $10,000 per violation using a process under Section 1128A of the Social Security Act.

In a recent rule to implement the NSA, HHS proposed a new subpart dedicated to HHS enforcement with respect to providers and facilities.[6] The proposed requirements generally track existing investigative processes, with only a few notable differences. For instance, in considering whether to assess penalties, HHS would be allowed to consider medical bills, claims, notice and consent forms, disclosures, air ambulance services data, and more. HHS also proposed explicit criteria for waiving civil monetary penalties, settling cases, or establishing hardship exemptions. The rule, if finalized, will establish new requirements for hearings, sanctions, collateral estoppel, and judicial review of final decisions. HHS intends to notify certain organizations and entities—including state regulators, licensing boards, utilization and quality control peer review organizations, and potentially other federal agencies—about any final penalty imposed against a provider or facility.

HHS did not identify or otherwise give guidance as to which state entities can (or cannot) be responsible for enforcing NSA requirements against health care providers (including air ambulances) and facilities. This entity (which may include an attorney general office, health department, public health department, etc.) may be different from the entity that regulates insurers (e.g., the insurance department).[7] There may also be some complications with respect to enforcement of the NSA by states on air ambulance providers. While the NSA grants this enforcement authority to states, it is not yet clear whether state enforcement actions (or other attempted regulations) will run afoul of the Airline Deregulation Act which continues to preempt state authority to regulate rates, routes, or services of air carriers.[8]

Enforcement Under State Law

Several, but not all, states with comprehensive surprise medical bill protections include explicit enforcement provisions in their laws. States that did not explicitly address enforcement may rely instead on "implicit" enforcement authority, which may be determined based on how the protections are codified into law. Where state balance bill protections are codified in the state's insurance code, the insurance department (or appropriate agency that regulates health insurance products) likely has the implicit authority to enforce surprise bill protections.

Enforcement Against Insurers

State insurance departments can use traditional enforcement mechanisms, such as investigating consumer complaints, conducting market conduct examinations, and imposing civil monetary penalties to promote compliance with surprise billing protections. However, in many states, the insurance department's enforcement authority is limited to insurers and thus may not extend to health care providers or facilities. If enforcement authority is vested in only the insurance department, state insurance regulators may be limited in their ability to ensure that providers—typically the entity that sends a surprise medical bill to a patient—also comply with the law.

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[6] *See* 86 Fed. Reg. 51730-79 (Sep. 16, 2021); *see also* Katie Keith, Jack Hoadley, and Kevin Lucia, "Proposed Rule on No Surprises Act Focuses on Data Collection and Enforcement," *Health Affairs Blog* (Sep. 13, 2021).

[7] HHS suggested that states could enforce NSA protections against providers or facilities that provide telehealth services to residents of their state even if the provider or facility is in a different state.

[8] Erin Fuse Brown, Loren Adler, Karan R. Chhabra, Barak D. Richman, Erin Trish, "The Unfinished Business of Air Ambulance Bills," *Health Affairs Blog* (Mar. 26, 2021).

Enforcement Against Health Care Providers and Facilities

States have generally adopted four approaches for enforcement against providers and facilities. States have vested enforcement authority in 1) the insurance department; 2) the health department; 3) a medical licensing entity; or 4) a consumer protection agency.

- ***Insurance Departments.*** Because insurance departments generally do not have regulatory authority over health care providers or facilities, some may be limited in their ability to enforce state insurance laws against providers. However, states may authorize the insurance department to enforce against providers and facilities or otherwise report violations by these entities to the appropriate enforcement agency.

- ***Health Departments.*** States may regulate managed care products under their health laws (rather than their insurance laws). This could provide the health department (which also regulates health care providers) with implicit authority to enforce surprise billing protections against the entities they regulate. Other states might codify language to prohibit all providers from sending surprise bills in their health code, providing the health department with the general authority to monitor and oversee compliance with this protection. Not all health departments have enforcement authority over all providers (meaning a department could enforce state law with respect to facilities but not medical professionals).

- ***Medical Licensing Entities.*** States may prohibit physicians and other licensed professionals (although not hospitals or facilities) from sending surprise medical bills in their professional or occupational licensing codes, which can then be enforced by the medical or professional licensing entity. These licensing entities might have the authority to investigate complaints, issue fines, and suspend or revoke the licenses of providers and medical professionals that fail to comply with state requirements.

- ***Consumer Protection Agencies.*** States may prohibit providers from sending surprise medical bills in their consumer protection code. This could provide the state's attorney general or commissioner of consumer protection with enforcement authority to investigate complaints and take action against noncompliance. Treating surprise bills as a consumer protection issue could help state regulators protect against broader abuses, such as debt collection practices.

State Penalties

State insurance departments, health departments, and medical licensing boards can use their general enforcement authority to impose penalties that range from cease and desist orders, corrective action orders, fines, and revocation of a state license. Serious issues can often be referred to the state's attorney general. Some states may impose specific monetary penalties for the failure to comply with surprise billing protections (e.g., fines of up to $1,000 per violation on insurers and health care facilities).

Key Enforcement Decisions for State Policymakers

Ahead of the law's 2022 effective date, state policymakers are grappling with how to ensure that the NSA's protections are fully enforced against insurers, providers (including air ambulances), and facilities. HHS is currently working with states to assess legal authority and capacity to enforce each NSA provision with the goal of sending a letter to each governor that outlines 1) whether the state or the federal government will be enforcing each provision (with the option of direct federal enforcement, direct state enforcement, or collaborative state/federal enforcement); and 2) which entity in the state will be responsible for enforcement of each provision.

As state officials coordinate with HHS on this process, policymakers may want to consider the following questions:

- Do state officials have full legal authority and capacity to enforce the NSA? Is this true for both insurers and providers/facilities? If not, will the state enter into a collaborative enforcement arrangement with federal officials—or opt for direct federal enforcement?
- Which entity or entities in the state is best positioned to enforce the NSA requirements on health care providers (including air ambulances) and facilities? Does this entity have experience with billing and consumer complaints? Are there any conflicts of interest to consider?
- Assuming that different state agencies will be responsible for enforcing the NSA against different entities, will the state develop a coordinated interagency process to receive, respond to, and investigate complaints in a timely manner?
- Are state officials prepared to educate consumers and stakeholders about the NSA's new protections and distribute state-specific notices and information as needed?