



Georgetown University Health Policy Institute

CENTER ON HEALTH INSURANCE REFORMS

The No Surprises Act: Implications for States

NAIC Regulatory Framework Task Force

March 25, 2021

Jack Hoadley and Kevin Lucia

About Georgetown's Center on Health Insurance Reforms (CHIR)

- A team of experts on private health insurance and health reform
- Conduct research and policy analysis, provide technical assistance to federal and state officials and consumer advocates
- Based at Georgetown University's McCourt School of Public Policy
- Learn more at <https://chir.georgetown.edu/>
- Subscribe to CHIRblog at <http://chirblog.org/>
- Follow us on Twitter @GtownCHIR



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Surprise Medical Bills

- Result from interactions with providers that patients *reasonably assumed would be in network but were not*, or when patients have *no real choice* of provider.

| Where they come from | Why |
|---|--|
| Emergency situations | <ul style="list-style-type: none">• ED physicians OON at in-network facility• Closest emergency facility is OON |
| Nonemergency care at an in-network facility | <ul style="list-style-type: none">• Surgery at network facility with network surgeon may include an OON anesthesiologist, radiologist, pathologist, assistant surgeon, or other specialist• OON hospitalist provides care at network facility |
| Ambulance services | <ul style="list-style-type: none">• Ground or air ambulance dispatched is OON |

No Surprises Act

- Public Law 116-260, signed December 27, 2020
- Included in the Consolidated Appropriations Act, 2021
- Most provisions are effective for plan years beginning on or after January 1, 2022
- New protections for states that don't have their own balance billing laws and for the nearly 135 million in self-insured plans beyond the reach of state law.

- *The analysis presented is based on the best reading by the Georgetown team. The federal rulemaking process may reach different conclusions.*



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Scope of Protections

- Which plans are covered by federal law?
 - Fully insured plans
 - Self-funded plans
 - Grandfathered plans
 - *Excludes* short-term plans and excepted benefit (dental, vision)
- Where do protections apply?
 - Non-emergency care at in-network facilities provided by out-of-network clinicians
 - Emergency care provided in in-network or out-of-network facilities
 - Post-stabilization services until the patient can travel using nonmedical or non-emergency medical transportation
 - Air ambulance services
 - *Excludes* ground ambulances



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Nature of Protections

- How are patients protected?
 - Patients responsible for in-network cost sharing only
 - Cost sharing payments count toward the in-network deductible and out-of-pocket limit
 - Coinsurance is based on the “recognized amount,” generally the median in-network rate or the amount determined under state law
 - Providers are barred from sending or collecting a bill for amounts other than in-network cost sharing



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Determining Payment for Out-of-Network Care

- Payment for out-of-network care is determined:
 - For states with a “specified state law” that includes a method for determining the payment, the state method applies for the health plans regulated by the state and for the services to which the state law applies.
 - The state method is likely to apply in the 18 states with comprehensive surprise billing laws and in several states with partial protections for applicable services.
 - For other states or for plans not regulated by the state (self-funded plans), the federal method applies.
 - For services not regulated by the states, such as air ambulances, the federal method applies.



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Federal Method for Determining Payment for Out-of-Network Care

- Health plan or insurer can, within certain timeframes, negotiate the payment amount with the provider or facility
- Failing that, either party can request arbitration through an independent dispute resolution (IDR) entity
- IDR features include:
 - Multiple items and services may be batched for a single arbitration
 - Parties submit amounts; arbitrator must select one
 - Decision is binding; losing party pays the cost of arbitration
 - Key factor for arbitrators: insurer's median in-network rate but not public-sector rates
 - Other factors: case and provider characteristics, prior contracted rate



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Waiving Protections

- Protections do not apply when patient knowingly and voluntarily agrees to receive care from certain out-of-network providers
- Providers can request that a patient sign a consent to receive *non-emergency* care from an out-of-network provider or facility
- Protections cannot be waived when:
 - There is no in-network provider available
 - For urgent or unforeseen care
 - Services are delivered by providers in designated specialties, (e.g., anesthesiology, pathology, radiology, neonatology), hospitalists, intensivists, assistant surgeons, and others that may be *designated by Secretary through rulemaking*



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Emergency Transport

- Air ambulance
 - Consumer protections match those for other emergency services
 - Federal IDR system with similar factors, including in-network rate
 - Requirement for cost reporting and secretarial report
 - Advisory committee on air ambulance quality and patient safety
- Ground ambulance
 - No protections established in the No Surprises Act
 - Advisory Committee on Ground Ambulances and Patient Billing will make recommendations for states and the Congress
 - Law calls for committee to be formed 90 days after enactment
 - Committee to report 180 days after first meeting



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Enforcement on Insurers

- State departments of insurance are the primary enforcers of provisions that apply to insurers and fully insured group health plans
- Federal government enforces in states that fail to substantially enforce the law and for self-funded group health plans



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Enforcement on Providers, Facilities

- States may enforce provisions on providers (including air ambulances) but federal government will do so where a state fails to substantially enforce the law
 - Law is silent on which state agency is responsible for enforcing provider provisions - unless addressed through rulemaking
- States have taken various approaches:
 - Vest enforcement authority for providers in the 1) insurance department 2) health department 3) medical licensing entity, 4) consumer protection agency or 5) attorney general
 - Some use “blended” approach to provider enforcement: allowing insurance department or provider licensing entity to report patterns of unresolved or intentional violations to another entity



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Reporting

- Data Reporting
 - Extensive reporting requirements for the outcomes of IDR, including the final amounts as a percentage of the median in-network rate (but not on negotiated settlements)
- Studies to Monitor Implementation
 - Effect on health care costs
 - Effect on provider consolidation
 - Effect on provider networks



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Additional Provisions

- **Continuity of Care:** When provider contract ends, some patients can maintain access to the provider with in-network cost sharing
- **Provider Directories:** Applies requirements to providers and health plans to keep provider directories current and accurate
- **Advanced Explanation of Benefits:** Providers and facilities are required under law to provide good-faith cost estimate to insured and uninsured
- **Dispute Resolution for Uninsured:** New process to contest charges that “substantially exceed” the good-faith estimate
- **All Payer Claims Database Funding:** Grants to states and new standardized reporting form for data from group health plans



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Communications and Education

- How will consumers learn about their rights under both federal and state laws?
- How will providers and insurers learn about their roles under federal and state laws?
- Challenges for understanding and using the laws
 - Which cases are in state versus federal jurisdictions?
 - How do parties determine which laws apply?
 - What should consumers do if they receive balance bills?
 - Where do parties direct their questions?
- What responsibilities do states have to educate all interested parties?



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Considerations for States with Balance Billing Laws

- In general, state laws can be more consumer protective, as long as they don't "prevent the application of federal law."
- Example provisions where state laws may differ
 - Waiver of protections by the consumer
 - Scope of providers (out-of-network facilities, certain specialties)
 - Protection for post-stabilization services
- How will it be determined where federal law prevails?
- Law explicitly defers to states on provider directory requirements
- Federal law has no provisions applying protections in certain areas (e.g., ground ambulances, short-term plans), leaving states the opportunity to regulate



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Considerations for States with a Method to Determine Payments

- In general, states using either a payment standard, arbitration, or a hybrid combining both will use their method for services regulated under state law
- Will federal rules have any standard for what counts for a deferral?
- What happens when a case is mixed, e.g., state law applies to the physician service, but the state law does not apply to the facility?
- What happens when a person residing in and insured in one state receives services out of network in another state?



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Next Steps for New Law

- Secretaries of HHS, Labor and Treasury must draft regulations to implement multiple provisions, including:
 - Creation and maintenance of the IDR system
 - Criteria for batching multiple claims for submission to IDR
 - Criteria for the certification of IDR entities
 - Methodology for calculating median in-network rates (including NAIC role on geographic regions for these determinations)
 - Complaint process for patients
- Timeline for Rulemaking:
 - Two provisions where rulemaking must be done by 7/1/21: consent forms and methodology for in-network rate
 - Otherwise, no deadlines in law



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Opportunities for States to Engage

- States with balance billing laws may want to ensure federal regulators understand how those laws operate to mitigate disruption or confusion for regulated entities and consumers
- States may also want to weigh in on state law provisions that may be more protective of consumers
- Where state laws are less protective, should they be changed to come into alignment?
- State experiences may be instructive to federal rulemaking
- Do states need authorization to enforce this federal law?



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**

Resources

Jack Hoadley, Research Professor Emeritus, jfh7@georgetown.edu

Kevin Lucia, Research Professor, kwl@georgetown.edu

Georgetown University Center on Health Insurance Reforms

Website: <https://surprisemedicalbills.chir.georgetown.edu/>

Interactive map:

<https://www.commonwealthfund.org/publications/maps-and-interactives/2020/nov/state-balance-billing-protections>

Health Affairs blog:

<https://www.healthaffairs.org/doi/10.1377/hblog20201217.247010/full/>

Commonwealth Fund blog with link to detailed summary:

<https://www.commonwealthfund.org/blog/2020/surprise-billing-protections-cusp-becoming-law>



Georgetown University Health Policy Institute

**CENTER ON HEALTH
INSURANCE REFORMS**