No Surprises Act IDR Process Altered by Court Order

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Under the No Surprises Act ("NSA"), when out-of-network ("OON") providers cannot agree to a payment amount from insurers, the payment amount is determined by an Independent Dispute Resolution ("IDR") process. On February 23, 2022, the United States District Court for the Eastern District of Texas invalidated portions of the interim final rules regarding IDR that presumed the qualified payment amount ("QPA") to be the proper payment amount. The court order does not affect any other rules under the NSA.

Background

As previously reported, with respect to group health plans (and health insurance carriers), the NSA provides protection as it relates to OON cost-sharing and "balance billing" with respect to:

- Emergency services,
- Non-emergency services delivered by OON providers at in-network facilities, and
- OON air ambulance services.

The law also establishes a pathway for resolving payer-provider payment disputes using negotiation and arbitration. If entities are unable to come to an agreement, the IDR process requires each party to submit a final payment offer and the arbiter will select one of these offers as the final payment amount. The arbitrator's decision is final and generally may not be appealed. The Departments of Health and Human Services ("HHS"), Labor ("DOL"), and the Treasury (collectively, "the Departments") published interim final rules implementing the NSA.

The interim final rules at issue in this case required the certified IDR entity to begin with the presumption that the QPA is the basis for the appropriate OON amount, and generally it must select the offer closest to the QPA. If a party submits additional permissible information, then the certified IDR entity must consider this information if it is credible. The IDR entity should deviate from the offer closest to the QPA only if submitted information clearly demonstrates that the value of the item or service is.

The Court's Decision

The Texas Medical Association had filed suit seeking to block the rules from taking effect. They argued that the NSA did not include the deference to the QPA that the interim final rule required. The court determined that the presumption that the QPA should be the proper payment amount was contrary to the plain language of the statute and therefore exceeded the rulemaking authority of the Departments. The court invalidated the deference to the QPA in the IDR process but did not affect any other parts of the NSA.

DOL Memorandum and Future Outlook

On February 28, 2022, the DOL issued a memorandum explaining that the guidance relating to the QPA presumption for IDR was being withdrawn to be updated and reissued. The Memorandum also emphasized that consumers continue to be protected from surprise medical bills for OON emergency services, OON air ambulance services, and certain OON services received at in-network facilities.

The Departments may appeal the Texas court's decision to the 5th Circuit Court of Appeals. Further, there are similar cases pending before other federal courts on this issue. It is possible a future ruling could create a split in the circuits which ultimately may need to be resolved by the Supreme Court.

Employer Action

Carriers are generally responsible for compliance in the fully insured market.

Employers sponsoring self-funded group health plans will want to review the NSA requirements with their TPAs for compliance with the IDR process. The presumption that the QPA was the proper payment amount may have made the IDR process more predictable and may have served to avoid some disputes from being resolved through IDR. The court order does not affect any other aspect of the IDR process.