Illinois Department of Insurance

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TO: All Companies Writing Accident and Health Insurance and Managed Care Plans in Illinois

FROM: Dana Popish Severinghaus, Acting Director dps

DATE: February 10, 2022

RE: Company Bulletin 2022-03
Initial Implementation of the Federal No Surprises Act in Illinois

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The federal Centers for Medicare and Medicaid Services ("CMS") have discussed with states how to allocate enforcement responsibilities for the federal No Surprises Act ("NSA") (Pub. L. 116-260, div. BB, tit. 1), including the new provisions protecting consumers against balance billing that took effect January 1, 2022. The NSA and its implementing regulations establish default requirements for the calculation and payment of cost-sharing, calculation and payment of provider or facility reimbursement, independent dispute resolution, and other concerns arising when patients use out-of-network providers or facilities or lack health insurance coverage. For details on the federal implementation of the NSA, please consult the rulemakings at 86 Fed. Reg. 36872 (Jul. 13, 2021) and 86 Fed. Reg. 55980 (Oct. 7, 2021). Pursuant to the NSA, some provisions of the Act will be enforced by federal CMS and some provisions will be enforced by the Illinois Department of Insurance ("Department") or the Illinois Department of Financial and Professional Regulation, as appropriate.

Some provisions of the NSA are already required by Illinois law. This Company Bulletin is primarily to assist regulated entities in determining whether Section 356z.3a of the Illinois Insurance Code or the NSA will apply to a given situation. A few related questions will be addressed as well.

The Department will continue to enforce the balance billing protections in 215 ILCS 5/356z.3a for purposes of calculating the "recognized amount" or "out-of-network rate" as those terms are used in the NSA. *See* 42 U.S.C. § 300gg-111(a)(3)(H), (K). In general, the Department will continue to enforce Illinois laws that are not federally preempted.

CMS will directly enforce the NSA's default balance billing provisions (other than the calculation of the recognized amount or out-of-network-rate or the federal independent dispute resolution system) with respect to health insurance issuers. For provisions of the NSA governing health care professionals, enforcement responsibility has been allocated among CMS and the Illinois Department of Financial and Professional Regulation. For provisions of the NSA governing emergency facilities and health care facilities, CMS has sole enforcement responsibility. Please see the CMS letter to Illinois describing allocation of responsibility among the various state and federal agencies, which will be posted here when finalized: https://www.cms.gov/CCIIO/Programs-and-Initiatives/Other-Insurance-Protections/CAA.

This Company Bulletin cannot specifically address all permutations of provider-issuer-patient interactions that the NSA either directly regulates or delegates to specified State laws. It bears emphasizing:

> "In order for a state law to determine the recognized amount or out-of-network rate, any such law must apply to: (1) The plan, issuer, or coverage involved, including where a state law applies because the state has allowed a plan that is not otherwise subject to applicable state law an opportunity to opt in, subject to section 514 of ERISA; (2) the nonparticipating provider or nonparticipating emergency facility involved (and in the case of state out-of-network rate laws, the nonparticipating provider of air ambulance services involved); and (3) the item or service involved. **In instances where a state law does not satisfy <u>all</u> of these criteria, the state law does not apply to determine the recognized amount or out-of-network rate**."
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> 86 Fed. Reg. 36872, 36885 (Jul. 13, 2021) (emphasis added).

I. Preferred Provider Organizations ("PPOs")

For accident and health insurance issued under 215 ILCS 5/4 Class 1(b) that incentivizes enrollees to use a preferred provider network for services, the requirements of 215 ILCS 5/356z.3a will continue to apply without interruption on and after January 1, 2022. The Department will continue to enforce those requirements.

However, there are provider and facility types, health care services, and scenarios for which the NSA imposes requirements while Section 356z.3a is silent. In these scenarios, the NSA provisions will apply. Additionally, as described below, some NSA requirements related to payments to the provider or facility will apply even when Section 356z.3a governs the calculation method for the payment amounts. These NSA requirements will be enforced by CMS. The Department will continue to review policy form filings for compliance with Illinois law, the ACA, and the NSA as applicable.

A. When Section 356z.3a applies to PPOs

Section 356z.3a determines the total amount payable when all of the following conditions are satisfied:

1) Facility type: the enrollee receives care at a participating hospital or a participating ambulatory surgical treatment center;
2) Unintentionality: the enrollee does not willfully receive the service from a nonparticipating provider at that participating facility when the service is available from a participating provider within the network; and
3) Provider specialty/service: the nonparticipating provider at that facility provides radiology, anesthesiology, pathology, neonatology, or emergency department services to the enrollee.

When all above conditions are satisfied, the negotiation and arbitration provisions of Section 356z.3a of the Illinois Insurance Code will apply rather than the NSA's independent resolution process. **It is essential that disputing parties consult Company Bulletin 2011-07 for instructions on how to proceed with arbitration under Section 356z.3a.**

If the above conditions are *not* satisfied, then the NSA defaults will determine the total amount payable and the NSA's independent resolution process will apply rather than the provisions of Section 356z.3a (see section I.B).

The NSA expressly requires an issuer to make an initial payment or send a notice of denial of payment to the provider or facility within 30 days of the provider or facility's transmission of its bill to the issuer. 42 U.S.C. § 300gg-111(a)(1)(C)(iv)(I). Because Section 356z.3a has no comparable deadline, CMS will

enforce this requirement under the NSA. However, the Department will continue to enforce the interest penalty under Section 356z.3a for nonpayment of the total amount owed by the issuer starting 30 days after the arbitrator has issued a decision on and after January 1, 2022. 215 ILCS 5/356z.3a(g).

The NSA provides that the cost-sharing amount owed by an enrollee to a non-participating provider will depend on the "recognized amount." 42 U.S.C. § 300gg-111(a)(1)(C)(iii) and (b)(1)(B). When Section 356z.3a is the specified State law, the recognized amount is only ascertainable either after the provider and the issuer have agreed to the total amount payable under the individual's coverage or after the arbitrator has issued a written decision.

B. When the NSA applies to PPOs

If a PPO enrollee receives care from a nonparticipating provider, and if any one of the three enumerated conditions identified above (Facility Type, Unintentionality, or Provider Specialty/Service) is not satisfied, and if the NSA otherwise applies to the circumstances under which the patient received care, then the NSA defaults will exclusively determine the total payment amount. This includes, but is not limited to, the federal calculation method for total amount payable, the individual's cost-sharing, and the federal independent dispute resolution process.

Below is a partial list of situations in which the NSA applies rather than Section 356z.3a:

1) Emergency services received at nonparticipating emergency facilities;
2) Emergency services received at a participating or nonparticipating freestanding emergency department;
3) Post-stabilization services that the NSA deems within the scope of "emergency services" and are received from a nonparticipating provider at a participating or nonparticipating emergency facility;
4) Non-emergency services provided at a participating health care facility by an assistant surgeon, hospitalist, or intensivist, and diagnostic services other than radiology or pathology;
5) Non-emergency services provided at a participating health care facility any time an enrollee intentionally chooses a nonparticipating provider in one of the following specialties even though the service is available from a participating provider:
    i) emergency medicine, anesthesiology, pathology, radiology, or neonatology, whether provided by a physician or non-physician practitioner;
    ii) items and services provided by assistant surgeons, hospitalists, and intensivists;
    iii) diagnostic services, including radiology and laboratory services;
6) Non-emergency services provided at a participating health care facility, any other time a nonparticipating provider at a participating health care facility delivers services to an enrollee when there is no participating provider who can deliver those services at that same facility except when all three criteria for Section 356z.3a apply;
7) For non-emergency services at a participating health care facility, items or services furnished as a result of unforeseen, urgent medical needs that arise at the time an item or service is furnished.

II. Health Maintenance Organizations ("HMOs") and Related Coverage

NSA default requirements apply to all health care plans issued under an HMO certificate of authority, including voluntary health services plans and point-of-service products. CMS will directly enforce NSA provisions whenever an enrollee with such coverage receives treatment under any of the circumstances described in the NSA regulations. The Department will review policy form filings for compliance with Illinois law, the ACA, and the NSA as applicable. Also, the Department will continue to enforce Illinois statutes applicable to HMOs and related coverages to the extent such statutes are not federally preempted.

A. Ground Ambulances and HMOs

For enrollees with HMO coverage, the Health Maintenance Organization Act's consumer billing protection related to ground ambulance services, 215 ILCS 125/4-15(b), remains in effect and the NSA will not apply.

The Health Maintenance Organization Act provides: "Upon reasonable demand by a provider of emergency transportation by ambulance, a Health Maintenance Organization shall promptly pay to the provider, subject to coverage limitations stated in the contract or evidence of coverage, the charges for emergency transportation by ambulance provided to an enrollee in a health care plan arranged for by the Health Maintenance Organization. By accepting any such payment from the Health Maintenance Organization, the provider of emergency transportation by ambulance agrees not to seek any payment from the enrollee for services provided to the enrollee." 215 ILCS 125/4-15(b).

This protection, which applies regardless of whether the ground ambulance provider is a participating provider in the health care plan, will remain in force on and after January 1, 2022. This provision does not apply to voluntary health services plans.

III. Air Ambulances

Currently, no Illinois law applies to balance billing by air ambulance providers. Therefore, CMS will directly enforce the NSA and all implementing regulations for both PPO and HMO coverage.

IV. Self-funded Plans of Individual Employers, Employee Organizations, and State or Local Governments

Self-funded plans of individual employers, employee organizations, and state or local governments are subject to the NSA default requirements and are not subject to Section 356z.3a. To the extent that any private or non-Federal governmental employer or employee organization offers fully-insured, network-based coverage to its employees, that coverage will be subject to Illinois insurance laws applicable to the health insurance issuer.

The Department may issue further guidance as issuers, providers, facilities, and consumers adjust to the new regulatory framework.

Questions regarding this Company Bulletin should be directed to DOI.InfoDesk@illinois.gov.