

Bipartisan Senate Group Pushes Bill to Protect Patients from Surprise Medical Bills



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In September 2018, we wrote about a draft U.S. Senate bill aimed to protect patients from surprise medical bills (available at: <https://www.pepperlaw.com/publications/bipartisan-senate-group-leads-charge-to-protect-consumers-from-surprise-medical-bills-2018-09-27/>), the “Protecting Patients from Surprise Medical Bills Act.” The Surprise Medical Bills Act aims to shield individuals against balance billing, a practice that, while prohibited by some states, can pose a major financial threat to many insureds.

Although nearly two dozen states have laws designed to protect consumers from surprise balance bills, many of these state-based measures offer no protection for

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consumers covered under employer-based, ERISA-governed plans, and the majority of states offer no protection at all. The Surprise Medical Bills Act would offer protection to all consumers with commercial coverage, including those enrolled in self-funded plans under ERISA. Specifically, it would prohibit out-of-network providers from balance billing for (1) emergency services provided at an out-of-network facility, and (2) non-emergency services provided at an in-network facility, such as services rendered by out-of-network anesthesiologists. In each scenario, patients would be responsible only for the in-network cost-sharing amount, while health plans would pay the difference between the “provider charges” and the cost-sharing amount. The amount of “provider charges” would be determined by state law or, if no state law applies, then is at least equal to the greater of: (1) the average amount for the service (i.e., the median in-network rate negotiated by plans and issuers for the service provided by a provider in the same or similar specialty and same geographical area); or (2) the usual, customary, and reasonable rate for the service (i.e., 125% of the average allowed amount for all private plans and issuers provided by a provider in the same or similar specialty and same geographical area) for the service).

On February 5, the drafters of the bill sent a letter to a variety of insurers and providers seeking additional data and information “in order to refine and inform [their] legislative proposal.” The letter sought recommendations on how to promote in-network contracting and combat balance billing, and raised a number of insurer- and provider-specific questions regarding billing and payment practices. As to insurers, these questions generally sought to determine the average out-of-network rates, how they compare to other rates (e.g., Medicare rates, average in-network rates, provider charges), the extent to which premiums are attributed to certain services (e.g., emergency care, radiology, anesthesiology), and the effect of various balance billing proposals (including the Surprise Medical Bills Act and state models) on overall plan premiums charged to consumers and employers.

As to providers, the letter generally sought to determine the average amount of out-of-network payments received for emergency services and services performed by ancillary providers, how these reimbursement amounts compare to Medicare and charges, the extent to which outsourced providers are performing services, the extent to which the provider is balance billing patients, and the amount of payments actually collected from patients. The letter sought a state-by-state breakdown of all requested data from AL, CA, CO, FL, MD, NY, and TX (where balance billing laws are in effect) and averages from remaining states without laws.

Although the specifics of the Surprise Medical Bills Act have yet to be finalized, the effort to address the harm associated with balance billing has unusual bipartisan support. The current draft of the Act was released by a group of six Senators, three Democrats (Sens. Bennet (CO), Carper (DE) and McCaskill (MO)) and three Republicans (Sens. Cassidy (LA), Grassley (IA) and Young (IN)). Last year, two other bills were introduced proposing alternative measures to address the issue. In one bill, introduced by Sen. Hassan (D-NH), balance billing for emergency services would be limited to the patient's in-network rate, and the insurer's payment responsibility would be determined in arbitration. In the other bill, proposed by Rep. Dogget (D-TX) and Sen. Brown (D-OH), balance billing would be limited to in-network cost sharing if the patient received same-day emergency treatment or the hospital failed to provide 24 hours' notice and obtain the patient's consent to receive services from an out-of-network provider and pay the out-of-pocket amount. President Trump also recently spoke on the issue during a roundtable at the White House, which included patients, where he vowed to end surprise medical bills.

We will continue to monitor this legislation and issue future alerts.

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