

New protections for patients mean new challenges for health care providers



VIEWPOINT Ted Case

Change is a common theme at the start of every new year, and health care is no exception.

Jan. 1, 2022 marks the effective date of the No Surprises Act (NSA), a new federal law that is designed to increase price transparency for health care services and protect patients from unexpected high bills. The law provides protections for patients in three circumstances: (1) when a patient receives emergency treatment from a hospital or freestanding emergency department (ED) that may not be fully covered by the patient's health plan (Plan); (2) when a patient undergoes non-emergency treatment at a hospital or ambulatory surgery center (a Facility) that participates in the patient's Plan but receives a surprise bill" from professionals who do not participate in the Plan; or (3) when a patient who lacks insurance (or chooses not to use it) schedules a service that may be billed to the patient at a providers full (undiscounted) charges.

• **Emergency Services Protections:**

NSA prohibits health plans from denying payment for emergency services because the patient did not obtain prior authorization or received care from an out of network (OON) provider. It prohibits Plans from imposing conditions or restrictions on OON EDs and professionals that do not apply to in network providers. NSA also limits the cost sharing plans may impose for OON emergency services to an amount comparable to what the patient would have paid for in-network services. It prohibits "balance billing patients for the difference between the OON provider's full charge and the lower amount paid by the Plan,

except for some services provided after emergency stabilization, and only then with informed written patient consent. The law also establishes an Independent Dispute Resolution (IDR) process to resolve disputes between OON providers and Plans over the appropriate payment for an OON service.

• **Services at In-Network Facilities:**

NSA protects patients receiving non-emergency services at in-network hospitals and ambulatory surgery centers (collectively Facilities) in circumstances where they reasonably could not have expected to receive a balance bill from an OON professional (so-called "surprise bills"). It generally restricts the amount OON professionals may collect from patients to an in-network cost sharing equivalent, as determined by regulation. Certain professionals, such as anesthesiologists, pathologists, and radiologists, are prohibited from receiving more than this amount; other professionals may receive higher payments by strictly adhering to patient notice and consent requirements. Where consent is not permitted or obtained, disputes over the amount due from the Plan may be resolved through the IDR process.

• **Services Provided to Self-Pay Patients:**

NSA provisions that take effect Jan. 1 provide transparency and price protection to patients who lack insurance or choose not to use it for a non-emergency service. The Facility must inform these patients of the availability of estimates and provide written good faith estimates (GFE) of the cost of its own services and the services of other providers expected to participate in the care. The GFEs must be provided within strict timelines upon patient request and without patient request when the service is scheduled. If a provider's bill exceeds its GFE by \$400 or more, the at patient is

entitled to a submit the bill to a Selected Dispute Resolution (SDR) entity, which will make a final determination of whether the provider's higher billed charge was appropriate due to circumstances that could not have been reasonably anticipated. The SDR determines the payment due in accordance with regulatory guidelines.

Facilities are required to make patients aware of the protections afforded by the NSA and of similar protections afforded by state law by providing them with written notices, posting signs in public spaces and including a link on their searchable home page. Providers are subject to fines of as much as \$10,000 for each NSA violation. New York State has been a leader in developing protections against excessive cost sharing related to OON emergency services and surprise bills. New York's OON protections, which took effect in April 2015 and were expanded as of Jan. 1, 2020, address patient notification, OON cost sharing, surprise billing, balance billing, dispute resolution and payment estimate requirements. The NSA does not supplant New York law; it allows state protections to continue to regulate delivery of OON services. As a result, the New York requirements apply to traditional health insurance regulated by the state while NSA applies to both traditional health insurance and to self-insurance plans, such as those offered by employers that are governed by federal ERISA laws.

To ensure compliance with both the state and federal requirements:

- Providers should immediately revise existing OON notices, websites and signs to meet NSA requirements;
- Facilities should assess their patient registration and scheduling processes. To meet NSA GFE requirements, it is important to timely identify uninsured patients and patients who do not intend to use insurance to pay for care;
- All providers must develop the means to determine whether a patient's coverage is

state-regulated insurance or self-insurance governed by ERISA. This is critical because the New York State IDR process applies to traditional insurance while the NSA IDR process applies to self-insurance plans. The new NSA IDR process has different procedural requirements and deadlines, applies different benchmarks, and considers different factors to resolve disputes between Plans and OON providers. Some factors relevant in state IDR proceedings may not even be considered in NSA IDR proceedings. Accordingly, providers must adjust their strategies depending on the coverage the patient has and the applicable IDR process.

- To avoid improper balance billing, facilities must collaborate effectively with members of their medical staffs and ancillary providers, particularly those responsible for their own contracting and billing. For uninsured and self-pay patients, they need to develop effective mechanisms for generating and providing timely GFEs to patients. For insured patients, they should confirm the professionals are aware of NSA limitations on balance billing and the notice and consent requirements that must be met to balance bill (in the very limited circumstances where it is permitted).

- All providers should familiarize themselves with the changes to the New York State IDR process adopted in December by the Department of Financial Services, in response to the NSA. Among other revisions, these changes expand the scope of the state IDR process to include certain emergency services, safety net hospitals and non-physician providers. Change, especially involving regulatory compliance, is rarely easy. For health care providers navigating the NSA, preparation is the best prescription.

Ted Case, former chief compliance officer at Vanderbilt University Medical Center and University of Rochester Medical Center, is a Partner in the Health Care practice at Harter Secrest & Emery. He can be reached at ecase@hslaw.com.