

Congress Searches for Agreement on Surprise Billing

Insights

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Over the past year and a half, Congress has made health care cost transparency and surprise billing a top priority, and lawmakers from both sides of the aisle have indicated a willingness to work together on addressing the circumstances that leave insured individuals at financial risk for covered services, particularly out-of-network emergency services or out-of-network professional services from a facility-based physician at an in-network facility. In recent months, Congress has stepped up activity with various hearings and legislative drafts – in order to meet a very aggressive (and perhaps unrealistic) timeline of getting a bill to the President by August.

In addition to the various proposals in Congress, more than a dozen states have passed surprise billing protection laws that generally require coverage of certain out-of-network services at in-network benefit levels, prohibit balance billing for these services, establish a framework for determining the appropriate payment amount for these services, and/or establish a dispute resolution process for out-of-network providers and payers. State law, however, cannot regulate self-funded group health plans and protect the approximately 110 million people covered under these plans by virtue of the strong preemption under the Employee Retirement and Income Security Act (“ERISA”). In light of this, federal legislation is viewed as necessary to protect members in self-funded group health plans from surprise billing, but questions remain as to the extent to which any new federal legislation will incorporate or override existing state laws.

This article briefly summarizes the key provisions of current federal legislative proposals that have been released to date and the status of each proposal. Although the odds of any one of the current pieces of legislation listed below becoming law without any changes at this time are very slim, their provisions provide important insights into the various policies potentially in play. Over the next few months, Hooper, Lundy, & Bookman, PC will be releasing short papers on particular questions surrounding surprise billing legislation and potential impacts on health care providers. We will also keep you updated on the movement of any bills on Capitol Hill.

The U.S. Senate

May 23: The Senate Health, Education, Labor & Pension (HELP) Committee’s Bipartisan Draft: [The Lower Health Care Costs Act](#)

- How would this proposed legislation reduce surprise billing disputes?
 - Prohibits Balance Billing
 - Requires Coverage at In-Network Benefits

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- Services Covered:
 - Out-of-network emergency services
 - Out-of-network professional services at an in-network facility
 - Certain out-of-network post-stabilization services
- Rate-Setting: Median In-Network Amount (proposed as an option)
- Dispute Resolution: Baseball-Style Arbitration (proposed as an option)
- In-Network Facility Guarantee (proposed as an option)

Earlier today, the HELP Full Committee held a hearing entitled; “[Lower Health Care Costs Act](#)” to further discuss their draft. Even though their discussion draft offered three options for solving surprise billing disputes, today was the first time Chairman Alexander commented that his preference was to require all providers at the same facility to be in-network. Of course, his statement does not necessarily indicate that this is the option that will appear in the next draft or any final bill. Many would agree that implementing an in-network facility guarantee would risk narrowing hospital networks and might have anticompetitive effects. Moreover, such a proposal would present a host of legal issues under federal and state laws, including those relating to the corporate practice of medicine and physician and provider relationships. After the hearing, Committee leadership stated that they hope to mark-up the legislation next week, combining the bill with additional drug pricing proposals lead by their colleagues in the Senate Finance Committee. The Senate set a goal of passing a bill by August.

May 16: Bipartisan Senate Workgroup’s [S. 1531, the STOP Surprise Medical Bills Act](#)

- How would this proposed legislation reduce surprise billing disputes?
 - Prohibits Balance Billing
 - Requires Coverage at In-Network Benefits
 - Services Covered:
 - Out-of-network emergency services
 - Out-of-network professional services at an in-network facility
 - Certain out-of-network post-stabilization services
 - Rate-Setting: Median In-Network Amount (default, automatic payment amount)
 - Dispute Resolution: Baseball-Style Arbitration

This [bill](#) is the result of over a year and half worth of collecting stakeholder feedback on surprise billing. The bill would prohibit balance billing in certain instances and automatically provide payment to providers at the median in-network rate. However, providers could also go through a “baseball-style” arbitration process if they dispute that amount. At this current time, there has been no talk to advance this bill given release of the Lower Health Care Costs Act draft bill.

The U.S. House

May 23: A Doctor-Supported Bipartisan Group led by Emergency Physician Rep. Raul Ruiz (D-CA) and OB/GYN Rep. Phil Roe (R-TN) Release an Outline of [“Protecting People from Surprise Medical Bills Act.”](#)

- How would this proposed legislation reduce surprise billing disputes?
 - Prohibits Balance Billing
 - Requires Coverage at In-Network Benefits
 - Services Covered:
 - Out-of-network emergency services
 - Out-of-network professional services at an in-network facility
 - Certain out-of-network post-stabilization services
 - Out-of-network imaging or laboratory services ordered by an in-network provider
 - Rate-Setting: Average Allowed Amount or Median In-Network Amount (outline is unclear)
 - Dispute Resolution: Baseball-Style Arbitration

This draft is very similar to what New York adopted in 2015. It would create a “baseball-style” arbitration model where if providers and insurers cannot agree on a payment rate, they can engage in an independent dispute resolution process (IDR). The group hopes to introduce this bill in the forthcoming weeks.

May 21: The House Ways & Means Committee Held a Hearing entitled “[Protecting Patients from Surprise Medical Bills.](#)”

Although Ways & Means does not have their own bill yet, their Health Subcommittee Chairman, Lloyd Doggett (D-TX), does. [H.R. 861, the End Surprise Billing Act](#) was introduced on January 30. It’s unclear how much of that bill will be combined into any action Ways & Means takes, but Chairman Doggett mentioned it frequently during the hearing, while pointing out the problems that other bills in the House and the Senate have.

May 14: The House Energy & Commerce Committee’s Bipartisan Draft: [The No Surprises Act](#)

- How would this proposed legislation reduce surprise billing disputes?
 - Prohibits Balance Billing
 - Requires Coverage at In-Network Benefits
 - Services Covered:
 - Out-of-network emergency services
 - Out-of-network professional services at an in-network facility
 - Rate-Setting: Median In-Network Amount
 - Dispute Resolution: None

This [draft](#) legislation holds patients to their in-network cost-sharing amounts for certain services while prohibiting balance billing, and setting the payment for out-of-network services at a “recognized amount.” Chairman Palone (D-NJ) and Ranking Member Walden (R-OR) asked for stakeholder feedback, which was due May 28. The Committee also held a Health Subcommittee hearing on June 12 entitled, “[No More Surprises: Protecting Patients from Surprise Medical Bills.](#)” Energy & Commerce leadership is now working on firming up their bipartisan draft, based on the comments they received.

If you would like more information or need assistance, please contact [Kelly Delmore](#) in Washington, DC, [Katrina Pagonis](#) in San Francisco, or your regular Hooper, Lundy & Bookman contact.

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