

# Federal Agencies Respond To Questions Regarding Out-Of-Network Reimbursement For Emergency Care

Insights

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On April 27, 2018, the U.S. Department of Health and Human Services, Department of Labor, and the Treasury Department (collectively the Departments) issued a “Clarification” of its previously-issued Greatest of Three (GOT) rule regarding payment for out-of-network emergency services. While the immediate impetus was a court order requiring the Departments to clarify the basis for the GOT rule, the Departments have provided valuable guidance that will assist providers in challenging the level of payment for such services.

The Patient Protection and Affordable Care Act amended and added to parts of the Public Health Services Act (PHSA). Section 2719A of the PHSA required, among other things, that if emergency services were provided out-of-network, the cost-sharing requirement (i.e., copayments and coinsurance) must be no more than would apply if the same services were provided in-network.

In issuing regulations under the statute, the Departments determined that, since Section 2719A of the PHSA does not prohibit balance billing of beneficiaries, it would defeat the purpose of the protections in the statute if a plan could pay an unreasonably low amount to a provider. 75 Fed.Reg. 37188 and 80 Fed.Reg. 72192. Therefore, the Departments set a minimum level of payment that a plan must provide for out-of-network emergency services based upon the greatest of three amounts: (i) the amount negotiated with in-network providers for emergency services; (ii) the amount for the emergency service calculated using the same method the plan uses to determine out-of-network emergency services (i.e., its UCR methodology); or (iii) the amount that Medicare would pay for the emergency services.

In May 2016, the American College of Emergency Physicians (ACEP) filed a lawsuit against the Departments asserting that the GOT regulation should be invalidated because it does not ensure a reasonable payment for out-of-network emergency services. The federal court in the District of Columbia declined to overturn the regulation, but held that the Departments did not adequately respond to concerns raised by ACEP and others, including ACEP’s proposal to use a database to set UCR payment.

The Departments have now issued this Guidance in response to the court’s order. They explain that they had declined to adopt ACEP’s proposal to use a database to set UCR amounts because (a) it would require the Departments to extend the scope of their authority under the PHSA, and (b) “creating and monitoring a publicly available database would be costly and time consuming,

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and there is no indication in either case that such a database would provide a better method for determining UCR than the methods group health plans and health insurers currently use.” The Departments declined to adopt the Fair Health database, as that would also require them to monitor the database.

In response to ACEP’s concerns about the transparency of the plans’ methodology, the Departments stated that “a group health plan subject to ERISA must disclose how it calculates a payment amount under the GOT regulation, including payment amounts to in-network providers, and the method the group health plan or health insurance issuer used to determine the UCR amount to a claimant or the claimant’s authorized representative.” While this statement is framed in terms of ERISA, the guidance also clarifies that all plans subject to PHSA Section 2719 (including non-ERISA plans) have to provide access to this information in the course of an appeal of an adverse benefit determination. Such plans are therefore required to provide copies of all documents and information relating to how the plan determined the UCR amount.

Perhaps most significantly, the Departments reiterated that the GOT regulation creates a floor for the reimbursement of out-of-network emergency services, and that states can set higher amounts.

While the Departments did not address all of ACEP’s concerns about the GOT regulation, we believe that the Clarification should assist out-of-network providers in their challenges to the amounts that they are being paid by plans.

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If you require assistance with this matter, or have any additional questions, please contact Eric Chan at (310) 551-8158 or [echan@hooperlundy.com](mailto:echan@hooperlundy.com) in Los Angeles or Katrina Pagonis at (415) 875-8515 or [kpagonis@hooperlundy.com](mailto:kpagonis@hooperlundy.com) in San Francisco.

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