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efforts to address surprise medical billing could yield a bipartisan solution

The healthcare industry is seeing renewed interest in tackling the problem of "surprise" medical bills—as evidenced by a recent White House roundtable to discuss the issue.

Because Democrats also regard this issue as important, it is even possible that legislation on preventing surprise billing could pass Congress on a bipartisan basis—although the poisonous atmosphere dominating Washington is likely to quash any efforts to advance a bipartisan solution agreement, even where the two parties inherently agree the issue should be addressed.

Surprise billing refers to bills that come from out-of-network physicians—primarily physicians providing care coverage in the emergency department (ED) or hospital—who are enlisted to see a patient without the patient's consent. Typically, these physicians are anesthesiologists, radiologists, or pathologists, or they are part of a physician group that services the ED. Such bills also can be issued for services delivered in outpatient settings, such as when an in-network physician sends a specimen to be tested to an out-of-network lab, or when an in-network physician refers a patient to a specialist who does not participate in the network but who practices in the same facility as the in-network physicians.

More than 20 states have passed laws to protect people from receiving such surprise bills from out-of-network physicians. But a federal solution would be best, because about half of all privately insured individuals have employer-sponsored self-insurance covered by the Employee Retirement Income Security Act (ERISA). State laws generally do not apply to these insurance plans, because ERISA exempts the plans from state law. The exception is that states have authority to proceed with remedies directed only to the providers involved and not the health plans.

The Scope of the Problem—and State Responses

It's unclear how much money is being charged from out-of-network bills or how much of it is actually paid, but in some reported instances, the amounts are significant. A 2010 study of larger out-of-network bills submitted under New York health plans reported per patient charges of almost $3,800 per case, and charges for some out-of-network assistant surgeons amounted to just over $12,000.[a] Stories of individual "horror cases" include a teacher in Texas who received a bill of $108,951 from the hospital after his heart attack.[b] The teacher had insurance, but the hospital wasn't in his insurance network.[c] Or there's the case of a college professor in Tennessee who had emergency gallbladder surgery. He ended up receiving an $8,000 bill from the out-of-network hospital after he and his insurer paid $8,000.

a. The case is cited in New York State Department of Financial Services, *An Unwelcome Surprise: How New Yorkers Are Getting Stuck with Unexpected Medical Bills from Out-of-Network Providers*, March 7, 2012.
b. Terhune, C., "Life-Threatening Heart Attack Leaves Teacher with $108,951 Bill," NPR, Aug. 17, 2018.
c. Appleby, J., "Taking Surprise Bills to Court," *KaiserHealth News*, Dec. 19, 2018.

The New York balance billing policy has been in effect since early 2015. It establishes an independent resolution process for hospitals and insurers that are unable to resolve how much should be paid. Both the hospital and insurance plan provide what each thinks is a fair price, and an independent third party decides price based on the proposed amounts. With this approach, the patient is removed from the resolution process. The law also prohibits out-of-network providers from billing insured patients more than their allowed cost sharing (i.e., their regular copayment for the service).

Texas also protects consumers against surprise billing but requires patients to be aware of the law and to start the dispute-resolution process by contacting the state. Probably as a result of this requirement, slightly fewer than 4,000 patients in Texas have invoked the law since 2009.

Early in 2019, the insurance commissioner in the state of Washington proposed legislation to bar out-of-network providers from sending surprise bills for a covered service at an in-network facility. Providers and insurers would be given an opportunity to resolve payment disputes, but otherwise, both parties would move to arbitration. The patient would not be subject to additional billing.

U.S. Senate Proposals

Last fall, a bipartisan group of U.S. Senators released a plan to protect patients from surprise bills and high charges from hospitals and physicians who are not in their insurance networks. For emergency treatment delivered to a patient by out-of-network physicians, the patient is required only to pay the out-of-pocket amount required by the insurance plan for in-network treatment. The hospital and physician also are prohibited from billing the patient for the remainder of the bill, although they may seek additional payments from the patient's insurer.

The physicians can seek more payments from plans based on formulas set up by state rules. Further, after patients requiring emergency services have been medically stabilized, they must be notified that they could face excess charges if they remain in an out-of-network hospital. The draft legislation was supported by Sens. Bill Cassidy (R-La.), Michael Bennet (D-Colo.), Chuck Grassley (R-Iowa), Tom Karper (D-Del.), Todd Young (R-Ind.), and Claire McCaskill (D-Mo.).

Another Senate bill to address surprise out-of-network medical bills was introduced in October 2018 by Maggie Hassan (D-N.H.) and cosponsored by Jeanne Shaheen (D-N.H.). It takes a similar approach to the bipartisan bill by taking the patient out of the dispute and protecting patients with both emergency and nonemergency conditions. The main difference is that instead of directing a minimum payment rate to the provider from the insurer, the bill requires a binding arbitration process to determine the appropriate provider payment in unplanned out-of-network instances. The bill also instructs the arbiter to consider Medicare and negotiated network rates in making this determination.

The bill introduced by Hassan and Shaheen caps the amount out-of-network providers can charge in any situation and allows states to choose from three options to set the out-of-network charge limit. Both of these strategies reduce the risk on introducing a strong inflationary push to billing, which is a concern raised by the bipartisan bill.

With the president and members of both parties expressing concern about surprise billing, and with legislation already in draft form, in a normal political environment, one could expect legislative action. But as has been clear since the 2016 election, this has been anything but a normal political environment. ■

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