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No Surprise



CMS begins investigating complaints alleging provider violations of the No Surprises Act

■ **By Jeff Davis**

The federal government's implementation of the No Surprises Act (NSA) is entering a new phase, with the Centers for Medicare & Medicaid Services (CMS) contacting medical groups and providers to investigate allegations of NSA violations. CMS investigations include requests for significant documentation to confirm compliance with the federal ban on balance billing and the requirement to provide a good faith estimate (GFE) of expected charges to uninsured and self-pay patients, including potential refunds to patients in certain cases.

Medical groups and providers should confirm which NSA requirements apply to them, ensure they have policies, procedures, and workflows in place to prevent NSA violations, and be prepared to respond to CMS investigations of patient complaints.

Background on NSA Requirements Applicable to Providers and Medical Groups

Enacted by Congress in December 2020, the NSA includes several consumer protections for commercially insured patients and self-pay or uninsured patients. Many of the provisions went into effect on January 1, 2022. The federal agencies implementing the law—the Departments of Health and Human Services (HHS), Labor, and Treasury (the Departments)—have issued two interim final rules with comment period, two final rules, and two proposed rules.¹ The Departments have also issued considerable guidance related to facility and provider compliance obligations. The requirements currently enforced by the Departments generally fall into two categories: the ban on balance billing for patients with private insurance, and the requirement to provide a GFE of expected charges to uninsured and self-pay patients.

Ban on Balance Billing

The ban on balance billing protects patients with private insurance from paying more than the in-network cost-sharing amount in certain cases in which the patient receives services on an out-of-network (OON) basis. The ban applies differently in the cases of emergency and nonemergency services. The ban generally does not apply to services furnished by providers in physician offices, but it does apply to certain services furnished by providers at a facility, including a hospital or ambulatory surgical center (ASC). OON providers may not balance bill for emergency services at a hospital or independent freestanding emergency department or for nonemergency services at an in-network hospital or ASC.

The NSA also requires providers to disclose information to patients about their protections against balance billing, both at the federal and state level. Providers must make the disclosures via their webpage, a sign posted prominently at the provider's location (if there is a publicly accessible location), and in a one-page notice given to the patient. Providers can meet the onsite and written notice disclosure requirements (but not the webpage requirement) by having a facility make the disclosures on the provider's behalf, so long as the disclosures are made pursuant to a written agreement between

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the parties. The disclosure requirements generally apply to all providers, regardless of their payer network status, so long as they provide services subject to the ban on balance billing (i.e., they provide services to patient in facilities such as hospitals and ASCs). The disclosure requirements may not apply if a provider treats patients only in a physician office setting.

GFE Requirements

The requirement to provide a GFE of expected charges to uninsured and self-pay patients applies to all licensed providers, regardless of the setting in which they provide care, including physician offices. The requirement applies to services scheduled at least three days in advance. Providers must inquire whether a patient is uninsured or self-pay and notify uninsured and self-pay patients of the availability of a GFE. Providers must furnish a written GFE to uninsured and self-pay patients upon request or upon scheduling the service. There are different timelines for when the GFE must be provided depending on when the service is scheduled.

Recent CMS Investigations of Providers Related to NSA Compliance

Although the NSA has been in effect since January 1, 2022, CMS has only recently begun taking steps to investigate provider compliance. In late 2023, providers began to report receiving letters notifying them that CMS received a complaint alleging an NSA violation and requesting information to resolve the complaint. In the initial communications, CMS generally asks the provider to first respond to confirm the correct individual to receive communications and then sends a letter with a description of the complaint and a list of information and documents requested. CMS generally gives providers 10 business days to provide the information, although the agency may grant extensions. The agency also requests that the provider complete a Provider Details Form with contact and other demographic information.

CMS is investigating complaints related to both the ban on balance billing and the GFE requirements. For example, CMS is looking into allegations brought by patients that they received a bill from an OON provider for a service furnished at an in-network hospital or ASC, even though their explanation of benefits (EOB) indicated a patient responsibility amount of \$0.00. In these cases, CMS suggests that the provider may have potentially violated the NSA's ban on balance billing by charging the patient more than the in-network cost-sharing amount. CMS generally asks for documentation related to the claim in question, including patient bills and the payer remittance showing the patient responsibility amount and any claim adjustment reason codes or remittance advice remark codes. If the provider charged the patient more than the patient responsibility amount, CMS instructs providers to correct the balance due in the patient's account. If the patient already paid the bill, CMS instructs the provider to issue a refund as needed.

CMS also requests documentation showing workflows providers have in place to identify and prevent instances of balance billing. Compliance with the request may require production of policies and procedures and/or standard operating procedures used by revenue cycle teams. CMS asks providers to share what corrective actions they have taken or will take to prevent



similar issues from occurring in the future, along with a timeline of expected changes. CMS also instructs providers to outline steps taken to identify other patients who were balance billed since the NSA went into effect on January 1, 2022, including any findings and steps taken to reverse incorrect charges or issue refunds.

With respect to the GFE requirements, CMS is investigating allegations that patients received scheduled services but the facility or practice did not notify the patient of the availability of a GFE and the patient did not receive a written GFE in advance of receiving the service. As a result, CMS suggests the facility or practice may have potentially violated the NSA's GFE requirements. In these cases, CMS may ask for copies of patient bills for the scheduled service and any GFE document provided to the patient, including when it was provided. CMS may also ask for documentation showing when the facility or practice:

- ▶ Inquired into the patient's insurance status;
- ▶ Confirmed whether the patient intended to have a claim billed to a payer;
- ▶ Informed the patient of the availability of a GFE;
- ▶ Scheduled the service; and
- ▶ Provided a GFE.

CMS may also ask for a copy of the GFE template the facility or practice uses and documentation showing workflows to identify and prevent violations of the GFE requirements. Similar to the requests related to the ban on balance billing, CMS also asks facilities and practices to share corrective actions they have taken or will take to prevent GFE violations in the future and a timeline for any expected changes, as well as any steps taken to identify other patients who did not receive GFEs and any results from reviews of potential noncompliance.

Potential Penalties for NSA Noncompliance

The federal and state governments share responsibilities to enforce the NSA provider requirements. States have primary enforcement authority, and if a state fails to substantially enforce the requirements, the federal government will enforce the requirements. In cases where CMS is responsible for enforcement, the NSA authorizes CMS to impose a civil monetary penalty (CMP) in an amount not to exceed \$10,000 per violation.

CMS has issued proposed regulations related to the penalties for noncompliance but has not yet issued final regulations.²

Under CMS' proposal, the agency may initiate an investigation into a provider if there is information brought to CMS' attention indicating that the provider may not be meeting an NSA requirement. Information could be brought to CMS' attention through complaints, reports from payers, state insurance departments or health departments, medical boards, the National Association of Insurance Commissioners, and any other federal or state agencies. CMS could conduct random or targeted investigations. If CMS receives information indicating a potential violation, or if CMS selects a provider for investigation, CMS would provide written notice to the provider providing a date by which the provider must respond and indicating that a CMP may be assessed and that CMS may require a corrective action plan.

Future Updates to GFE Requirements

Medical groups and providers should be aware of several updates to GFE requirement that HHS will implement in the future.

Coproducer GFE Requirements

When patients receive services from multiple providers related to the same visit, the GFE requirements apply differently depending upon which provider scheduled the primary service that is the reason for the visit. For example, if a patient undergoes a procedure in an ASC and receives services from the ASC and an anesthesiologist, which provider will furnish the GFE depends on who scheduled the service. If the ASC scheduled the service (referred to as the "convening" facility), the ASC must prepare the GFE. The NSA also requires the ASC to contact the anesthesiologist (referred to as the "coproducer") to share expected charges for the anesthesiologist's professional services for the ASC to include in the GFE.

However, HHS delayed enforcement of the GFE requirements for coproducers, in recognition of the technical challenges related to setting up systems for coproducers to share GFE information with convening facilities or providers.³ HHS has extended the enforcement delay until HHS fully implements the requirements through future regulations.⁴ In the meantime, HHS will continue using its enforcement discretion in cases in which a GFE does not include



expected charges for coproviders, and HHS encourages facilities and providers to include in their GFEs a range of expected charges for coprovider services.

GFE Requirements for Commercially Insured Patients

The NSA also includes a GFE requirement for commercially insured patients. Under this provision, providers must share a GFE with the payer, and the payer must include the GFE in an advanced explanation of benefits to be sent to the patient. Although this GFE requirement also went into effect on January 1, 2022, HHS has indicated the agency will defer enforcement of the requirement for facilities and providers until HHS issues implementing regulations.⁵ On September 16, 2022, the Departments issued a request for information seeking recommendations on how providers can transfer GFE information to payers to implement the GFE requirement.⁶

Medical Group and Provider Considerations

In light of the recent CMS investigations into patient complaints alleging NSA noncompliance, medical groups and providers should review their current practices to confirm they comply with the NSA ban on balance billing and GFE requirements. Groups and providers also should ensure they are prepared to respond to any CMS inquiries. Not all providers are subject to the ban on balance billing, given that it applies only when OON providers furnish services at a facility. Providers who furnish services subject to the ban should review their websites and workflows to confirm they are providing the necessary disclosures and are not billing more than the in-network amount when patients are protected against balance billing.

Because the GFE requirements for uninsured and self-pay patients apply to all providers, regardless of practice setting, *all* providers and practices should confirm they have policies, procedures, and workflows in place to inquire into patients' payer status, inform uninsured and self-pay patients of the availability of a GFE, and provide a written GFE for scheduled services upon scheduling or request.

Medical groups and providers should monitor their communications for CMS inquiries related to NSA compliance. [GPI](#)

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