



DOMESTIC & FOREIGN INSURERS BULLETIN NO. 127

TO: ALL DOMESTIC AND FOREIGN INSURERS WRITING HEALTH INSURANCE IN DELAWARE

RE: IMPLEMENTATION OF THE FEDERAL NO SURPRISES ACT

DATED: November 30, 2021

The purpose of this bulletin is to capture for health care carriers the latest iteration of the Department of Insurance (the Department's or DOI's) negotiations with the Federal Centers for Medicare and Medicaid Services (CMS) concerning the Department's authority and intention to enforce specified provisions of the Federal No Surprises Act (the NSA).

I. Background

As referred to in this bulletin, the NSA consists of:

- Title XXVII of the Public Health Service Act (PHS Act), as amended by Title I (the No Surprises Act), available at: <https://www.govinfo.gov/content/pkg/COMPS-8798/pdf/COMPS-8798.pdf>;
- Title II (Transparency) of Division BB of the Consolidated Appropriations Act, 2021, available at: <https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf>; and
- The interim final rules implementing certain provisions of the No Surprises Act, including Requirements Related to Surprise Billing Parts I and II:
 - Part I, published 7/13, effective 9/13
<https://www.federalregister.gov/documents/2021/07/13/2021-14379/requirements-related-to-surprise-billing-part-i>, and Part II published/effective 11/7; and
 - Part II, published 10/7, effective 11/7
<https://www.federalregister.gov/documents/2021/10/07/2021-21441/requirements-related-to-surprise-billing-part-ii>

The NSA establishes protections for consumers related to surprise billing and price and care transparency in health care. CMS summarizes the question of enforcement jurisdiction as follows:

With respect to health insurance issuers, facilities, and providers (including air ambulance services providers), states have primary enforcement authority over these new requirements. CMS has a statutory obligation under sections 2723 and 2799B-4 of the PHS Act to directly enforce any provision (or provisions) that a state fails to substantially enforce. If the applicable state authority lacks the authority but wants to participate in the enforcement of a provision (or provisions), the applicable state authority may enter into a collaborative enforcement agreement (CEA) with CMS. Under a CEA, the applicable state authority agrees to seek voluntary compliance from health insurance issuers, providers, facilities, and/or air ambulance service providers, and refer to CMS for possible enforcement action any potential violation for which the state is not able to obtain voluntary compliance.

II. Ongoing Jurisdiction and Enforcement Considerations

Since the passage of the NSA, the Department has been in communication with CMS to discuss the nature and extent of its jurisdictional authority. As a part of this exercise, the Department has made the following observations:

- CMS is currently undertaking its own rulemaking initiative to implement the NSA with an anticipated completion deadline of July 2022. Until CMS completes its rulemaking, it is difficult for the Department to assess the nature and extent of its own legislative and regulatory reach;
- The Department may need to work with the Delaware General Assembly to expand the Department's enforcement authority, or otherwise promulgate or modify related regulations;
- The Department has no authority and will not seek to exercise authority over self-insureds;
- Jurisdiction over certain provisions of the NSA may be more appropriately housed in Delaware agencies other than the Department; and
- Although certain provisions of the NSA have set effective dates, without the associated federal regulations, it is difficult to determine whether and when CMS (and correspondingly, the Department) can begin enforcement.

This bulletin is meant to be informative, but the process of finalizing authorities will be iterative. Accordingly, this bulletin should not be interpreted as the final word on this issue. The Department's determinations of authority are not yet complete, and other state agencies may issue guidance of their own pursuant to their jurisdiction.

The attached table sets forth the Department's current assessment of its jurisdictional authority, noting where determinations are not yet final.

Questions concerning this bulletin should be emailed to: DOI-Legal@delaware.gov.

This bulletin shall be effective immediately and shall remain in effect unless withdrawn or superseded by subsequent law, regulations, or bulletin.



Trinidad Navarro
Delaware Insurance Commissioner

Status of Jurisdictional Determination as of the Date of this Bulletin

Applicable Provision	Provision Description	Enforcement Jurisdiction (DOI or CMS)	Contemplated Delaware Statutory/Regulatory Authority	Applicability Date per the Federal Legislation
Carrier Provisions				
PHS Act Sec. 2719 2719	Appeals Process, as extended by Section 110 of the NSA	DOI	18 <i>Del. C.</i> §§ 332 and 6416	With respect to adverse benefit determinations related to surprise billing in plan years beginning on or after January 1, 2022.
PHS Act Sec. 2746	Disclosure to Enrollees of Individual Market Coverage, as enacted by Section 202 of Title II (Transparency) of Division BB of the Consolidated Appropriations Act, 2021	CMS		One year after the date of enactment except contracts executed prior to the applicability date of this provision are exempt from reporting and disclosure.
PHS Act Sec. 2799A-1 (a), (b), (d), (e) and (f).	Preventing Surprise Medical Bills, as enacted by Sections 102, 107, and 111 of the NSA <ul style="list-style-type: none"> • Limitations on Out-of-Pocket Costs for Out-of-Network Emergency Services • Cost-Sharing and Out-of-Network Payment Amounts • Emergency Services Definition and Non-Emergency Services Provided by an Out-of- 	DOI via CEA after CMS rules finalized; Delaware legislative action may be needed	Out-of-pocket costs: 18 <i>Del. C.</i> §§ 3349(b), 3565(b), 3370A(d)(2), 3571S(d)(2), 18 DE Admin. Code 1316-2.0 Cost-sharing: 18 <i>Del. C.</i> §§ 3349(b), 3565(b), 3370A(d)(2) and 3571S(d)(2), 18 DE Admin. Code 1316-3.4 Network disclosure: 18 DE Admin. Code 1317 (updates re ancillary services likely needed)	To all group health plans and health insurance coverage, including grandfathered health plans, for plan years (in the individual market, policy years) beginning on or after January 1, 2022.

Applicable Provision	Provision Description	Enforcement Jurisdiction (DOI or CMS)	Contemplated Delaware Statutory/Regulatory Authority	Applicability Date per the Federal Legislation
	<p>Network Provider at an In-Network Facility</p> <ul style="list-style-type: none"> Consumer Protections related to Price Transparency and Other Information 		<p>Emergency services definition: 18 <i>Del. C.</i> §§ 3348(b), 3349, 3565(d), 3370A(d) and 3571S(d), 18 DE Admin. Code 1316-2.0 and 1317. Consumer protections: Delaware’s requirements relate to information that must be provided at the time an application is made but does not have requirements such as an Advance EOB notice prior to scheduled services.</p>	
PHS Act Sec. 2799A-1(c)	Preventing Surprise Medical Bills, Independent Dispute Resolution (IDR) Process, as enacted by Section 103 of the No Surprises Act	DOI via CEA after CMS rules finalized; Delaware legislative action may be needed	18 <i>Del. C.</i> §§ 332, 6416 and 333, 18 DE Admin. Code 1310, 1312, 1313,1315, 1316 and 1319	For plan years beginning on or after January 1, 2022.
PHS Act Sec. 2799A-2(a) and 2799A-2(b)	Ending Surprise Air Ambulance Bills, as enacted by Section 105 of the No Surprises Act	DOI is awaiting Federal contemplation of the Fed. Aviation Admin. jurisdiction preemption.	18 <i>Del. C.</i> §§ 3349(d) and 3565(d), 18 DE Admin. Code 1316	For services furnished during plan years that begin on or after January 1, 2022.
PHS Act Sec. 2799A-3.	Continuity of Care, as enacted by Section 113 of the No Surprises Act	Delaware legislative action may be needed	No state equivalent	For plan years beginning on or after January 1, 2022

Applicable Provision	Provision Description	Enforcement Jurisdiction (DOI or CMS)	Contemplated Delaware Statutory/Regulatory Authority	Applicability Date per the Federal Legislation
PHS Act Sec. 2799A-4.	Maintenance of Price Comparison Tool, as enacted by Section 114 of the No Surprises Act	Undetermined	18 DE Admin. Code 1314	Applicability Date: For plan years beginning on or after January 1, 2022.
PHS Act Sec. 2799A-5. 719	Protecting Patients and Improving the Accuracy of Provider Directory Information, as enacted by Section 116 of the No Surprises Act	DOI has some authority; Delaware legislative action may be needed	Some components found in 18 <i>Del. C.</i> §§ 3370A and 3571S, 18 DE Admin. Code 1317-6-7.0	For plan years beginning on or after January 1, 2022.
PHS Act Sec. 2799A-9.	Increasing Transparency by Removing Gag Clauses on Price and Quality Information, as enacted by Section 201 of Title II (Transparency) of Division BB of the Consolidated Appropriations Act, 2021	Undetermined	No state equivalent except with regard to Pharmacy Benefits Managers	Became applicable upon enactment (December 27, 2020).
Provider Provisions				
PHS Act Sec. 2799B-1	Provider balance billing provisions	CMS / Other Delaware Agencies	Delaware State agencies other than DOI may hold levels of authority over aspects of these provisions	Services furnished during plan years that begin on or after January 1, 2022
PHS Act Sec. 2799B-2.	Balance Billing in Cases of Non-Emergency Services Performed by Nonparticipating Providers at Certain Participating Facilities, as enacted by Section 104 of the No Surprises Act			Services furnished during plan years that begin on or after January 1, 2022.
PHS Act Sec. 2799B-3	Provider Requirements with Respect to Disclosure on Patient Protections against Balance Billing, as enacted by Section 104 of the No Surprises Act			January 1, 2022

Applicable Provision	Provision Description	Enforcement Jurisdiction (DOI or CMS)	Contemplated Delaware Statutory/Regulatory Authority	Applicability Date per the Federal Legislation
PHS Act Sec. 2799B-5	Air Ambulance Services, as enacted by Section 105 of the No Surprises Act (Prohibits Air ambulance services providers from billing or holding consumers liable for amounts greater than the in-network cost-sharing amount.)	DOI has partial jurisdiction; however, air ambulance jurisdiction remains in question as discussed previously.	Partially via 18 <i>Del. C.</i> §§ 3349(d) and 3565(d) and 18 DE Admin. Code 1316	For services furnished during plan years that begin on or after January 1, 2022.
PHS Act Sec. 2799B-6.	Provision of Information Upon Request and for Scheduled Appointments, as enacted by Section 112 of the No Surprises Act	CMS / Other Delaware Department	Delaware State agencies other than DOI may hold levels of authority over aspects of these provisions	January 1, 2022
PHS Act Sec. 2799B-7.	Patient-Provider Dispute Resolution, as enacted by Section 112 of the No Surprises Act			January 1, 2022
PHS Act Sec. 2799B-8.	Continuity of Care, as enacted by Section 113 of the No Surprises Act			For plan years beginning on or after January 1, 2022
PHS Act Sec. 2799B-9.	Provider Requirements to Protect Patients and Improve the Accuracy of Provider Directory Information, as enacted by Section 116 of the No Surprises Act			January 1, 2022