

California's Surprise Medical Bill Statute: Part 1: Implications and National Trends

By Jackie Selby and Kevin J. Malone

December 2016

I. Executive Summary

On September 23, 2016, the California Legislature passed, and Governor Jerry Brown signed, Assembly Bill 72 (“the Law”), creating a new regime for the regulation of “surprise bills.”¹ Surprise bills under the Law are medical bills sent to patients by out-of-network (“OON”) individual health professionals for non-emergency services delivered at an in-network facility without the enrollee’s prospective voluntary choice (or resulting from such a service).² The Law will significantly impact billing procedures and reimbursement rates for such services in California. For health care service plans regulated by the California Department of Managed Health Care (“DMHC”) and health insurers regulated by the California Department of Insurance (“CDI”), the Law also creates new obligations related to provider reimbursement rates, rate-setting methodology, and network adequacy that will take significant time and careful analysis to implement.

The Law does not apply to: MediCal managed health care service plans or any entity that enters into a contract with the State Department of Health Care Services pursuant to Chapter 7, Chapter 8, and Chapter 8.75 of Part 3 of Division 9 of the California Welfare and Institutions Code; self-insured plans or the uninsured; and emergency services because they are already subject to a limitation on balance billing to the amounts specified for in-network coverage under the terms of the plan pursuant to a decision by the California Supreme Court. See *Prospect Med. Grp., Inc. v. Northridge Emergency Med. Grp.*, 45 Cal. 4th 497, 198 P.3d 86 (2009).³

¹ Assembly Bill No. 72, Approved by Governor Sep. 23, 2016, available at

https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB72.

² “Individual health professional” means a physician and surgeon or other professional who is licensed by this state to deliver or furnish health care services. It does not include a dentist licensed to practice under the California Dental Practice Act.

³ California Health and Safety Code Section 1317.1 defines emergency services as “medical screening, examination, and evaluation by a physician and surgeon, or, to the extent permitted by applicable law, by other appropriate licensed persons under the supervision of a physician and surgeon, to determine if an emergency medical [or psychiatric] condition or active labor exists and, if it does, the care, treatment, and

Considering that the Law applies to plans and insurance policies issued in California, amended, or renewed after July 1, 2017, it is important for providers, health plans, and insurers in California to quickly create a plan to successfully navigate the new regime.

The Law may be a harbinger of laws elsewhere as it represents the next step in the evolution of state legislative efforts to address the tricky issues that arise when beneficiaries receive OON services without a reasonable opportunity to consent to them.⁴ California has incorporated many of the key design elements of surprise bill legislation that has already been enacted or is under consideration around the country but has introduced a number of new provisions and has taken a unique approach. In particular, California is prioritizing new reimbursement regulations over disclosure obligations, is only imposing surprise bill regulations on OON individual health professionals, and is incorporating new network adequacy provisions.

For providers in California and plans and insurers regulated by DMHC or CDI in California, the Law presents a new business and compliance challenge that needs to be addressed immediately. Providers, plans, and insurers operating in other states, especially in those states where legislation has been proposed and debated but not yet enacted, should take careful note of the provisions of the Law as a model that other states or the US Congress may soon adopt.

To help put the Law provisions in context, a follow-up to this Health Care and Life Sciences Client Alert will provide a detailed chart comparing the Law to New York's

surgery, if within the scope of that person's license, necessary to relieve or eliminate the emergency medical condition, within the capability of the facility.”

⁴ Bills that are similar to California's have recently been enacted in New York (Emergency Medical Services and Surprise Bill. Financial Services Law Article 6, signed March 31, 2014, *available at*: <http://www.dfs.ny.gov/consumer/hprotection.htm>); Texas (Senate Bill 481 built upon earlier restrictions to create additional transparency and make mediation available for more patients, *available at*: <http://www.tdi.texas.gov/news/2015/tdi09102015.html>); Colorado (C.R.S.A. § 10-16-704 provides a hold-harmless protection for services rendered by OON providers at in-network facility where patient cannot reasonably know that the service provider is OON, *available at*: http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2002a/sl_235.htm); Maryland (Maryland Health - General Section 19-710.1; Does not have a concept of “surprise bill” but does impose reimbursement limits on OON services in general, *available at*: <http://mgaleg.maryland.gov/webmgaf/mStatutesText.aspx?article=ghg§ion=19-710.1&ext=html&session=2015RS&tab=subject5>); Connecticut (Public Act No. 15-146 signed June 30, 2015, providing enhanced disclosure and hold harmless protections for surprise bills, *available at*: <https://www.cga.ct.gov/2015/act/pa/2015PA-00146-R00SB-00811-PA.htm>); and have recently been proposed in Florida (SB 516 would add emergency service surprise bill protections to existing disclosure requirements; *available at*: <https://www.flsenate.gov/Session/Bill/2015/0516/?Tab=BillText>); Pennsylvania (Balance Billing Legislation – Proposed DRAFT 01-19-16, *available at*: <http://www.insurance.pa.gov/Coverage/Documents/Balance%20Billing%20Legislation%20PROPOSED%20DRAFT.pdf>); Georgia (SB 382 "Surprise Billing and Consumer Protection Act" introduced 2/16/2016, referred to Health and Human Services Committee, *available at*: <http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/382>); New Jersey (S1285 "Out-of-network Consumer Protection, Transparency, Cost Containment and Accountability Act." Cleared the Senate Commerce Committee and is currently with the Budget and Appropriations Committee, *available at*: <http://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=S1285>); and the US Congress (H.R. 3770 “End Surprise Billing Act of 2015” introduced Oct. 20, 2015, and referred to committee, *available at*: <https://www.congress.gov/bill/114th-congress/house-bill/3770>).

Emergency Medical Services and Surprise Bills Law (Financial Services Law Article 6), which is considered one of the most comprehensive state surprise bill laws.

II. California's Approach to Surprise Bills

a. Definition of a Surprise Bill, Limitations on Patient Cost Share, and Consent Safe Harbor

The Law applies to bills for “covered services from a contracting health facility at which, or as a result of which, the enrollee receives services provided by a noncontracting individual health professional.”⁵ The “as a result of” provision has yet to be fully explained by DMHC or CDI and will be an important area of clarification during regulatory implementation. Covered facilities include (but are not limited to) hospitals, ambulatory surgery “or other outpatient settings,” laboratories, and radiology/imaging centers. This definition of surprise bills is narrower in scope than the law in New York (which includes non-professional providers such as laboratories receiving referrals from in-network providers) and other similar states, but may be broader depending on the ultimate interpretation of the “as a result of” provision. Pending a surprising interpretation of the provision, this surprise bill definition substantially reduces the burden of the Law on hospitals, surgical centers, laboratories, diagnostic facilities, and other non-individual provider entities.

The Law requires health plans and insurers in California to limit beneficiary cost exposure for surprise bills to the copay, coinsurance, and deductible amounts provided for in-network providers. This is the key beneficiary protection of the Law and it places the obligation firmly on the providers, plans, and insurers to resolve any disagreement on a reimbursement amount for surprise bills.

As with other states implementing surprise bill provisions, the Law provides a safe harbor for services delivered by OON individual health professionals when the patient consents in writing to the OON service in advance. The consent form requirements are more specific in the Law than in other similar statutes, providing, among other requirements, that the consent be collected separately from other consent to treat or share medical information, that the OON health professional furnish a written estimate of the patient's total out of pocket costs, and that billed charges be limited to that estimate absent separate updated consent. This consent safe-harbor provides significant disclosure obligations on OON individual health professionals hoping to avoid the submission of surprise bills.

b. Independent Dispute Resolution Process

As seen in many other surprise bill statutes, the Law includes a provision creating a binding independent dispute resolution process (“IDRP”) in order to facilitate efficient resolution to claims disputes between a plan or insurer and an OON individual health

⁵ Cal. Gov't Code § 1371.9.

professional.⁶ The IDRPs provision requires the individual health professional to exhaust any internal appeals process prior to going to the IDRPs with a dispute about the amount the plan or insurer offers. In addition, although only bills from individual health professionals can constitute surprise bills, the Law does allow physician groups, independent practice associations, or other entities authorized to act on behalf of an individual health professional to submit a dispute to the IDRPs. The Law otherwise defers to the discretion of DMHC and CDI to promulgate rules and procedures for IDRPs fees and process. Pending changes that may be a part of that regulatory process, the approach appears to be very similar to the independent process outlined in other states. However, as discussed below, the reimbursement rate regulatory provisions of the Law will likely reduce the importance of the IDRPs in comparison to its role in other states because the OON reimbursement rates will be set by state regulation.

c. Disclosure Process

Unlike the disclosure procedure called for in numerous other states, the Law only imposes consumer disclosure obligations as a component of the consent safe-harbor. This is an important distinction and further clarifies that the Law focuses on regulating the reimbursement for surprise bills as the core policy lever for motivating providers, plans, and insurers to negotiate a reasonable settlement.

In contrast, the provision in New York relies on an intensive disclosure process and employs only limited direct regulation of provider reimbursement rates. Nonetheless, any individual health professional that regularly delivers services OON will need to carefully review the disclosure requirements included in the consent safe-harbor in order to avoid submitting surprise bills in the first place. The Law's approach to disclosure—only including disclosure requirements in the consent safe-harbor—represents an innovation that may be adopted in other states because it limits the disclosure obligation to the circumstances when it is arguably most important (when a service is about to be delivered), limits the compliance enforcement obligations for state agencies, and provides a strong financial incentive for disclosure.

d. Reimbursement Rate Established

The Law also includes a number of other unique provisions that demonstrate a different approach in surprise bill regulation from the programs in other states. Unlike other states that do not provide specific requirements for the reimbursement rate for surprise bills, the Law requires plans and insurers to reimburse providers of surprise bills the greater of the average contracted rate or 125 percent of the Medicare payment for the same service in that geographic region. In addition, in order to implement this reimbursement provision, rather than deferring to the traditional usual, customary, and reasonable ("UCR") process to determine the average contracted rate, the Law creates a new regime of rate oversight. In particular, the Law requires each health plan or insurer in California to provide to DMHC or CDI by July 1, 2017, with the average

⁶ The Law requires the IDRPs to be established by September 1, 2017, and does allow providers to dispute the appropriateness of the methodology the plan or insurer used to calculate the reasonable and customary value.

contract rate they will use, data on average contracted rates for services delivered by OON individual health professionals at in-network facilities, and data on in-network services sufficient to determine the proportion of OON health professionals to in-network health professionals (and an accompanying methodological and policy/procedure report).⁷ Health plans and insurers in California are then only allowed to update their OON reimbursement rates annually based on increases in the Consumer Price Index (“CPI”). The Law also requires DMHC and CDI to jointly specify to their regulated entities a methodology for determining the average contracted rate by January 1, 2019.

These provisions not only create a regulatory process for establishing OON reimbursement rates for surprise bills, they create a significant new analysis and reporting obligation that is subject to audit. The Law also includes a unique related compliance regime where an OON health professional who collects more than the in-network cost-sharing amount from the patient, is required to refund any overpayment plus interest at 15 percent year.

e. Network Adequacy

The Law includes a reference to network adequacy provisions as a component of surprise bill enforcement, granting additional authority to DMHC and/or CDI to promulgate related regulations. In addition, the Law requires DMHC to annually review health plan compliance with newly developed timely access standards and to post the findings on its website. Although many of the other surprise bill statutes recently enacted or under consideration make reference to already existing network adequacy requirements, the California Law explicitly ties network adequacy compliance to surprise bill policy by granting new regulatory authority to enforcement agencies. Although this provision is intended to reduce the frequency of or need for OON individual physician services, this provision may also provide individual providers arguments to use against health plans and insurers in the network participation negotiation process.

* * *

*This Client Alert was authored by **Jackie Selby** and **Kevin J. Malone**. For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

⁷ This data is not subject to the Public Records Act and the Law requires the agencies to keep data confidential to protect trade secrets.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of: (i) avoiding any tax penalty, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

If you would like to be added to our mailing list or need to update your contact information, please contact Lisa C. Blackburn at lblackburn@ebglaw.com or 202-861-1887.