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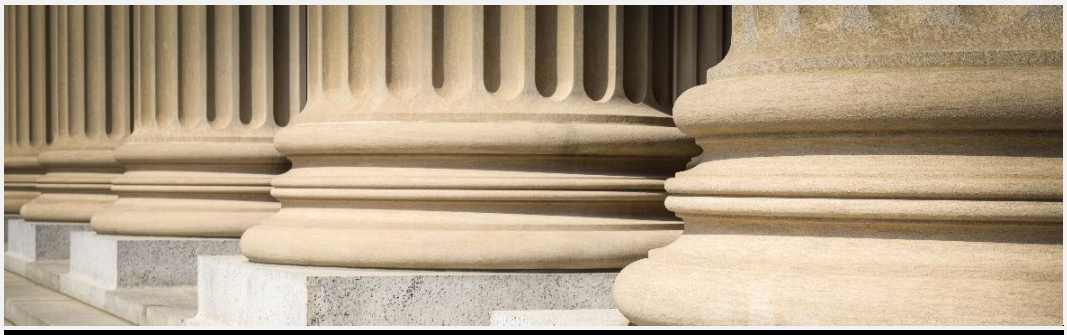
United States | Human Capital | 30 July 2021



Rewards Policy Insider
2021-14

In this Issue:

Applying Surprise Billing Rules to Non-emergency Services

In Rewards Policy Insider 2021-13, we provided an overview of the new "Surprise Billing" rules that will take effect for plan years beginning on or after January 1, 2022, and how those rules will apply when participants receive emergency services. But these new rules can also apply when participants receive non-emergency services from an out-of-network provider at a network facility.

Background

Broadly speaking, the new "surprise billing" provisions, which were enacted as part of the Consolidated Appropriations Act, 2021, are targeted at certain situations where group health plan participants and others with insurance end up with unexpected medical bills because they received care from an out-of-network provider or at an out-of-network facility. Because the provider's bill exceeds the amount the plan or health insurance issuer is willing to pay for an out-of-network provider, the provider may "balance bill" the participant or insured for the difference.

The Departments of Health and Human Services, Labor, and Treasury all have jurisdiction over certain aspects of these new rules, and the agencies have jointly issued Interim Final Regulations (IFR) to implement them. Generally speaking, the new rules address three separate (but related) issues:

1. What prior authorization and cost-sharing requirements the plan can impose on participants?
2. The amount providers and facilities can recover from plans for their services?
3. What, if any, responsibility the participant/patient have to pay the provider for amounts the plan doesn't pay?

However, these rules only apply in certain circumstances. They most typically apply when a plan covers emergency services and a participant obtains emergency medical services at an out-of-network facility and/or from an out-of-network provider. Another common situation is when a plan covers air ambulance services and a participant uses an out-of-network air ambulance provider.

But, as discussed more below, the surprise billing protections also can apply if a participant obtains non-emergency services from an out-of-network provider at a network facility.

The rules do not apply if a participant obtains non-emergency services at an out-of-network facility, regardless of whether the provider is in or out of network.

When do the Rules Apply to Non-emergency Services?

The surprise billing protections generally come into play when a participant receives non-emergency services in a network facility from a nonparticipating provider. However, if certain notice and consent requirements are satisfied the surprise billing protections will not apply in these circumstances.

Briefly, the notice requirements are satisfied if the nonparticipating provider gives written notice to the participant stating that the provider is a nonparticipating provider with respect to the individual's plan, and provides a

good faith estimate of the amount the provider may charge the participant for the items and services involved, along with additional required information. The written notice must be provided:

- At least 72 hours before the individual is furnished the items or services, if the appointment was scheduled more than 72 hours before the date of service; or
- On the date of the appointment, if the appointment was scheduled within 72 hours before the date of service.

In the latter case, the notice still must be provided at least 3 hours before furnishing the items or services.

Once proper and timely notice has been given, the participant must voluntarily consent to be treated by the nonparticipating provider. Among other things, the consent must state the participant has been given the required notice and informed that she might be balance billed and be subject to out-of-network cost-sharing, etc. It also must include the time and date the participant received the notice, as well as the time and date the participant signed the consent.

It is the nonparticipating provider's responsibility to inform the group health plan that the notice and consent requirements have been satisfied. The plan can rely on the nonparticipating provider's representation. However, if the plan does not receive notice from the nonparticipating provider then it must assume the surprise billing protections apply.

How do the Rules Apply to Non-emergency Services?

If the nonparticipating provider does not satisfy the notice and consent requirements, then the surprise billing rules will apply. That means the same requirements relating to cost-sharing and initial payments for emergency services will govern how much the provider is paid. Additionally, the plan will have to count any participant cost-sharing against the plan's in-network deductible and out-of-pocket maximums. Also, the provider will not be permitted to balance bill the participant.

The full text of the IFR is here.

IRS Issues Updated Employee Plans Compliance Resolution System

The IRS has issued Revenue Procedure 2021-30 to update the Employee Plans Compliance Resolution System (EPCRS), which provides guidance on correcting retirement plan qualification failures so that plan sponsors can continue providing retirement benefits to their employees on a tax-favored basis. EPCRS was last updated in 2019.

The IRS describes Rev. Proc. 2021-30 as a "limited update" that is being published primarily to:

- Expand guidance on the recoupment of overpayments;
- Eliminate the anonymous submission procedure under the Voluntary Correction Program (VCP), effective January 1, 2022;
- Add an anonymous, no-fee, VCP pre-submission conference procedure, effective January 1, 2022;
- Extend the end of the self-correction program (SCP) correction period for significant failures by one year (which has the result of also extending the safe harbor correction method for Employee Elective Deferral Failures lasting more than three months but not beyond the extended SCP correction period for significant failures);
- Expand the ability of a Plan Sponsor to correct an Operational Failure under the SCP by plan amendment; and
- Extend by three years the sunset of the safe harbor correction method available for certain Employee Elective Deferral Failures associated with missed elective deferrals for eligible employees who are subject to an automatic contribution feature in a § 401(k) plan or § 403(b) Plan (from December 31, 2020, to December 31, 2023).

Significantly, the update further clarifies and expands the options available for recouping overpayments by defined benefit pension plans. The changes include adding two new correction methods applying to defined benefit plan overpayments: the funding exception correction method and the contribution credit correction method.

Under the funding exception correction method, corrective payments will not be required if the plan's AFTAP is at least 100%. The plan will still have to reduce payments to the correct amount for any overpayment recipient going forward, but will not otherwise be required to obtain any corrective payments.

The new contribution credit correction method provides that the amount of overpayments required to be repaid to the plan is the amount of the overpayments reduced (but not below zero) by: (A) the cumulative increase in the plan's minimum funding requirements attributable to the overpayments (including the increase attributable to the overstatement of liabilities, whether funded through cash contributions or through the use of a funding standard carryover balance, prefunding balance, or funding standard account credit balance), beginning with (1) the plan year for which the overpayments are taken into account for funding purposes, through (2) the end of the plan year preceding the plan year for which the corrected benefit payment amount is taken into account for funding purposes; and (B) certain additional contributions in excess of minimum funding requirements paid to the plan after the first of the overpayments was made. This reduction is referred to as a "contribution credit." No interest adjustment is required for purposes of calculating the overpayment amount, or the cumulative contribution credit. Future benefit payments to an Overpayment recipient must be reduced to the correct benefit payment amount. But no further corrective payments from any party are required.

The full text of Rev. Proc. 2021-30 is here.

IRS Extends Relief for Leave-Based Donation Programs

During national emergencies the IRS often provides special relief from otherwise applicable tax rules to facilitate employer-sponsored leave-based donation programs. The COVID-19 national emergency has been no different. The special relief the IRS first provided last year has now been extended through the end of 2021.

Background

Last year, the IRS issued Notice 2020-46 to provide guidance on the income and employment tax treatment of leave-based donation programs set up to help victims of the COVID-19 pandemic. In general, these programs permit employees to forgo paid vacation, sick, or personal leave in exchange for their employer making a cash donation to certain charitable organizations. Under normal tax rules, employees would be required to recognize the value of the forgone leave as taxable income. However, pursuant to Notice 2020-46, employers can operate these leave-based donation programs without causing employees to recognize taxable income if certain requirements are satisfied.

Specifically, Notice 2020-46 provided these payments would not be included in employees' gross incomes if they are:

1. Made to certain charitable organizations for the relief of victims of the COVID-19 pandemic; and
2. Paid to the charitable organization before January 1, 2021.

Relief Extended

Notice 2021-42 extends these special rules to payments made by employers before January 1, 2022 pursuant to qualifying leave-based donation programs.

Note that, even though the payments are not included in employees' gross incomes, the Notice clarifies that employers can still deduct them. However, employees cannot claim a charitable contribution deduction on their individual income tax returns.

The full text of Notice 2021-42 is available here.

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