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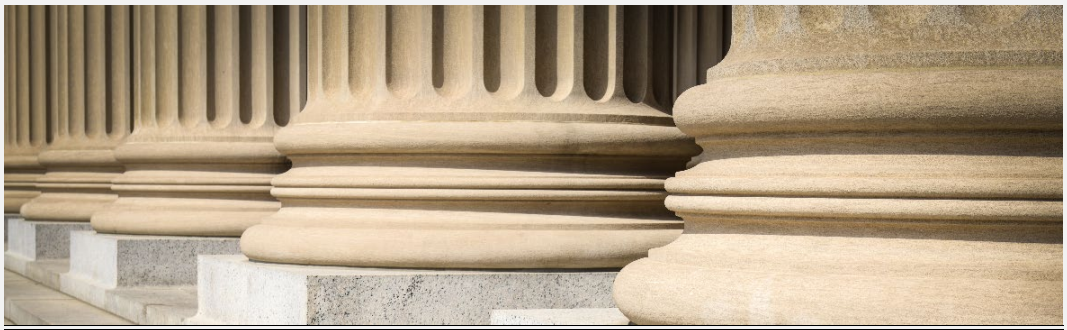

Rewards Policy Insider
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In this Issue:

1. Agencies Issue "Surprise Billing" Rules, Part II
2. HHS Answers Questions about Employer Vaccine Requirements and HIPAA Privacy Rule
3. IRS Issues Guidance on COBRA Premium Payment Deadlines

Agencies Issue "Surprise Billing" Rules, Part II

The Consolidated Appropriations Act (CAA), 2021, features new restrictions on "surprise billing" for certain

emergency services provided by out-of-network providers and/or at out-of-network facilities, certain nonemergency services provided by out-of-network providers at participating facilities, and out-of-network air ambulance services. These new requirements, which will apply to plan years beginning on or after January 1, 2022, will affect group health plans and participants, as well as health insurers and health care providers. As reported in Rewards Policy Insider 2021-13, the Departments of Health and Human Services (HHS), Labor, and Treasury (the "Agencies") issued an initial set of interim final regulations (IFR) to implement these requirements in July. Part II, which was released on September 30, focuses primarily on the Independent Dispute Resolution (IDR) process for plans and providers.

Background

Broadly speaking, the CAA's "surprise billing" provisions are targeted at 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 in an emergency situation, for example. 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 CAA amended ERISA, the Internal Revenue Code, and Public Health Service Act (PHSA) to prevent "surprise billing" in certain circumstances in which it is most likely to occur. Generally speaking, the new rules address three separate (but related) issues:

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

What Does Part II Cover?

While the focus of the first IFR was on the first and third issues, Part II is primarily concerned with the second issue. In particular, Part II "details a process that will take patients out of the middle of payment disputes, provides a transparent process to settle out-of-network (OON) rates between providers and payers, and outlines requirements for health care cost estimates for uninsured (or self-pay) individuals."

Additionally, Part II implements changes to the external review process so that group health plan participants can dispute certain claims that have been denied.

Finally, Part II adds a payment dispute resolution process for providers and uninsured or self-pay individuals.

As with Part I, Part II is lengthy and complex. We will feature additional analysis of Part II, particularly how it will apply to group health plans, in future editions of Rewards Policy Insider.

In the meantime, an HHS press release and link to the IFR is available here.

HHS Answers Questions about Employer Vaccine Requirements and HIPAA Privacy Rule

Even before a COVID-19 vaccine was available, employers have been asking questions about what they can and can't do with respect to requiring or encouraging employees to get the vaccine – and with respect to asking for proof of an employee's vaccination status. With the Biden Administration now pushing employers to require their employees to be vaccinated, HHS has issued guidance to clarify that the HIPAA privacy rules do not apply when an employer asks employees for proof of vaccination.

Background

In general, the HIPAA privacy rule prohibits "covered entities" (i.e., health plans, health providers, and health clearinghouses) and their business associates from using or disclosing an individual's protected health information (PHI) (e.g., information about whether the individual has received a vaccine, such as a COVID-19 vaccine, the individual's medical history, or demographic information) except with the individual's authorization or as otherwise expressly permitted or required by the privacy rule. Generally, where a covered entity or business associate is permitted to disclose PHI, it is limited to disclosing the PHI that is reasonably necessary to accomplish the reason for the disclosure.

Can an Employer ask Employees if they have been Vaccinated?

Employers generally are not "covered entities," so the HIPAA privacy rule does not regulate an employer's ability to ask their employees health-related questions. Furthermore, even if an employer were a "covered entity" or a business associate, the HIPAA privacy rule would not prevent it from asking these questions of employees.

According to the HHS guidance, the HIPAA privacy rule "**does not prohibit** a covered entity or business associate from requiring or requesting each workforce member to:

- Provide documentation of their COVID-19 or flu vaccination to their current or prospective employer.

- Sign a HIPAA authorization for a covered health care provider to disclose the workforce member's COVID-19 or varicella vaccination record to their employer.

- Wear a mask—while in the employer's facility, on the employer's property, or in the normal course of performing their duties at another location.

- Disclose whether they have received a COVID-19 vaccine in response to queries from current or prospective patients."

Other federal and state laws, however, may apply. As discussed in Rewards Policy Insider 2021-11, the Americans with Disabilities Act (ADA) requires that any documentation or confirmation of an employee's vaccination status must be kept confidential and separate from their employment records. But similar to HIPAA, the ADA does not prohibit employers from asking the question or requiring proof.

For More Information

The HHS guidance is available here. In addition, guidance from the Equal Employment Opportunity Commission (EEOC) on how the ADA and other non-discrimination laws apply in these circumstances is available here.

IRS Issues Guidance on COBRA Premium Payment Deadlines

Since March of 2020, the IRS, Department of Labor, and Department of Health and Human Services (Agencies) have used their statutory authority to extend various employee benefits-related deadlines – including those relating to making a COBRA election and paying COBRA premiums – during the COVID pandemic. The IRS on October 6 issued Notice 2021-58 to clarify how this special relief applies to COBRA election and premium payment deadlines.

Background

In general, an individual who experiences a COBRA qualifying event has up to 60 days to make a COBRA election. From the date of that election, the individual has another 45 days to make the initial COBRA premium payment, which may include premiums for multiple periods of coverage.

Pursuant to the special relief provided by the Agencies' Emergency Relief Notices since March 1, 2020, the normal COBRA timeframes for various purposes – including making a COBRA election and paying COBRA premiums – may not run during a "disregarded period." In general, a "disregarded period" is one year from the date the individual was first eligible for relief, unless the "Outbreak Period" ends earlier.

The Outbreak Period will end 60 days after the Presidentially declared COVID National Emergency ends. That is not expected to happen any time soon.

So What is the Issue?

Simply put, the question is whether a separate disregarded period applies to the COBRA election and premium payment timelines, or does the disregarded period for both run concurrently?

For example, consider an individual who received a COBRA election notice on July 1, 2020 and did not make a COBRA election until one year and 60 days later, on August 30, 2021. Does a new disregarded period with respect to the premium payment deadline begin on August 30, 2021, giving the individual an additional one year plus 45 days to make a timely COBRA premium payment?

The answer, according to Notice 2021-58, is "no." The Notice clarifies that the disregarded periods for the COBRA election and premium payment timeframes generally run concurrently. More specifically, the Notice provides:

- If an individual elected COBRA continuation coverage outside of the initial 60-day COBRA election timeframe, that individual generally will have one year and 105 days after the date the COBRA notice was provided to make the initial COBRA premium payment.
- If an individual elected COBRA continuation coverage within the initial 60-day COBRA election timeframe, that individual will have one year and 45 days after the date of the COBRA election to make the initial COBRA premium payment.

Significantly, this confirms that the Emergency Relief Notices do not allow individuals more than two years after a COBRA qualifying event to make an initial COBRA premium payment.

Because the Notice may result in some people having COBRA premiums due earlier than expected, the Notice also specifies that these rules generally will not require anyone to make a COBRA premium payment before November 1, 2021.

The Notice also provides numerous helpful examples to illustrate the operation of these rules, including how it interacts with the American Rescue Plan Act's COBRA premium assistance that was available for periods of COBRA coverage from April 1 through September 30. The full text is available here.