NAHU Celebrates Regulatory Victory Following Surprise-Billing Interim Final Rules

HHS, DOL and the Treasury Department recently released "Part 2" of the regulations surrounding the ban on balance-billing that was included in the Consolidated Appropriations Act (CAA) of 2021. This interim final rule mainly deals with the process to settle out-of-network payment disputes that will arise between providers and payers in addition to outlining requirements for healthcare cost estimates for uninsured individuals. The combination of both the "Part 1" and "Part 2" IFRs result in a regulatory victory for NAHU. However, to explain how we achieved this regulatory win, we must look back at the statutory and rulemaking process that got us to this point.

The CAA - passed at the end of 2020 - included the No Surprises Act, which holds patients harmless from surprise medical bills, including from air ambulance providers, by ensuring they are only responsible for their in-network cost-sharing amounts in both emergency situations and certain non-emergency situations where patients do not have the ability to choose an in-network provider. For other claims, this new surprise-billing agreement utilizes an arbitration process, with some patient safeguards. Prior to the CAA's passage, NAHU was quite vocal in conversations with lawmakers that a surprise-billing ban should implement a fair market-based price calculated using the privately negotiated in-network rate for the geographic area. We opposed arbitration due to its potential to add to higher costs on healthcare, particularly for self-insured plans and individuals enrolled in such coverage that would face the costs of arbitration passed on through higher premiums, co-pays, deductibles, and other costs.

In "Part 1" of the administration's regulations surrounding the implementation of this balance-billing ban – released in July -- the agencies outlined the calculation of the qualified payment amount (QPA), which is generally the plan or issuer's median contracted rate for the same or similar service in the specific geographic area. During the negotiations of this section of the No Surprises Act, some policymakers felt strongly that a national third-party claims database should be established to collect data on claims to then be used to determine QPAs. NAHU felt that this role would be better suited for state all-payer databases, which is what was included in July's IFR. If a state does not have an all-payer database, the calculations will be made based on geographic criteria. Ultimately, the determination of QPAs as outlined here will pass savings on to consumers by limiting cost-sharing to in-network levels by basing cost-sharing for out-of-network services on the state all-payer agreements.

The "Part 2" IFR released last week utilizes the QPA in an ideal fashion; when making a payment determination, arbitrators (referred to as independent dispute resolution entities, or IDREs) must begin with the presumption that the QPA is the appropriate out-of-network amount. Essentially, the IDR process will allow for the payer and provider to give the IDRE the amount they feel is fair for the service in question, then the IDRE is required under the IFR to choose the amount that is closest to the QPA. For the IDRE to deviate from the offer closest to the QPA, any information submitted must clearly demonstrate that the value of the item or service is materially different from the QPA. This means that, despite the law's utilization of arbitration, the median in-network rate that NAHU and our membership fought to include still plays a vital role, which we believe will prevent the significant rise in healthcare costs we previously anticipated.

Earlier this summer, NAHU submitted a letter to the administration with suggestions on future rulemaking and items we felt we needed more guidance on. Those items included questions about how the independent dispute resolution or arbitration process would be implemented, what entities could serve as arbitrators, and what data elements could be taken into consideration, such as the median in-network rate when a claim is being considered by arbitrators. Most of these questions and suggestions were answered and considered with these two IFRs. NAHU will once again be submitting comments to the administration with questions and concerns about the content included in "Part 2."

To learn more about how this independent dispute resolution process works, along with other information included in the "Part 2" IFR, check out last week's edition of the Washington Update.