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3 Benefits Takeaways From New Surprise Medical Billing Law

By **Emily Brill**

Law360 (January 15, 2021, 12:23 PM EST) -- A new federal law clamping down on surprise medical billing will likely trigger a short-term increase in employers' compliance spending, a long-term decrease in patients' out-of-pocket medical costs and an as-yet-unknown impact on employee health plans' overall price tag, experts say.

The **No Surprises Act**, which was signed into law Dec. 27 after being tucked into the year-end spending bill, protects patients from getting slapped with surprise bills after visits to the emergency room or their regular medical providers, leaving any payment disputes up to their plan and provider to resolve.

The law, many years in the making, goes into effect on Jan. 1, 2022. Until then, employers should keep in mind that they could open themselves up to the risk of an **Employee Retirement Income Security Act** lawsuit if their plan sends a patient a surprise medical bill.

Here, Law360 lists three takeaways from the No Surprises Act that employers should know.

Compliance Costs Will Spike

The No Surprises Act creates a dispute resolution process that doctors can use if they can't resolve payment issues with health plans on their own within 30 days. A neutral party will arbitrate the dispute, considering information such as the doctor's level of expertise and the average price tag for the treatment within the plan's provider network, according to the law.

Creating the internal procedures to facilitate this dispute-resolution process will likely be costly for plans, said Judith Wethall, a health benefits partner at McDermott Will & Emery LLP.

And the No Surprises Act isn't the only new federal policy that health plans are going to have to comply with over the next few years. Plans will also have to instate new procedures for following the **health cost transparency regulations** the administration of President Donald Trump rolled out this fall.

Though President-elect Joe Biden's administration is anticipated to review its predecessor's health care moves, experts say the transparency regulations are likely to stick around. The regulations, which require plans to disclose treatment prices online, are consistent with the **Affordable Care Act**, and former Obama White House health policy adviser Kavita Patel predicted last fall that cost transparency in health care is "here to stay, even in a Biden administration." Similar regulations recently **survived a court challenge** in the D.C. Circuit.

What does that mean for employers, in the short term? A **spike in their health plan's compliance costs**, attorneys say.

Employers are "going to have to look at their budget for compliance and consider increasing it, because there's a lot of change on the horizon," Wethall said. "It's going to get expensive."

Long-Term Cost Impact is Uncertain

A September study in the American Journal of Managed Care predicted that legislation attacking surprise medical billing could reduce health plans' premiums by between 1% and 5%.

After analyzing more than 500 million insurance claims submitted to UnitedHealthcare, Aetna and Humana in 2017, the study found that more than 10% of a plan's spending goes to paying for the types of services that usually result in surprise bills. If legislation could reduce the prices of those services, the savings enjoyed by insured people nationwide could be anywhere from \$12 billion to \$38 billion, depending on how aggressively the law targeted costs, the study found.

How forcefully did the No Surprises Act target costs? Not quite as much as employers and insurers had hoped, said Thomas Greaney, a visiting professor of law at the University of California, Hastings. Instead of setting benchmark rates for doctors' services, the law allowed doctors and plans to go into arbitration to determine final payments.

"I think the decision to go with arbitration rather than benchmarks certainly gives a lot more flexibility and breathing room for the providers in terms of what the ultimate payouts look like," Greaney said.

The arbitration approach thus renders the long-term cost impact of the No Surprises Act on health plans more uncertain than it might have been with the benchmarking approach, he said.

One thing's for certain, though: Patients' out-of-pocket medical costs will decrease, given that the law holds them harmless from surprise bills they receive.

Surprise Billing Remains Risky

The No Surprises Act goes into effect next year. In the meantime, surprise billing and the practice that precipitates it — underpaying doctors — remain risky, opening plans up to the possibility of ERISA suits.

A proposed class action challenging United Behavioral Health's practice of sending surprise bills for behavioral health treatment just **cleared a motion to dismiss** in California, and a **recent Ninth Circuit decision** could make it easier for providers to sue plans after underpayments.

Napoli Shkolnik PLLC's Matt Lavin, one of the attorneys representing the UBH patients in the California suit, said plan administrators often think they can get away with underpaying medical providers — causing those doctors to bill patients for the remainder of the treatment cost — because the providers and patients lack the resources to fight it.

But sometimes, providers and patients do fight, resulting in decisions like the recent rulings out of the Ninth Circuit and California federal court, making underpayment and surprise billing practices that employers and insurers engage in at their own risk.

"Provider suits are more common ... [because] providers are usually more sophisticated in their understanding of benefits law, and they have the financial resources to find lawyers," Lavin said. "And the cases I see on behalf of patients are generally bigger class actions."

--Editing by Haylee Pearl and Neil Cohen.