

New IDR Rules Under The No Surprises Act

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On September 30, 2021, the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury (collectively, the “Departments”) released an interim final rule with comment period entitled “*Requirements Related to Surprise Billing; Part II*” (the “Interim Final Rule”) relating to Title of Division BB of the Consolidated Appropriations Act of 2021 (the “No Surprises Act”).

For a general introduction to the No Surprises Act, see Nexsen Pruet attorney Matthew Roberts’s article, “Trend Toward Transparency in Pricing Continues.”

Building on prior rulemaking from the Departments in their July 1, 2021 rule (entitled “*Requirements Related to Surprise Billing; Part I*”), the Interim Final Rule continues the implementation of the No Surprises Act by providing for additional regulatory requirements under the No Surprises Act. Specifically, the Interim Final Rule establishes provisions related to the independent dispute resolution process, good faith estimates from healthcare providers and facilities for uninsured and self-pay individuals, a patient-provider dispute resolution process, and expanded rights to external review of payors’ claims and coverage determinations. For a comprehensive summary of all of the new provisions under the Interim Final Rule, as well the Departments’ prior rulemaking under the No Surprises Act, we recommend referencing the Centers for Medicare and Medicaid Services website’s detailed press release regarding the Interim Final Rule: “Requirements Related to Surprise Billing; Part II Interim Final Rule with Comment Period” (the “Press Release”).

The specific focus of this article is on the new rules under the No Surprises Act related to the independent dispute resolution process between providers and payors (the “IDR Process”). With respect to the IDR Process, the stated goal of the Interim Final Rule is to help take consumers with job-based or individual health plans out of the middle of *surprise bill* payment disagreements and provide a process for providers, facilities, providers of air ambulance services, and health plans to negotiate out-of-network payments.

A *surprise bill*, as contemplated in the No Surprises Act arises when a patient unexpectedly receives a bill for the balance between an out-of-network providers' billed charges and the amount covered by the patient's health plan. This happens most frequently when patients receive medical care from a provider or facility who, unbeknownst to the patient, is not in the patient's health plan's network (e.g., when a patient urgently goes to the nearest emergency room without any consideration for health plan status).

The Interim Final Rule establishes the formal IDR Process that out-of-network providers, facilities, providers of air ambulance services, and health plans may use to determine the out-of-network rate for items or services to which the No Surprises Act's surprise billing prohibitions apply if the parties have not mutually agreed upon a rate during a mandatory open negotiation period. As part of the No Surprises Act framework for determining the applicable out-of-network rate, the disputing parties must engage in a 30-day open negotiation period, commencing on starting on the day of initial payment or notice of denial of payment, to try to mutually agree on a payment rate before they may initiate and utilize the IDR Process.

Upon the expiration of an unsuccessful open negotiation period, either party may initiate the IDR Process. Once the parties initiate the IDR Process, they may jointly select a certified independent dispute resolution entity ("IDR Entity") to resolve the dispute. The Interim Final Rule provides that if the parties cannot jointly select an IDR Entity that does not have a conflict of interest, the Departments will select an IDR Entity for the parties. After an IDR entity is selected, the parties must submit to the IDR Entity their respective offers for payment of the rate along with supporting documentation. The IDR Entity will then issue a binding decision *selecting one of the parties' offers* as the final out-of-network payment amount. Note that the IDR Entity's decision is expressly limited to either one party's offer or the other—it cannot determine that the rate is some other amount not reflected in the parties' respective offers. This "baseball arbitration" style framework is intended to incentivize the parties to submit reasonable, substantiated offers to avoid getting easily dismissed in favor of the other party's offer.

The Interim Final Rule enacts very short time periods for each forgoing step of the negotiation and IDR process to avoid protracted and backlogged disputes over these matters. *See the bottom of this article for a detailed summary of the specific timing requirements applicable to each of the foregoing steps as provided by CMS in the Press Release.*

The Interim Final Rule also establishes requirements for IDR Entities in making payment determinations in the IDR Process. When making a payment determination, IDR Entities must generally begin with the presumption that the health plan's (or other payor's) median contracted rate for the same or similar service in the specific geographic area (the "Qualifying Payment Amount") is the appropriate out-of-network amount. A party may permissibly submit certain additional information regarding its position with respect to the determination of the rate amount, and such information must also be considered by the IDR Entity if it is credible. For the IDR Entity to deviate from the offer closest to the Qualifying Payment Amount, any information submitted by a party must clearly demonstrate that the value of the item or service is materially different from such amount.

The Interim Final Rule also clarifies the "cooling off" period provided under the No Surprises Act, which requires that after submitting items or services to the IDR Process a provider may not bring another claim under the IDR Process for such item or service with that plan for 90 days. Specifically, the Interim Final Rule provides in part that services provided during the 90-day period are still eligible for the IDR Process following the end of the 90-day period and that either party can initiate the IDR Process for claims affected by the suspension by initiating within 30 business days

following the end of cooling off period (instead of the 4 days provided following the end of the open negotiation period).

As part of the IDR Process, both parties must pay a small administrative fee (e.g., \$50 per party for Calendar Year 2022). Additionally, the losing party must pay the IDR Entity fee for the parties' use of the IDR Process. For the Calendar Year 2022, the IDR Entity fee for an IDR Process determination is limited to a range of \$200 to \$670 depending on whether the determination is a single determination or batch determination, subject to individualized exceptions upon an IDR Entity's written submission to and the approval of the Departments pursuant to a process prescribed in applicable IDR Process fee guidance from the Departments. That fee guidance from the Departments for Calendar Year 2022 is available here: [Calendar Year 2022 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act](#).

The Interim Final Rule also establishes in detail the process for and requirements related to certifying IDR Entities as well as a process through which interested parties can petition for the denial or revocation of an IDR Entity's certification.

The patient protections provided for in the Interim Final will take effect beginning on January 1, 2022. Public comments on the Interim Final Rule are due by 5:00 pm ET on November 29, 2021.

CMS' SUMMARY OF TIMELINE FOR IDR PROCESS **Independent Dispute Resolution Action Timeline** Initiate 30-business-day open negotiation period 30 business days, starting on the day of initial payment or notice of denial of payment Initiate independent dispute resolution process following failed open negotiation 4 business days, starting the business day after the open negotiation period ends Mutual agreement on certified independent dispute resolution entity selection

3 business days after the independent dispute resolution initiation date Departments select certified independent dispute resolution entity in the case of no conflict-free selection by parties 6 business days after the independent dispute resolution initiation date Submit payment offers and additional information to certified independent dispute resolution entity 10 business days after the date of certified independent dispute resolution entity selection Payment determination made 30 business days after the date of certified independent dispute resolution entity selection Payment submitted to the applicable party 30 business days after the payment determination