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No Surprise Billing Rules: Good Faith Estimates and Unscheduled Services

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The No Surprise Billing Rules took effect January 1, 2022, but many questions remain, including if and to what extent the new rules for good faith estimates apply to items or services that are provided to self-pay patients on an unscheduled basis, such as emergency, urgent care, or walk-in patients.

Requirements for Self-Pay Patients. Part II of the No Surprise Billing Rule (the "Self-Pay Rule") generally requires all healthcare facilities[1] and providers[2] to:

1. Post required notices concerning an "uninsured (self-pay)"[3] patient's right to obtain a good faith estimate at the provider's offices and on its website. (45 CFR § 149.610(b)(1)(iii)).

2. When a person seeks care, determine whether the patient is a self-pay patient. (45 CFR § 149.610(b)(1)(i)-(ii)).

3. Inform self-pay patients orally and in writing that they have the right to obtain a good faith estimate of charges upon request or upon scheduling an appointment. (45 CFR § 149.610(b)(1)(iii)).

4. Provide the required written good faith estimate to the self-pay patient within the time required by the regulation, *i.e.,*

> a. If the item or service is scheduled at least three (3) business days before the date the item or service is scheduled to be furnished: not later than one (1) business day after the date of scheduling;
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> b. If the item or service is scheduled at least ten (10) business days before such item or service is scheduled to be furnished: not later than three (3) business days after the date of scheduling; or
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> c. If a good faith estimate is requested by a self-pay patient or if a patient inquires about the cost of care: not later than three (3) business days after the date of the request.

(45 CFR § 149.610(b)(1)).

Limits on Providing the Good Faith Estimate. Arguably, the foregoing Self-Pay Rule requirements should only apply to self-pay patients who schedule their services at least three (3) days in advance and perhaps those who request an estimate in advance of services being provided. The

section of the No Surprises Act that the Self-Pay Rules were intended to implement states:

> Each health care provider and health care facility shall, beginning January 1, 2022, [1] in the case of an individual who schedules an item or service to be furnished to such individual by such provider or facility at least 3 business days before the date such item or service is to be so furnished, not later than 1 business day after the date of such scheduling (or, [2] in the case of such an item or service scheduled at least 10 business days before the date such item or service is to be so furnished (or [3] if requested by the individual), not later than 3 business days after the date of such scheduling or such request)—
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> (1) inquire if such individual is enrolled in a group health plan, group or individual health insurance coverage offered by a health insurance issuer, or a Federal health care program (and if is so enrolled in such plan or coverage, seeking to have a claim for such item or service submitted to such plan or coverage); and
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> (2) provide a notification (in clear and understandable language) of the good faith estimate of the expected charges for furnishing such item or service (including any item or service that is reasonably expected to be provided in conjunction with such scheduled item or service and such an item or service reasonably expected to be so provided by another health care provider or health care facility), with the expected billing and diagnostic codes for any such item or service, to—
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> > (A) in the case the individual is enrolled in such a plan or such coverage (and is seeking to have a claim for such item or service submitted to such plan or coverage), such plan or issuer of such coverage; and
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> > (B) in the case the individual is not described in subparagraph (A) and not enrolled in a Federal health care program, the individual.

(No Surprises Act § 2799B-6, 42 USC § 300gg-136, emphasis added). Although not a model of clarity, the underlined clause seems to confirm that the obligation (1) to inquire about the individual's insurance status, and (2) to provide notice of and/or the good faith estimate only applies to an

individual "who schedules an item or service … at least 3 business days before the date such item or service is to be so furnished" or "if [the notice or good faith estimate is] requested by the individual."

Consistent with the foregoing interpretation, HHS commentary to the Self-Pay Rule suggests that providers and facilities are not required to provide a good faith estimate if the items or services are not scheduled at least three days in advance, *e.g.,* if a patient receives emergent or other services on an unscheduled or walk-in basis:

> HHS also clarifies that some items or services may not be included in a good faith estimate because they are not typically scheduled in advance and are not typically the subject of a requested good faith estimate, such as urgent, emergent trauma, or emergency items or services; however, HHS clarifies that to the extent an urgent care appointment is scheduled at least 3 days in advance, these interim final rules require a provider or facility to provide a good faith estimate.

(86 FR 56015, emphasis added). The corollary to the underlined clauses would seem to be that a good faith estimate is not required if the services are not scheduled at least three days in advance. This is also consistent with other HHS commentary which suggests that the good faith estimate is only required if the services are scheduled in advance or a patient asks about the price of services, which services are presumably to be rendered at some future time. Per HHS's commentary, the rule

> places the requirement to provide a good faith estimate … upon providers and facilities with whom an individual schedules an item or service, or from whom an individual requests a good faith estimate for an item or service…. HHS notes that [the No Surprises Act] requires that a good faith estimate of expected charges include any item or service that is reasonably expected to be provided in conjunction with such scheduled item or service…
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> … HHS is of the view that to the extent possible, an uninsured (or self-pay) individual is entitled to receive a clear and understandable document that informs the uninsured (or self-pay) individual of the expected costs associated with the care that they are considering or are scheduled to receive….

(86 FR 56015-16, emphasis added). HHS defines "good faith estimate" as "a notification of expected charges for a scheduled or requested item or service, including items or services that are reasonably expected to be provided in conjunction with such scheduled or requested item or

service…" (45 CFR § 149.610(a)(2)(vi), emphasis added).

This interpretation appears to also be consistent with HHS's sample Notice of Right to Receive a Good Faith Estimate of Expected Charges, which states in relevant part:

- You have the right to receive a Good Faith Estimate for the total expected cost of any non-emergency items or services. This includes related costs like medical tests, prescription drugs, equipment, and hospital fees.
- Make sure your health care provider gives you a Good Faith Estimate in writing at least 1 business day before your medical service or item. You can also ask your health care provider, and any other provider you choose, for a Good Faith Estimate before you schedule an item or service.

(Appendix 1, Standard Notice: "Right to Receive a Good Faith Estimate of Expected Charges" Under the No Surprises Act, available here, emphasis added.)

Based on the No Surprises Act and HHS commentary, it would appear that a facility or provider would be relatively safe in declining to provide a good faith estimate to emergency, urgent care, or walk-in patients or others who schedule services less than three days in advance. However, the facility or provider should provide a good faith estimate for services scheduled more than three days in advance or if a patient requests an estimate for future services. Application of other Self-Pay Rule requirements is less certain…

Other Requirements: Inquiry, Notice, and Estimates Upon Request. Assuming no good faith estimate is required because the services were not scheduled or requested in advance, it is unclear as to whether and to what extent other Self-Pay Rule requirements apply, including the obligations (1) to inquire whether the patient is self-pay; (2) to provide notice of the ability to obtain a good faith estimate; and/or (3) to provide a good faith estimate if requested. It would seem to make little sense to require providers to notify patients of the right to obtain a good faith estimate if the patient is not entitled to such because the patient did not schedule services at least three days in advance. Presumably, that is why Congress conditioned the self-pay inquiry, notice, and/or good faith estimate on the patient's advance scheduling or request for services. Nevertheless, HHS's rules appear to extend provider obligations beyond the statutory conditions.

First, unlike the requirements outlined in the No Surprises Act, HHS appears to require providers to inquire of all patients whether they are self-pay, not just those who schedule services at least three days in advance or who request an estimate. (45 CFR § 149.610(b)(1)). Per HHS's commentary:

> These interim final rules establish in 45 CFR

> 149.610(b)(1) certain requirements for the convening provider or facility [1] to verify whether an individual meets the definition of an uninsured (or self-pay) individual, [2] to provide oral and written communication regarding the requirement to provide good faith estimates to uninsured (or self-pay) individuals upon scheduling an item or service or upon request, and [3] to provide timely good faith estimates to uninsured (or self-pay) individuals. To determine whether a good faith estimate must be provided to an individual under 45 CFR 149.610(b)(1), the convening provider or facility must inquire and determine if the individual meets the definition of an uninsured (or self-pay) individual as established in 45 CFR 149.610(a)(2).

(86 FR 56016). There is no limitation on the patients to whom the obligation applies. As a practical matter, this should not be a problem for most providers or facilities because they will usually confirm the patient's payer source as part of their registration process. Even in the case of emergency patients, EMTALA allows hospitals to ask whether a person is insured and, if so, ascertain their insurance so long as the inquiry does not delay the person's emergency examination or treatment. (42 CFR § 489.24(d)(4)(iv)). The remaining Self-Pay Rule obligations are more problematic as discussed below.

Second, HHS seems to require notification of the right to receive a good faith estimate to all self-pay patients, not just those who schedule services in advance or who request an estimate. (45 CFR § 149.610(b)(1)(iii)). HHS's commentary states:

> HHS is of the view that conveying information about the availability of good faith estimates prior to or upon scheduling an item or service aligns with and is most relevant when uninsured (or self-pay) individuals are considering whether to proceed with medical care while interacting with their providers or facilities. Requiring that providers and facilities notify uninsured (or self-pay) individuals of the availability of good faith estimates will help ensure that all uninsured (or self-pay) individuals understand that they can request a good faith estimate and will also receive a good faith estimate upon scheduling an item or service and upon request.
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> Therefore, HHS is using its general rulemaking authority to establish in 45 CFR 149.610(b)(1)(iii) that the convening provider or facility must inform uninsured (or self-pay) individuals that good faith estimates of expected charges are available to uninsured (or self-pay) individuals upon

> scheduling an item or service or upon request.[4]

(86 FR 56016, emphasis added). Again, this requirement would seem superfluous in the case of unscheduled walk-in or emergency patients who are not entitled to a good faith estimate; nevertheless, as written, neither the rule nor HHS's sample Notice of Right to Receive a Good Faith Estimate contains any express exception for unscheduled, walk-in, or emergency patients. (*See* here; *see also* HHS's summary for consumers available here). To be safe, until we receive further clarification from HHS, providers and facilities who render services on an unscheduled basis should still post and provide the mandated notices but add appropriate language confirming that the estimate is not required for emergent, urgent, or other services that are not scheduled or perhaps requested at least three days in advance.

Third, unlike the requirements in the No Surprises Act, HHS requires providers to offer a good faith estimate to those who inquire about price in addition to those who schedule services or request an estimate of charges for future services. (45 CFR § 149.610(b)(1)(iii)-(iv)). The regulations state, "Convening providers and convening facilities shall consider any discussion or inquiry regarding the potential costs of items or services under consideration as a request for a good faith estimate." (*Id.* at § 149.610(b)(1)(iv)).

> HHS notes that uninsured (or self-pay) individuals may use different terminology other than "good faith estimate" when requesting a good faith estimate. Therefore, these interim final rules at 45 CFR 149.610(b)(1)(iv) specify that convening providers and convening facilities shall consider any discussion or inquiry regarding the potential cost of items or services under consideration as a request for a good faith estimate.

(86 FR 56017). It is not clear how this rule jibes with HHS's position that no good faith estimate is required for emergent care or other services that are not scheduled at least three days in advance. By its express terms, the rule would appear to require a good faith estimate anytime a self-pay patient discusses price, but that does not seem practical or possible in the case of unscheduled services. As a practical matter and absent further guidance from HHS, I believe providers and facilities will likely face little risk if they limit estimates to services scheduled or requested three days in advance, but providers and facilities should continue to monitor HHS guidance.

Fourth, HHS takes the position that a patient may obtain a good faith estimate upon request even if the patient does not schedule services:

> HHS understands, and is of the view that it is appropriate, that consumers may request a good faith estimate without actually scheduling items or services to compare costs and make a decision about from which provider or facility they will seek

> care, or whether they will submit a claim to insurance or self-pay.

(86 FR 56015). This requirement may make sense if a patient asks about the cost of future care that he or she is considering, but it does not seem practical in the case of emergent, walk-in, or unscheduled care to be provided immediately. Again, providers and facilities rendering such unscheduled items or services should provide an estimate in response to requests for future care, but they likely face little risk if they fail or decline to provide an estimate in advance of or in conjunction with walk-in or emergent care.

Penalties. The primary consequence for failing to provide a sufficient good faith estimate if required is that a patient may force the Selected Dispute Resolution ("SDR") process and likely avoid paying his or her full bill if the actual charges are more than $400 over the expected charges. (45 CFR § 149.620). That may not be much of a concern or deterrent for providers or facilities if (1) the provider or facility has few self-pay patients; (2) all or nearly all of its self-pay patients are unscheduled such that they are not entitled to a good faith estimate; and/or (3) the provider or facility has clearly delineated and disclosed costs for services such that the actual charges seldom if ever exceed the advertised prices by $400.

Aside from SDR consequences, however, failure to comply with the No Surprises Act or its implementing regulations (including the Self-Pay Rule and/or separate Balance Billing Rules that apply to some out-of-network providers) may subject the provider or facility to additional adverse action by state or federal agencies. (No Surprises Act § 2799B-4(b), 42 USC § 300gg-134(b); 45 CFR § 150.501(a)). Under the No Surprises Act, states have the primary responsibility for enforcing the statute and rules; however, if a state fails to substantially enforce the requirements, HHS may impose a corrective action plan and/or civil monetary penalties of up to $10,000 per violation. (No Surprises Act § 2799B-4(a)-(b), 42 USC § 300gg-134(a)-(b); 45 CFR §§ 150.101(b)(3), 150.501(a), and 150.513(a)). For this reason, providers and facilities should implement appropriate policies and practices to ensure compliance with relevant portions of the No Surprise Billing Rules even if they are not concerned about the SDR process, including but not limited to providing the required notices and good faith estimates if services are scheduled at least three days in advance or the patient requests a good faith estimate for future services.

More Information. For more information about the No Surprise Billing Rules and their requirements, see our client alert.

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[1]"*Health care facility (facility)* means an institution (such as a hospital or hospital outpatient department, critical access hospital, ambulatory surgical center, rural health center, federally qualified health center, laboratory, or imaging center) in any State in which State or applicable local law provides for the licensing of such an institution, that is licensed as such an institution pursuant to such law or is approved by the agency of such State or locality responsible for licensing such institution as meeting the standards

established for such licensing." (45 CFR § 149.610(a)(2)(vii)).

[2]"*Health care provider (provider)* means a physician or other health care provider who is acting within the scope of practice of that provider's license or certification under applicable State law, including a provider of air ambulance services." (45 CFR § 149.610(a)(2)(viii)).

[3]"*Uninsured (or self-pay) individual* means: (A) An individual who does not have benefits for an item or service under a group health plan, group or individual health insurance coverage offered by a health insurance issuer, Federal health care program (as defined in section 1128B(f) of the Social Security Act), or a health benefits plan under chapter 89 of title 5, United States Code; or (B) An individual who has benefits for such item or service under a group health plan, or individual or group health insurance coverage offered by a health insurance issuer, or a health benefits plan under chapter 89 of title 5, United States Code but who does not seek to have a claim for such item or service submitted to such plan or coverage." (45 CFR § 149.610(a)(2)(xiii)).

[4]The notice must satisfy the requirements in 45 CFR § 149.610(b)(1). As summarized by HHS:

> Information regarding the availability of good faith estimates for uninsured (or self-pay) individuals must be provided in writing and orally. The convening provider or facility must provide written notice in a clear and understandable manner prominently displayed (and easily searchable from a public search engine) on the convening provider's or convening facility's website, in the office, and on-site where scheduling or questions about the cost of items or services occur. In addition, the convening provider or facility must orally inform uninsured (or self-pay) individuals of the availability of a good faith estimate when questions about the cost of items or services occur. Information regarding the availability of a good faith estimate must be made available in accessible formats and languages spoken by individuals considering or scheduling items or services with such convening provider or convening facility.

(86 FR 56016).
