Surprises May Lurk As 'No Surprises Act' Meets State Law

By **Alexandra Lucas and Christian Martin** (July 16, 2021)

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The No Surprises Act, or NSA, which goes into effect Jan. 1, 2022, introduces new requirements at the federal level that aim to protect consumers from unexpected and expensive medical bills.

For out-of-network emergency services and services received from nonparticipating providers at in-network facilities, the NSA caps patients' financial responsibility and creates a dispute resolution process for providers and payors to settle payment disputes.

State balance billing laws will play a major part in how stakeholders operationalize the NSA's requirements. This is because Congress drafted the NSA so that it would not apply where a state has itself legislated a remedy to surprise billing.

Specifically, if a state law applies to the patient's health care services and constitutes a specified state law, then it completely supplants the NSA's provisions regarding patient cost-share calculations, provider payments and dispute resolution.

Determining whether a state law qualifies as a specified state law is essential for health care providers and payors because different interpretations could affect whether the NSA or state law will govern a health care claim.

Furthermore, sometimes both a state law and the NSA will apply even to the same course of treatment for a single patient, presenting significant operational challenges. Stakeholders must be thoughtful in approaching these complex scenarios.

Key Phrases in the Statutory Definition of Specified State Law

Under the NSA, the term specified state law means a "state law that provides for a method for determining the total amount payable."[1] Delineating the scope of this definition depends on resolving the meaning of "method," "for determining," and "total amount payable."

First, the state law must provide for a method. Dictionaries contain various definitions for "method," but in this context it may broadly mean a particular way of doing something.[2]

States have enacted a variety of methods to address surprise bills, including fee schedules, other reimbursement standards and dispute resolution, both binding and nonbinding. Given the other key phrases in the definition of a specified state law, it is unlikely that all of these methods constitute a specified state law.

Second, the phrase "for determining" indicates that specified state laws are not limited to fee schedules, as there are many other ways to determine a payment amount — including dispute resolution. The regulators confirmed this interpretation in the preamble to the July 1, 2021, interim final rules, which are the first set of regulations implementing the NSA.

There, they noted that specified state laws are not limited "only to state laws that set a mathematical formula for determining the out-of-network rate" but also include laws that "require or permit a plan or issuer and a provider or facility to negotiate, and then to engage in a state arbitration process to determine the out-of-network rate."[3]

But the phrase "for determining" still raises questions. One way to define "determine" is to calculate something exactly.[4] Neither the NSA nor the interim final rules directly address situations where a state law requires a certain level of payment, but does not supply an exact payment rate.[5]

Finally, a specified state law must determine the total amount payable. The word "total" suggests that any state law method for determining payment must be binding in order to qualify as a specified state law; nonbinding determinations may yield subsequent payments if the provider files suit, in which case the state law itself does not supply the total amount payable.

Future rulemaking may provide more guidance on the definition of a specified state law, but in the interim stakeholders are tasked with interpreting the language of the NSA. Given the foregoing, fee schedules and binding dispute resolution mechanisms likely fall under the definition of specified state laws.

However, nonbinding dispute resolution mechanisms may not and reimbursement standards that do not supply an exact payment rate are not directly addressed.

Interplay Between the NSA and State Laws

State laws are unlikely to cover precisely the same services as the NSA. The consequence is that when a specified state law exists that does not cover a service subject to the NSA, the NSA will continue to apply to that service. And in some situations, a state law and the NSA could both apply to a single episode of treatment.

For example, Oregon's surprise billing law applies only to services by out-of-network health care professional providers, e.g., physicians who provide services at in-network facilities, e.g., hospitals.[6]

By contrast, the NSA extends to all emergency services — even when an out-of-network provider treats the patient at an out-of-network facility — and also to services billed by facilities themselves, such as hospital bills. In this situation, Oregon's law would apply to only some emergency services in that state, while the NSA would apply to the remainder.

Thorny situations can arise when a state surprise billing law applies to some, but not all, of the services billed on a single health care claim.

For example, except in limited circumstances, the NSA defines emergency services broadly to eclipse services provided before and after the patient's emergency condition has stabilized.

Most state surprise billing laws define emergency services more narrowly to exclude post-stabilization services. Thus, as explained in the preamble to the interim final rules, when a patient seeks emergency services and their treatment continues after their condition stabilizes, state law may apply to the prestabilization part of their treatment and the NSA may apply post-stabilization.

Determining whether a state surprise billing law constitutes a specified state law and, if so, its precise scope, is critical to effective implementation of the new federal surprise billing laws. Stakeholders should carefully delineate the scope of the state laws relevant to their business to ensure they comply with the NSA's requirements.

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[1] 42 USCS § 300gg-111A. State law that could be a specified state law under the No Surprises Act is still subject to ERISA's express preemption provision.

[2] Method, Oxford Learner's Dictionaries (July 9, 2021), https://www.oxfordlearnersdictionaries.com/us/definition/english/method.

[3] Dep't of Health and Hum. Servs., Interim Final Rule on Requirements Related to Surprise Billing; Part I, (July 1, 2019), https://www.hhs.gov/about/news/2021/07/01/hhs-announces-rule-to-protect-consumers-from-surprise-medical-bills.html.

[4] Determine, Oxford Learner's Dictionaries (July 9, 2021), https://www.oxfordlearnersdictionaries.com/us/definition/english/determine.

[5] See, e.g., Fla. Stat. § 641.513.

[6] ORS 743B.287(2).