

Can a Health Plan Participant Waive the Surprise Billing Protections?

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QUESTION: Can a participant in our group health plan waive the surprise billing protections? If so, how would the plan know about the waiver?

ANSWER: In limited circumstances, a participant may waive the surprise billing patient protections following proper notice and consent. The No Surprises Act, enacted as part of the Consolidated Appropriations Act, 2021, shields individuals from surprise bills for certain out-of-network emergency and non-emergency services from nonparticipating providers. But for certain services, a plan need not apply the surprise billing protections, and a nonparticipating provider is not prohibited from balance billing, if the provider has satisfied notice requirements and obtained participant consent. The No Surprises Act allows nonparticipating providers to seek a participant's consent to waive the surprise billing protections, but only for certain post-stabilization services or for non-emergency services other than "ancillary services." Ancillary services include items and services related to emergency medicine and anesthesiology, as well as diagnostic services such as radiology and laboratory services. Also considered ancillary services are items and services provided by a nonparticipating provider if there is no participating provider who can furnish the item or service at the participating facility. A participant might wish to waive the protections for post-stabilization and non-ancillary non-emergency services in order to receive care from a specific nonparticipating provider, even at a higher cost.

To obtain a waiver, the nonparticipating provider must provide the participant with a written notice (in paper or electronic form) containing specified information, no later than 72 hours before the date of service. If the participant makes the appointment less than 72 hours in advance, the notice must be provided on the date the appointment is made. The provider must also obtain the written consent of the participant before the services are furnished. (An HHS [model notice-and-consent](#) document is available.) By signing the consent, the participant agrees to be treated by the nonparticipating provider and acknowledges that balance billing and higher out-of-network cost-sharing may apply. You should be aware that certain state laws provide balance billing protections for participants in fully insured health plans that go beyond those provided under the No Surprises Act and may prohibit providers from balance billing even with notice and consent.

For each service furnished by a nonparticipating provider relying on the notice-and-consent document, the provider must timely notify the plan that the service was furnished during a visit at a participating health care facility, and, if applicable, provide to the plan or insurer a copy of the signed notice-and-consent document. In instances where the nonparticipating provider bills the participant directly, the provider may satisfy the requirement to notify the plan by including the notice with the bill to the participant.

For more information, see EBIA's Health Care Reform manual at Section XII.B.3 ("Surprise Medical Billing: Emergency and Non-Emergency Services"). See also EBIA's Group Health Plan Mandates

manual at Section XIII.B (“Patient Protections”) and EBIA’s Self-Insured Health Plans manual at Section XIII.C (“Federally Mandated Benefits”).

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