

Agencies Propose Extensive Modifications to Regulations Implementing Surprise Billing IDR

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Federal Independent Dispute Resolution Operations: Proposed Rule, 26 CFR Part 54; 29 CFR Part 2590; 45 CFR Part 149, 88 Fed. Reg. __ (Nov. 3, 2023)

Proposed Regulations

Fact Sheet

The DOL, HHS, and IRS have issued another set of surprise medical billing proposed regulations addressing independent dispute resolution (IDR) operations. As background, the agencies issued interim final regulations in 2021 to implement the procedural aspects of plan payments to nonparticipating providers subject to the surprise billing protections, including rules governing the federal IDR process. Portions of those regulations were finalized. However, several provisions of both the interim final and final regulations, as well as related agency guidance, have been vacated in a series of cases brought by an association of health care providers. In response, the agencies recently issued proposed regulations addressing IDR fee issues raised by the litigation and, among other things, partially shut down and reopened the federal IDR portal multiple times. The agencies now propose additional regulations to adjust the IDR process and change the fee structure. Here are highlights:

- **Early Communications.** Several proposals aim to improve early communications between the IDR parties. For instance, to address reports that parties are not first engaging in the 30-business-day open negotiation process to try to avoid IDR, the agencies propose amending the content requirements of the standard open negotiation notice to include significantly more information and adding a required open negotiation response notice. In addition, payers would be required to provide additional information at the time of initial payment or notice of denial, including the legal business name of the plan or insurer and plan sponsor (if applicable) and an IDR registration number. Registration numbers would be issued under a new IDR registry to be established by the agencies; insurers and plans subject to the IDR process would be required to register.
- **Eligibility Determinations.** Because the agencies have identified the complexity of determining whether disputes are eligible for the federal IDR process as the primary cause of delays in processing disputes, multiple provisions would address eligibility determinations. For example, a proposal requires certified IDR entities to determine eligibility within five business days of their selection. Disputing parties would be required to submit additional information requested by the certified IDR entity or agencies within five business days of request.
- **Administrative Fees.** Proposed provisions would change existing rules for collecting administrative fees, including the rules just proposed in September. In particular, the agencies would adjust the recently proposed methodology for calculating the administrative fee amount. Also, instead of the certified IDR entity collecting the non-refundable administrative fee, the proposals would allow the agencies to collect the fee directly from the disputing parties. Disputes would be closed for nonpayment unless the initiating party pays the administrative fee within two business days of certified IDR entity selection, and the non-initiating party pays within two business days of receiving notice of an eligibility determination.

- **Claims Batching.** The agencies propose more rules for batching multiple related claims for resolution in a single proceeding. For instance, new provisions would address when items related to treatment of a similar condition could be batched (e.g., items and services furnished to a single patient on consecutive dates on the same claim form could be batched, as could items or services provided to multiple patients and billed under the same service code). The agencies clarify that items can be batched only if payment is made by the same payer—thus, an insurer could batch items and services relating to claims from multiple plans, but for self-insured health plans only claims relating to a single plan can be batched, even if the same TPA administers multiple self-insured plans. Notably, batched determinations would be limited to 25 line items in a single dispute.

EBIA Comment: Foreshadowed in the recently proposed IDR fee regulations (for which the comment period just closed), these extensive and detailed proposals continue agency efforts to target the inefficiencies of the IDR process for the 225,000 disputes projected to be closed in 2024. Comments are generally due on these new proposals in 60 days. For more information, see EBIA’s Health Care Reform manual at Sections XII.B.3 (“Surprise Medical Billing: Emergency and Non-Emergency Services”) and XII.B.4 (“Surprise Air Ambulance Billing”). 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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