

Q10: How do the surprise billing provisions of the No Surprises Act and its implementing regulations apply to emergency services furnished with respect to a visit to a behavioral health crisis facility?

The July 2021 interim final rules made clear that the definition of emergency medical condition includes mental health conditions and substance use disorders that satisfy that definition.²⁴ The Departments recognize that individuals experiencing behavioral health emergencies may be served most effectively in settings outside of hospital emergency departments and that states, localities, and health care systems are actively exploring alternatives to hospital-based care to respond to behavioral health emergencies, including through services provided in specialized facilities that are staffed by behavioral health providers trained to provide crisis services.

To the extent that services provided in response to a behavioral health crisis meet the definition of “emergency services,” and are provided with respect to a visit to a facility that meets the definition of an “emergency department of a hospital” or an “independent freestanding emergency department,” as those terms are defined under the July 2021 interim final rules, these services are subject to the surprise billing protections in the No Surprises Act and its implementing regulations applicable to emergency services.²⁵ This is true regardless of whether the license issued to the facility uses the term “hospital emergency department” or “independent freestanding emergency department” and regardless of whether the license issued to the facility uses the term “emergency services” to describe the services the facility is licensed to provide. For example, if under state licensure laws, a facility that provides behavioral health crisis response services is permitted to provide emergency services as described in 26 CFR 54.9816-4T(c)(2), 29 CFR 2590.716-4(c)(2), and 45 CFR 149.110(c)(2), and is geographically separate and distinct from a hospital, then such a facility would fall within the definition of “independent freestanding emergency department” under the July 2021 interim final regulations, and the surprise billing protections would apply with respect to emergency services provided with respect to a visit to the facility.

General Disclosure for Protections Against Balance Billing

Section 9820(c) of the Code, section 720(c) of ERISA, and section 2799A-5(c) of the PHS Act, as added by the No Surprises Act, require plans and issuers to make certain disclosures regarding balance billing protections to participants, beneficiaries, and enrollees that are similar to disclosure requirements applicable to providers and facilities under section 2799B-3 of the PHS Act, as implemented in 45 CFR 149.430.

²³ 86 FR 36872, 36879 (Jul. 13, 2021).

²⁴ 26 CFR 54.9816-4T(c)(1), 29 CFR 2590.716-4(c)(1), and 45 CFR 149.110(c)(1).

²⁵ In addition, to the extent that a medical screening examination and stabilizing treatment provided in response to a behavioral health crisis meet the definition of “emergency services,” and are provided in an outpatient department of a hospital, these services are also subject to the surprise billing protections applicable to emergency services.

In general, plans and issuers must make publicly available, post on a public website of the plan or issuer, and include on each explanation of benefits for an item or service with respect to which the requirements under section 9816 of the Code, section 716 of ERISA, and section 2799A-1 of the PHS Act apply, information on:

- (1) the requirements under those sections, as applicable;
- (2) the requirements and prohibitions applied under sections 2799B-1 and 2799B-2 of the PHS Act (relating to the prohibitions against balance billing for emergency and non-emergency services in certain circumstances);
- (3) other applicable state laws on out-of-network balance billing; and
- (4) contacting appropriate state and Federal agencies if an individual believes the provider or facility has violated the prohibition against balance billing.

These disclosure requirements are applicable for plan years (in the individual market, policy years) beginning on or after January 1, 2022.

To reduce burden and facilitate compliance with these disclosure requirements, the Departments issued a model disclosure notice that may be used to satisfy the disclosure requirements regarding balance billing protections.²⁶ The Departments consider use of the model notice in accordance with the accompanying instructions to be good faith compliance with the disclosure requirements of section 9820(c) of the Code, section 720(c) of ERISA, and section 2799A-5(c) of the PHS Act, if all other applicable requirements are met.

Q11: May a group health plan that does not have its own website satisfy the disclosure requirements of section 9820(c) of the Code, section 720(c) of ERISA, and section 2799A-5(c) of the PHS Act, with respect to posting the required information on a public website of the plan, if the plan’s service provider posts the required information on its public website on behalf of the group health plan?

Yes. If a group health plan does not have a website, the plan may satisfy the requirements to post on its public website the information required by section 9820(c) of the Code, section 720(c) of ERISA, and section 2799A-5(c) of the PHS Act, by entering into a written agreement under which a plan’s health insurance issuer or third-party administrator (TPA), as applicable, posts the information on its public website where information is normally made available to participants, beneficiaries, and enrollees, on the plan’s behalf. To the extent a health insurance issuer or TPA posts the required information on its public website on behalf of a plan, the plan satisfies the requirements with respect to posting the information on the plan’s public website if the health insurance issuer or TPA makes the information available in the required manner. The Departments note this guidance applies in instances in which the plan sponsor (for example, an

²⁶ See Q13, which explains which versions of the standard notice and consent form and model disclosure notice providers, facilities, plans, and issuers may use.