
Health Care & Wellness Committee

HB 1688

Brief Description: Protecting consumers from charges for out-of-network health care services, by aligning state law and the federal no surprises act and addressing coverage of treatment for emergency conditions.

Sponsors: Representatives Cody, Schmick, Leavitt, Ryu, Graham, Taylor, Berry, Paul, Wicks, Springer, Sells, Bateman, Valdez, Davis, Eslick, Goodman, Klicker, Macri, Ramos, Simmons, Wylie, Callan, Sullivan, Chopp, Slatter, Tharinger, Thai, Pollet, Riccelli, Ormsby, Caldier, Kloba and Frame; by request of Insurance Commissioner.

Brief Summary of Bill

- Expands the services covered by the balance billing prohibitions to include post-stabilization services and air ambulance services in alignment with federal law.
- Expands the definition of emergency services to include post-stabilization services and emergency services provided by behavioral health emergency services providers.
- Modifies the dispute resolution process for carriers, health care providers, and facilities for bills covered by the balance billing prohibitions.
- Requires the Insurance Commissioner to submit recommendations on how balance billing for ground ambulance services can be prevented and if ground ambulance services should be subject to the balance billing prohibitions.

Hearing Date: 1/12/22

Staff: Kim Weidenaar (786-7120).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Background:

Emergency Services under State Law.

Under state law, a health carrier must cover emergency services (including services provided at out-of-network facilities) up until the point of stabilization and without prior authorization if a layperson acting reasonably would have believed that an emergency medical condition existed. A carrier may only retract authorization or reduce payment for coverage of previously authorized emergency services if the provider's material misrepresentation was made with the patient's knowledge and consent. Coverage of emergency services may be subject to applicable in-network copayments, coinsurance, and deductibles.

If a carrier requires pre-authorization for post-evaluation or post-stabilization services, the carrier must provide access to an authorized representative at all times to facilitate review. For these services to be covered, the provider or facility must make a documented good faith effort to contact the carrier within 30 minutes of stabilization.

"Emergency services" are defined as a medical screening examination within the capability of a hospital emergency department, including ancillary services routinely available to the emergency department to evaluate the emergency medical condition and further medical examination and treatment, as required to stabilize the patient. "Emergency medical condition" is defined as a medical, mental health, or substance use disorder condition manifesting itself by acute symptoms of sufficient severity including severe pain or emotional distress, such that a prudent layperson could reasonably expect the absence of immediate medical, mental health, or substance use disorder treatment attention to result in a condition: placing the health of the individual, or with respect to a pregnant woman, the health of the woman or her unborn child, in serious jeopardy; serious impairment to bodily functions; or serious dysfunction of any bodily organ or part.

Balance Billing Protection Act.

Prohibition on Balance Billing.

In 2019 the Legislature enacted the Balance Billing Protection Act, which prohibited balance billing for emergency services and certain non-emergency services.

An out-of-network provider or facility is prohibited from balance billing an enrollee for:

- emergency services provided to an enrollee; or
- non-emergency health care services provided to an enrollee at an in-network hospital or ambulatory surgical facility if the services: (1) involve surgical or ancillary services; and (2) are provided by an out-of-network provider.

For these purposes a "balance bill" is a bill sent to an enrollee by an out-of-network provider or facility for health care services provided to the enrollee after the provider or facility's billed amount is not fully reimbursed by the carrier, exclusive of permitted cost-sharing. "Surgical or ancillary" services are defined as surgery, anesthesiology, pathology, radiology, laboratory, or hospitalist services.

The balance billing provisions apply to health carriers regulated under the insurance laws and health plans offered to public employees and their dependents, but do not apply to Medicaid. A self-funded group health plan may elect to participate in the prohibition on balance billing.

Payments by the Enrollee.

If an enrollee receives health care services for which balance billing is prohibited:

- The enrollee satisfies the obligation if he or she pays the in-network cost-sharing amount specified in the enrollee's group health plan contract, which must be determined using the carrier's median in-network contracted rate for the same or similar service in a similar geographic region.
- A carrier, out-of-network provider, or out-of-network facility, or agent, trustee, or assignee must ensure the enrollee incurs no greater cost than the determined in-network cost-sharing amount and may not balance bill or otherwise attempt to collect from the enrollee more than the determined amount.
- The carrier must treat any cost-sharing amounts paid in the same manner as cost-sharing for in-network services. If the enrollee pays an amount in excess of the in-network cost-sharing amount, the provider, facility, or carrier must refund the excess within 30 business days.

A provider, hospital, or ambulatory surgical center may not require a patient to sign any document that would attempt to waive or alter any of the provisions related to payment of a balance bill.

Payments by Carriers.

The carrier must make payments for health care services covered by the balance billing prohibition directly to the provider or facility. The amount paid to an out-of-network provider for services covered by the balance billing prohibitions must be a commercially reasonable amount, based on payments for the same or similar services provided in a similar geographic area. Within 30 days of receipt of a claim from an out-of-network provider or facility, the carrier must offer to pay the provider or facility a commercially reasonable rate. If a provider or facility disputes the carrier's payment, the provider or facility must notify the carrier within 30 days of payment or payment notification from the carrier. If the provider or facility disputes the carrier's offer, the carrier and provider or facility have 30 days from the initial offer to negotiate in good faith. If the parties do not agree to a payment amount within the 30 days and the parties choose to pursue further action to resolve the dispute, it must be resolved through arbitration.

Arbitration.

To initiate arbitration, the carrier, provider, or facility must provide written notice to the Insurance Commissioner (Commissioner) and the non-initiating party no later than 10 days following the 30-day period of good faith negotiation. Within 30 days of receiving the notice, the non-initiating party must provide its final offer. The parties may reach an agreement on reimbursement before the arbitration proceeding.

Within seven days of receiving the notice from the initiating party, the Commissioner must

provide the parties with a list of approved arbitrators. If the parties do not agree on an arbitrator from that list, the parties must notify the Commissioner who must provide the parties with a list of five arbitrators and each party may veto two arbitrators. If more than one arbitrator remains, the Commissioner must choose from the remaining arbitrators on the list. This selection process must be completed within 20 days.

Each party must provide a written submission in support of the party's position within 30 days of the arbitrator's selection. The initiating party's submission must include the evidence and methodology for asserting that the amount proposed to be paid is or is not commercially reasonable. A party that fails to make a timely submission without good cause is considered in default and must pay the final offer amount submitted by the party not in default.

Within 30 days of receipt of the parties' submissions, the arbitrator must issue a written decision requiring payment of the final offer amount of one of the parties and notify the parties and Commissioner of the decision. The arbitrator must consider: the evidence and methodology submitted by the parties; and patient characteristics and the circumstances and complexity of the case, including the time and place of service and whether the service was delivered at a level I or II trauma center or a rural facility. The arbitrator may consider other information that a party believes relevant to the other factors, other factors the arbitrator requests, and information provided by the parties relevant to an arbitrator's request, including the All-Payer Claims Database (APCD) data set.

Arbitration fees, not including attorney's fees, must be equally divided among the parties to the arbitration. Multiple claims may be addressed in a single arbitration if the claims: (1) involve the same parties; (2) involve claims with the same or related current procedural terminology codes relevant to a particular procedure; and (3) occurred within two months of each other.

The Commissioner must prepare an annual report summarizing the dispute resolution information provided by arbitrators to the Commissioner. The parties must execute a non-disclosure agreement within 10 business days of a party notifying the Commissioner and the non-initiating party of the intent to initiate arbitration. The arbitration provisions apply to out-of-network payment disputes between carriers and health care providers.

Notification Requirements.

The Commissioner, in consultation with stakeholders, must develop standard template language for notifying consumers of the circumstances under which they may or may not be balance billed. Health carriers, health providers, and health facilities must post the notice on their website.

A hospital or ambulatory surgical facility must post on its website a list of the carrier health plan provider networks with which the facility is an in-network provider. A health care provider's website must list the carrier health plan provider networks with which the provider contracts. An in-network provider must submit accurate information to a carrier regarding network status in a timely manner, consistent with the contract between the carrier and the provider.

A carrier must update its website and provider directory within 30 days of an addition or termination of a facility or provider. A carrier must provide an enrollee with:

- a clear description of the plan's out-of-network benefits;
- notice of rights regarding balance billing using the standard template;
- notification regarding out-of-network financial responsibility;
- information on how to use the carrier's transparency tools;
- upon request, information on a provider's network status, and whether there are in-network providers available to provide surgical or ancillary services at the specified in-network facility; and
- upon request, an estimated range of out-of-pocket costs.

Enforcement and Rulemaking.

If the Commissioner has reason to believe any person or facility is violating provisions relating to balance billing, the Commissioner may submit information to the Department of Health (DOH) or the appropriate disciplining authority for action. If a provider or facility has engaged in a pattern of unresolved violations relating to balance billing, the DOH or appropriate disciplining authority may levy a fine or cost recovery upon the health care provider or facility or take other action as permitted under the authority of the DOH or disciplining authority. A pattern of violations of the balance billing provisions also constitute unprofessional conduct under the Uniform Disciplinary Act.

It is an unfair or deceptive practice for a health carrier to initiate arbitration with such frequency as to indicate a general business practice. A health carrier violating the balance billing provisions is subject to fines and other remedies imposed by the Commissioner. Violations of the provisions relating to balance billing subjects a provider or facility to a fine of up to \$1,000 per violation.

Network Adequacy.

When determining the adequacy of a health carrier's provider network, the Commissioner must consider whether the carrier's network includes a sufficient number of contracted providers practicing at the same facilities with which the carrier has contracted for the network to reasonably ensure enrollees have in-network access for covered benefits delivered at the facilities.

Federal No Surprises Act.

In 2020 Congress passed the federal No Surprises Act (NSA), which establishes federal protections against balance billing for emergency services and certain other services provided at in-network facilities beginning January 1, 2022. The NSA was passed as part of the 2021 Consolidated Appropriations Act and amended the Public Health Service Act. The NSA balance billing protections apply to:

- emergency services, including services provided in hospital emergency departments, freestanding emergency departments, urgent care settings that are licensed to provide emergency care, and air ambulance transportation;

- post-stabilization services provided in a hospital following an emergency visit; and
- non-emergency services provided at certain in-network facilities.

Enrollee cost sharing is limited to the amounts the enrollee would have paid if the services were furnished by a participating provider and providers are prohibited from billing patients more than the patient's applicable in-network cost sharing amount for services covered by the NSA.

The NSA provides some exceptions to the balance billing prohibitions if the enrollee consents to receive the services from a non-participating provider under certain circumstances if notice and written consent are provided. The waiver is not permitted for the following services: emergency services; unforeseen urgent medical needs arising when non-emergent care is provided; ancillary services, including anesthesiology, pathology, radiology, and neonatology; services provided by assistant surgeons, hospitalists, and intensivists; diagnostic services including radiology and lab services; and items and services provided by an out-of-network provider if there is not another in-network provider who can provide that service in that facility.

The NSA requires an independent dispute resolution (IDR) process to be established through rule and creates a certification process for IDR entities.

Air Ambulance Regulation.

The DOH is responsible for licensing emergency medical services agencies and services, including air ambulance services. As of January 2019, there are three licensed air ambulance services in Washington.

The Airline Deregulation Act of 1978 prohibits states from regulating the price, route, or service of an air carrier, including air carriers that provide air ambulance services. The Federal Aviation Administration Reauthorization Act of 2018 established an advisory committee to review options to improve the disclosure of charges and fees for air medical services, better inform consumers of insurance options for such services, and protect consumers from balance billing.

All-Payer Claims Database Data Set.

The Office of the Commissioner must contract with the agency responsible for administration of the APCD and the lead organization, who in collaboration with health carriers, health care providers, hospitals, and ambulatory surgical facilities centers, must establish a data set and business process to provide carriers, providers, facilities, and arbitrators to assist in determining commercially reasonable payment. The data used to calculate the median in-network and out-of-network allowed amounts and the median billed charge amounts by geographic area, for the same or similar service, must be drawn from commercial health plan claims and must be composed of commercial health plans and exclude Medicare and Medicaid claims. The data must be reviewed by an advisory committee that includes representatives of health carriers, health care providers, hospitals, and ambulatory surgical facilities for validation before use. The data set must be based upon the most recently available full calendar year of claims data. The data set for each subsequent year must be adjusted by applying the consumer price index-medical component established by the United States Department of Labor to the previous year's data set.

Review by Independent Review Organization.

An enrollee in a health plan may seek review by a certified independent review organization (IRO) if: (1) a carrier denies, modifies, reduces, or terminates coverage of, or payment for, a health care service; and (2) the enrollee has exhausted the carrier's grievance process or the carrier has exceeded timelines for grievances without good cause and without reaching a decision. Reviewers for the IRO make determinations regarding the medical necessity or appropriateness of, and the application of plan provisions to, health care services for an enrollee. An IRO determination must be consistent with the plan unless it is unreasonable or inconsistent with evidence-based medical practice.

Summary of Bill:

Emergency Services.

The definition of emergency services is expanded beyond medical screening, examination, and treatment within a hospital to include:

- medical screening, examination, and treatment provided within the capabilities of a behavioral health emergency services provider; and
- post-stabilization services in hospitals and behavioral health emergency services providers, which are the covered services provided by staff or facilities of a hospital or behavioral health emergency services provider after the enrollee is stabilized as part of outpatient observation or an inpatient or outpatient stay following screening and stabilization services.

A health carrier must cover emergency services (including post-stabilization services) provided to a covered person if a prudent layperson acting reasonably would have believed that an emergency medical condition existed. A health carrier must cover emergency services provided at a non-participating behavioral health emergency services provider in addition to a hospital emergency department and may not require prior authorization. Requirements that a facility make a documented good faith effort to notify the covered person's health carrier within 30 minutes of stabilization and that the carrier make an authorized representative available at all times are removed, though a carrier is permitted to require this notice if an authorized representative is available at all times.

Definitions.

For these purposes, a "behavioral health emergency services provider" means emergency services provided in the following settings: a crisis stabilization unit, an evaluation and treatment facility, an agency certified to provide outpatient crisis services, a triage facility, an agency certified to provide medically managed or monitored withdrawal management services, and a mobile rapid response crisis team that is contracted with a behavioral health administrative services organization (BHASO) to provide crisis response services in the BHASO's area.

Balance Billing.

Balance Billing Prohibitions.

A non-participating provider or facility may not balance bill an enrollee for:

- emergency services provided to an enrollee;
- non-emergency health care services performed by a non-participating provider at certain participating facilities; or
- air ambulance services.

Behavioral health emergency services providers may not balance bill enrollees for emergency services.

"Non-emergency health care services performed by non-participating providers at certain participating facilities" are the covered items or services other than emergency services with respect to a visit at a participating facility as provided in the No Surprises Act (NSA). For these purposes, "visit" includes items and services furnished by a provider at the facility, equipment and devices, telemedicine services, imaging services, laboratory services, preoperative and postoperative services, and other items or services determined by the Secretary of Health and Human Services (HHS) and a "participating health care facility" is a hospital, hospital outpatient department, critical access hospital, ambulatory surgical center, or any other facility specified by the Secretary of HHS that has a direct or indirect contractual relationship with a plan or carrier to provide items or services.

Payments by the Enrollee.

A health care provider, health care facility, or air ambulance service may not request or require a patient at any time, for any procedure, service, or supply, to sign or otherwise execute any document that would attempt to avoid, waive, or alter the provisions protecting enrollees from balance bills. If an enrollee pays a non-participating provider, facility, or air ambulance service more than the in-network cost sharing amount determined under the NSA and the implementing regulations, the provider must refund the excess amount within 30 days. The balance billing prohibitions and provisions protecting enrollees from balance bills are applied to behavioral health emergency services providers for emergency services provided to enrollees.

If an enrollee receives emergency services from a behavioral health emergency services provider:

- The enrollee satisfies the obligation if he or she pays the in-network cost-sharing amount specified in the enrollee's group health plan contract, which must be determined using the median contracted rate as calculated using the methodology described in federal rules implementing the NSA.
- A carrier, non-participating behavioral health emergency services provider, or agent, trustee, or assignee must ensure the enrollee incurs no greater cost than the median contracted rate and may not balance bill or otherwise attempt to collect from the enrollee more than the determined amount.
- The carrier must treat any cost-sharing amounts paid by the enrollee for a non-participating behavioral health emergency services provider's services in the same manner as cost-sharing for in-network services.

Payments by Carriers.

Payment for services covered by the balance billing prohibitions, except for emergency services provided by behavioral health emergency services providers, is subject to the federal NSA and the implementing regulations. However, until January 1, 2023, or a later date determined by the Insurance Commissioner (Commissioner), the allowed amount paid to a non-participating provider for health care services subject to the balance billing prohibitions, except air ambulance and emergency services provided by behavioral health emergency services providers, must be a commercially reasonable amount based on the same or similar service provided in a similar geographic region. Claims must be paid to the provider within 30 days. If the provider disputes the carrier's offer, the parties have 30 days to negotiate in good faith and if the parties fail to agree to a commercially reasonable amount, the dispute must be resolved under the state's arbitration process or federal independent dispute resolution process as applicable. These payment provisions apply to emergency services provided to behavioral health emergency services providers and continue to apply after January 1, 2023.

Carriers must make available through a means generally used by a provider or facility to verify enrollee eligibility, whether the enrollee's health plan is subject to the requirements of the balance billing chapter or the NSA.

Dispute Resolution under the State Arbitration Process.

Until January 1, 2023, or a later date determined by the Commissioner, the state's arbitration process applies to non-participating provider or facility payments and disputes between carriers and facilities and providers for services subject to the balance billing prohibitions except air ambulance services. If the federal independent dispute resolution process is not available to the state for disputes regarding behavioral health emergency services providers, the state's arbitration process will continue to apply beyond January 1, 2023.

The state's arbitration process is modified to include the following:

- If the parties agree on an out-of-network rate after providing arbitration initiation notice to the Commissioner, but before the arbitrator has made a decision, the amount agreed to will be treated as the out-of-network rate for the service and the initiating party must provide notice to the Commissioner and arbitrator within three business days of the agreement.
- Each party (rather than only the initiating party) must include with their written submission to the arbitrator their evidence and methodology for asserting the proposed amount is or is not commercially reasonable.
- The arbitrator's decision must include an explanation of the elements of the parties' submissions the arbitrator relied on to make their decision and why those factors were relevant.
- The Commissioner is authorized to establish allowable arbitrator fee ranges or a fee schedule.
- The decision of the arbitrator is final, binding on the parties, and not subject to judicial review.

Multiple claims may be addressed in a single arbitration if the claims:

- involve identical carriers and provider parties;
- involve claims with the same procedural code or comparable code under a different procedural code system; and
- occur within the same 30 business day period.

Dispute Resolution under the Federal Process.

Beginning January 1, 2023, or a later date determined by the Commissioner, services subject to the balance billing prohibitions, except air ambulance (and emergency services provided by behavioral health emergency services providers if the process is not available for these services), are subject to the independent dispute resolution process established under the NSA and its implementing regulations in effect on January 1, 2023, or a later date determined by the Commissioner. If a certified independent dispute resolution entity determines that the federal process does not apply to a dispute, a party may initiate arbitration under the state's arbitration process:

- without completing good faith negotiation as required by the state's balance billing requirements if the federal open negotiation period was completed; and
- by providing notice to the Commissioner and non-initiating party within 10 days following the notice from the certified independent dispute resolution entity.

Air ambulance services are only subject to the federal independent dispute resolution process.

Notification Requirements.

The standard template language the Commissioner must develop to notify consumers of their rights is modified so that template language must notify customers of their rights under the balancing billing chapter, the NSA, and its implementing federal regulations. Requirements for hospitals and ambulatory surgical facilities to posts notices and lists of their carrier health plan networks on the facility's website are applied to behavioral health emergency services providers.

Enforcement.

The Commissioner is authorized to enforce the provisions of the NSA and implementing federal regulations that are applicable to or regulate the conduct of carriers issuing health plans or grandfathered health plans to residents in Washington beginning January 1, 2022. The Commissioner may also impose a civil penalty not to exceed \$100 for each day for each individual for failure to comply with the NSA provisions.

The enforcement provisions that apply to health care providers and facilities are applied to behavioral health emergency services providers.

Network Adequacy.

When determining the adequacy of a health carrier's provider network or the ongoing adequacy of an in-force provider network, the carrier may not treat its payment of non-participating providers or facilities under the balance billing chapter or the NSA as a means to satisfy network access standards.

All-Payer Claims Database Data Set.

Until December 31, 2030, the Office of the Insurance Commissioner (OIC) must contract with the agency responsible for administration of the All-Payer Claims Database or other organizations biennially beginning in 2022, for an analysis of commercial health plan claims data to assess the impact of the balance billing provisions or the NSA have had or may have had on payments to participating and non-participating providers and facilities and on the utilization of out-of-network services. The analysis may include self-funded group data to the extent available within appropriated funds and the analysis must be published on the OIC website.

Ground Ambulance.

On or before October 1, 2023, the Commissioner, in collaboration with the Health Care Authority and Department of Health, must submit recommendations to the appropriate legislative committees detailing how balance billing for ground ambulance services can be prevented and if ground ambulance services should be subject to the balance billing restrictions.

Review by an Independent Review Organization.

An enrollee is permitted to seek review by a certified independent review organization of a health carrier's adverse determinations made under the balance billing prohibitions, the enrollee's obligations to pay under the balance billing chapter, and the NSA and its implementing federal regulations.

Miscellaneous.

References to "out-of-network" are changed to "non-participating." References to "surgical and ancillary services" are replaced with "emergency medicine, anesthesiology, pathology, radiology, neonatology, surgery, hospitalist, intensivist, and diagnostic services, including radiology and laboratory services." The stated intent of the balancing billing act is to align Washington state law with the federal balance billing prohibitions and transparency protections of the NSA and its implementing federal regulations while maintaining provisions of the balancing billing chapter that provide greater protection from consumers.

The Commissioner is authorized to adopt rules or incorporate by reference without material change federal regulations adopted on or after the effective date of the bill.

Appropriation: None.

Fiscal Note: Requested on January 4, 2022.

Effective Date: The bill contains an emergency clause and takes effect immediately.