

WSR 22-08-066
OFFICE OF THE
INSURANCE COMMISSIONER
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Technical Assistance Advisory 2022-01¹

¹ This advisory is a policy statement released to advise the public of the office of the insurance commissioner's (OIC) current opinions, approaches, and likely courses of action. It is advisory only. RCW 34.05.230(1).

TO: Health carriers.
FROM: Insurance Commissioner, Mike Kreidler.
DATE: April 4, 2022.
SUBJECT: OIC Implementation of E2SHB 1688.

The purpose of this technical assistance advisory (TAA) is to provide guidance for health carriers² on OIC's implementation of E2SHB 1688.³

² See RCW 48.43.005(28) (defining "health carrier").

³ See Consolidated Appropriations Act (CAA), 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020) (enacting several new laws, including the No Surprises Act at div. BB, tit. I, 134 Stat. at 2757-2890).

Background: Washington's Balance Billing Protection Act (BBPA) was enacted in 2019, and effective January 1, 2020.⁴ In December 2020, Congress enacted the No Surprises Act (NSA), which went into effect on January 1, 2022. E2SHB 1688 (the bill) was enacted in 2022, and relates to consumer protection from charges for out-of-network health care services. It aligns state law and NSA and addresses coverage for treatment of emergency services. The bill is effective March 31, 2022.

⁴ See OIC's surprise billing and BBPA web page for more information.

Below are some of the key components of the bill and applicable sections:

1. Applicable Plans: E2SHB 1688 applies to fully insured individual and group health plans offered to residents in Washington state and to Washington state public and school employee health benefit plans (PEBB/SEBB).⁵ The prohibition on balance billing, associated consumer protections and provider/carrier dispute resolution processes also apply to self-funded group health plans that have elected to participate in Washington state's balance billing protections.⁶

⁵ See RCW 48.43.005 definition of "health plan" and RCW 41.05.107.

⁶ See RCW 48.49.130.

2. Surprise billing dataset and study on impact of BBPA - Section 1, amending RCW 43.371.100: The surprise billing data set will be updated to align with the scope of services protected from balance billing in RCW 48.49.020, as amended by the bill. Section 1 directs OIC to conduct biennial analysis, beginning in 2022, of the impact of BBPA and NSA on payments for in-network and out-of-network services, including an analysis of the volume and percentage of claims of in-network health care providers versus out-of-network providers in Washington state. Section 1(3). The first analysis required under section 1 must be published on OIC's website on or before December 15, 2022. *Id.*

3. Emergency Services Coverage - Sections 2 and 3, amending RCW 48.43.005 and 48.43.093: Section 2 broadens the definition of emergency services to include covered services related to screening, stabilization, and post-stabilization, which includes observation or an inpatient and outpatient stay with respect to the visit during which screening and stabilization services were provided. Section 2 (16)(iii). Additionally, emergency services providers include, in ad-

dition to a hospital emergency department, mobile rapid response crisis teams, crisis triage and stabilization facilities, evaluation and treatment facilities, agencies certified by the state to provide out-patient crisis services and medical withdrawal management services. Section 2(48).

Emergency services must be covered regardless of the network status of a hospital or provider and without prior authorization. Section 3 (1)(a). Carriers can require notification of a person's stabilization or admission by in-network facilities. Section 3 (3)(a). They also can require a hospital or behavioral health emergency services provider to notify them within 48 hours of stabilization if a person needs to be stabilized, or by the end of the business day following the day the stabilization occurs, whichever is later. Section 3 (3)(b).

4. *Scope of Balance Billing Protections - Section 7, amending RCW 48.49.020; and section 21, adding a new section to chapter 48.49 RCW:* The bill amends BBPA to align the scope of services subject to balance billing protections with NSA. This includes emergency services, non-emergency health care services performed by nonparticipating providers at certain participating facilities and air ambulance services. Non-emergency services include covered items or services other than emergency services with respect to a visit at a participating health care facility, as provided in NSA. Section 2(46).

The bill amends applicable provisions of BBPA to reference "behavioral health emergency services providers" such that balance billing protections and other related consumer protections apply to these services.

Under section 21, OIC is required, in collaboration with the health care authority and the department of health, and with input from interested groups, to submit a report and any recommendations to the legislature by October 1, 2023, regarding how balance billing for ground ambulance services⁷ can be prevented and whether ground ambulance services should be subject to balance billing restrictions.

⁷ "Ground ambulance services" is defined under Section 21(4) of the Bill to mean "organizations licensed by the department of health that operate one or more ground vehicles designed and used to transport the ill and injured and to provide personnel, facilities, and equipment to treat patients before and during transportation."

5. *Consumer Cost-Sharing - Section 7, amending RCW 48.49.020; and section 8, amending RCW 48.49.030:* Consumer cost-sharing for services subject to balance billing protections under NSA will be calculated as provided in NSA. Section 7(2). Section 8 also requires NSA method for calculating consumer cost-sharing (as known as "qualified payment amount") for behavioral health emergency services.

6. *Waiver of Rights Sections - Section 10, adding a new section to chapter 48.49 RCW; and section 7, amending RCW 48.49.020:* The bill prohibits consumers from being asked to waive their balance billing protections. Sections 7 (2)(b) and 10(2).

7. *Out of Network Claim Payment Standard - Section 9, adding a new section to chapter 48.49 RCW:* Section 9 states the allowed amount paid to an out-of-network provider for health care services described under RCW 48.49.020(1), other than air ambulance services shall be a "commercially reasonable amount" based on payments for the same or similar services provided in a similar geographic area. Section 9(1). This is required until July 1, 2023, or a later date determined by OIC. *Id.* At that point, transition to NSA payment standard is required. Section 9(1).

8. *Dispute Resolution - Section 11, amending RCW 48.49.040; and section 18, amending RCW 48.49.150:* Under section 11, BBPA arbitration

is required until July 1, 2023, or a later date determined by OIC. Section 11 (1), (2). On July 1, 2023, or a later date determined by OIC, carriers are required to transition to NSA "independent dispute resolution" (IDR) system if out-of-network provider and carrier cannot agree on a commercially reasonable payment. *Id.* Upon transition to NSA independent dispute resolution system, if behavioral health emergency services payment disputes can be addressed using federal IDR system, carriers shall use that system. If not possible, BBPA dispute resolution process will continue to be used. Section 11(2). Air ambulance payment disputes shall use NSA IDR system. Section 11(14).

Section 11 revises existing BBPA arbitration provisions, including some provisions to align NSA more closely with state law:

- Section 11(4): Permits multiple claims to be addressed in a single arbitration proceeding if the claims at issue meet the following requirements:
 - The claims must involve identical carrier and provider, provider group, facility, or behavioral health emergency services provider parties. Section 11 (4) (a).
 - The bundled claims must have the same procedural code, or a comparable code under a different procedural code system. Section 11 (4) (b).
 - Bundled claims must occur within 30 business days of each other. Section 11 (4) (c).
- Section 11(5): Amends RCW 48.49.040(2) to provide that the arbitrators on OIC's required list "must" have experience in matters related to medical or health care services. Accordingly, OIC plans to review current arbitrators' experience within the next several months for compliance with this new requirement.
- Section 11(7): If the parties to a pending arbitration proceeding agree on an out-of-network payment rate at any point before the arbitrator has made their decision, the agreed-upon amount will be treated as the out-of-network payment rate for the service(s) at issue.
- Section 11 (13) (a): "Baseball arbitration" is retained, such that the arbitrator will choose the final offer of either the nonparticipating provider or the carrier.
- Section 11 (8) (a): The arbitrator's decision must include an explanation of the elements of the parties' submissions relied upon to make their decision and why those elements were relevant to their decision.
- Section 11(11): The arbitrator's decision is final and binding on the parties and is not subject to judicial review.
- Section 11(9): OIC is given authority to establish arbitrator fee ranges or schedules by rule. Arbitrator fees must be paid by the parties to the arbitrator within 30 calendar days following receipt of the arbitrator's decision by the parties.
- Section 11 (3) (b): If a federal IDR decision maker finds that it does not have jurisdiction over a dispute, time frames related to good faith negotiations and notice for BBPA arbitration are modified.

Sections 11 and 18 provide for use of BBPA arbitration process in limited circumstances for services that are subject to balance billing protections when a carrier and an out-of-network provider or facility cannot reach agreement on a contract and an amended alternative access delivery request (AADR) has been approved by OIC. OIC must approve use of this arbitration process. The bill includes some provisions that

apply specifically to arbitration proceedings in these circumstances, some of which are listed below:

- Section 11 (13) (a): The issue before the arbitrator is the commercially reasonable payment for services addressed in AADR.
- Section 18 (13) (b): During the period from the effective date of the amended AADR to issuance of the arbitrator's decision, the allowed amount paid to providers or facilities for services addressed in the amended AADR, shall be a commercially reasonable amount, based on payments for the same or similar services provided in a similar geographic area.
- Section 11 (13) (a): The arbitrator shall issue a decision related to whether payment for services should be made at the final offer amount of the carrier or the out-of-network provider or facility. The arbitrator's decision is final and binding on the parties for services rendered to enrollees from the effective date of the amended AADR to the expiration date of AADR or the date the parties enter into a provider contract and provider compensation agreement, whichever occurs first.
- Section 11 (13) (c): For these disputes, BBPA arbitration process will continue to be used, rather than transitioning to NSA IDR system in 2023.

9. *Network Adequacy - Section 18*: Under section 18, when determining the adequacy of a carrier's provider network, OIC must review the network to determine whether it includes a sufficient number of facility-based providers at the carrier's in-network hospitals and ambulatory surgical facilities. Section 18(1). OIC may allow carriers to submit an AADR to address a gap in their provider network. AADR must meet the requirements detailed under section 18(2).

For services subject to the balance billing prohibition, a carrier cannot treat their payment of out-of-network providers or facilities under BBPA or NSA as a means to satisfy OIC's network access standards. Section 18 (2) (b). However, if an AADR has been granted and a carrier meets the following requirements, a carrier may ask OIC to amend its AADR to allow use of BBPA dispute resolution process to determine the amount that will be paid to out-of-network providers or facilities for the services referenced in AADR. Section 18 (2) (b). The carrier must meet the following requirements:

- The carrier's request to amend AADR is made at least three months after the effective date of AADR at issue; and
- During that three-month period, the carrier has demonstrated substantial good faith efforts on its part to contract with out-of-network providers or facilities to deliver the services referenced in AADR. Section 18 (2) (b) (i).

For services subject to balance billing protections, a carrier must notify out-of-network providers that deliver the services referenced in the AADR within five days of submitting the AADR to OIC. Section 18 (2) (b). Once a carrier has notified an out-of-network provider or facility that delivers the services referenced in an AADR, a carrier is not responsible for reimbursing a provider's or facility's charges in excess of the amount charged by the provider or facility for the same or similar service at the time the notification was provided. Section 18 (2) (b) (ii). The provider or facility must accept this reimbursement as payment in full. *Id.*

10. *Consumer Appeals to Independent Review Organization (IRO) - Section 4, amending RCW 48.43.535*: Section 4(2) adds an NSA provision

which provides consumers an opportunity to appeal a carrier's adverse decision related to its obligations under NSA.

Rule Making: OIC plans to conduct rule making in the next several months. Rule making will address several of the topics discussed in this TAA.

OIC Enforcement: Aside from a few deferments described in the next section, OIC will enforce E2SHB 1688⁸ and other federal NSA provisions not specifically addressed in E2SHB 1688 pertaining to health carriers for health plans starting on or after January 1, 2022.⁹ Where there is any conflict between the provisions of E2SHB 1688 and OIC's regulations previously adopted to implement BBPA, the provisions of E2SHB 1688 govern.

⁸ See sections 5 and 19 of E2SHB 1688.

⁹ See WAC 284-43-0140 (health carriers shall comply with all Washington state and federal laws relating to the acts and practices of carriers and laws relating to health plan benefits).

Additionally, the following provisions of NSA, are not specifically discussed in the bill; however, OIC notes health carriers are required to comply with them:

- Requirements for in-network cost-sharing for enrollees that relied on an issuer's databases, response protocols, or provider directory representations that a provider was in-network.¹⁰
- Prohibition on balance billing for "continuing care patients" for 90 days after a provider becomes OON.¹¹

¹⁰ See section 116(b) of NSA.

¹¹ See section 113 of NSA.

NSA preempts state laws only when those laws impose a requirement that "prevents the application" of NSA.¹² Based upon this principle and a few NSA provisions expressly deferring to state law, OIC will continue to enforce related state laws related to provider directories.¹³

¹² See 42 U.S.C. § 300gg-23 (a)(1); 86 Fed. Reg. at 36,886.

¹³ See section 116(a) of NSA (deferring to state laws relating to provider directories).

Deferred Enforcement: OIC will defer enforcement against some entities due to jurisdictional limitations, and with respect to some provisions of NSA. This decision is in alignment with deferment recently announced by the departments of Health and Human Services, Labor, and Treasury (collectively referred to as "the departments"). Due to jurisdiction limitations, OIC will defer to other state or federal agencies for enforcement regarding the following entities:

- Air ambulances;¹⁴
- Self-funded group health plans that have not elected to participate in BBPA; and
- Health providers and facilities.¹⁵

¹⁴ See 86 Fed. Reg. at 36,885.

¹⁵ Pursuant [to] RCW 48.49.100, OIC will continue to give providers and facilities an opportunity to cure violations of RCW 48.49.020 or 48.49.030.

Additionally, OIC will defer enforcement for some of NSA provisions in accordance with the deferred enforcement policy announced by the departments, August 20, 2021, in a set of frequently asked questions (FAQs).¹⁶ In accordance with these FAQs, OIC will defer enforcement for the following NSA provisions:

¹⁶ See "FAQs About Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 49 (FAQs)," Aug. 20, 2021, available at: https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/FAQs%20About%20ACA%20%26%20CAA%20Implementation%20Part%2049_MM%20508_08-20-21.pdf. Additionally, the departments announced deferment of a few non-FNSA provisions, namely the requirement that issuers publish machine-readable files relating to prescription drug pricing. *Id.* at 1 (citing 85 Fed. Reg. 72,158 (Nov. 12, 2020); 26 C.F.R. § 54.9815-2715A3 (b)(1)(iii), 29 C.F.R. § 2590.715-2715A3 (b)(1)(iii), and 45 C.F.R. § 147.212 (b)(1)(iii)). Deferment will be until regulations to fully implement this requirement are adopted and applicable. *Id.* at 1-2 (describing deferment). The departments will defer enforcement of the requirement to publish the remaining machine-readable files until July 1, 2022. *Id.* at 2. OIC will similarly defer enforcement.

- Requirements for making available a price comparison tool (by internet website, in paper form, or telephone). Deferment will be up until plan years (in the individual market, policy years) beginning on or after January 1, 2023.¹⁷
- Requirements for providing an advanced explanation of benefits.¹⁸ Deferment will be until regulations fully implementing this requirement are adopted and applicable.¹⁹

¹⁷ *Id.* at 3-4 (citing Internal Revenue Code (Code) § 9819, Employee Retirement Income Security Act (ERISA) § 719, and Public Health Service (PHS) Act § 2799A-4, as added by section 114 of NSA).

¹⁸ *Id.* at 6 (citing Code § 9816(f), ERISA § 716(f), and PHS Act § 2799A-1(f), as added by section 111 of NSA).

¹⁹ *Id.* at 7 (describing deferment).

OIC will continue to enforce any state law counterpart to these NSA provisions, including, but not limited to the following:

- Requirements for transparency tools for price and quality information.²⁰
- Requirements for enrollee notification upon termination of a provider by a health carrier.²¹

²⁰ See RCW 48.43.007.

²¹ WAC 284-170-421(10).

The departments also detailed provisions of NSA²² that issuers must implement using a good faith, reasonable interpretation of the law, without the guidance of regulations. OIC will enforce the following provisions in the same manner as announced by the departments:

²² Additionally, the departments detailed a few non-FNSA provisions it will expect issuers to implement using a good faith, reasonable interpretation of the law, including requirements prohibiting gag clauses. See FAQs at 7 (citing Code § 9824, ERISA § 724, and PHS Act § 2799A-9, as added by section 201 of division BB, title II, of CAA). OIC will enforce these provisions in the same manner as the departments.

- Requirements to include on any insurance identification card issued to enrollees, any applicable deductibles, any applicable out-of-pocket maximum limitations, and a telephone number and website address for individuals to seek assistance.²³
- Requirements to establish a process to update and verify the accuracy of provider directory information and to establish a protocol for responding to requests by telephone and electronic communication from an enrollee about a provider's network participation status.²⁴
- Prohibition on cost-sharing when an enrollee relied on the issuer's provider directory or response protocol.²⁵
- Requirements to make certain disclosures regarding balance billing protections to enrollees.²⁶
- Requirements to apply continuity of care protections.²⁷

²³ *Id.* at 4-5 (citing Code § 9816(e), ERISA § 716(e), and PHS Act § 2799A-1(e), as added by section 107 of NSA).

²⁴ *Id.* at 7-8 (citing Code § 9820 (a) and (b), ERISA § 720 (a) and (b), and PHS Act § 2799A-5 (a) and (b), as added by section 116(a) of NSA). However, given the deferment to state law in section 116(a) of NSA, OIC will only enforce these FNSA provisions against health carriers for plans and services not subject to BBPA but subject to OIC's jurisdiction, e.g., grandfathered health plans.

²⁵ *Id.*

²⁶ *Id.* at 8-9 (citing Code § 9820(c), ERISA § 720(c), and PHS Act § 2799A-5(c), as added by section 116(c) of NSA).

²⁷ *Id.* at 9 (citing Code § 9818, ERISA § 718, and PHS Act § 2799A-3 and 2799B-8, as added by section 113 of NSA).

Consumer Notice: OIC is required to develop standard template language for a notice of consumer rights that notifies consumers of their rights under both BBPA and NSA. Section 13(1). OIC determines by rule when and how the notice must be provided to consumers by health

carriers, health care providers, and health care facilities. Section 18(3).²⁸

²⁸ See WAC 284-43B-050.

OIC is developing a consumer notice for balance billing rights that satisfies both NSA and E2SHB 1688.²⁹ OIC's consumer notice should be used for fully insured health plans, PEBB/SEBB plans, and self-funded ERISA plans that have opted into BBPA. Under BBPA, this notice must be provided to enrollees in any communication that authorizes nonemergency surgical or ancillary services at an in-network facility.³⁰ Also, the issuer must indicate on the enrollee's explanation of benefits whether the service is subject to balance billing protections.³¹ OIC will continue to enforce these BBPA consumer notice requirements against health carriers.

²⁹ The draft notice has been circulated for review and comment. When the E2SHB 1688 Consumer Notice is finalized, it will be posted on OIC's website and shared through a GovDelivery notice; see also Code § 9820(c), ERISA § 720(c), and PHS Act § 2799A-5(c), as added by section 116(c) of NSA.

³⁰ See WAC 284-43B-050 (2)(a)(i).

³¹ See WAC 284-43B-050 (4)(a).

Please direct any questions about this advisory to Jane Beyer, Senior Health Policy Advisor, who may be contacted at janeb@oic.wa.gov or phone 360-725-7043.