

Lawmakers push for surprise billing changes as law takes effect

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All Americans are protected as of Jan. 1 from unexpected out-of-network medical bills, thanks to the implementation of legislation to ban surprise medical billing, but many lawmakers want the Biden

administration to make more changes to line up with what they argue was Congress' intent in crafting the law.

"At this point, it's another principle involved. Can you just really totally reject that which Congress has said because you don't like it? Or because maybe a couple of members of Congress who didn't get their way influence you?" Sen. Bill Cassidy, R-La., told CQ Roll Call, expressing his frustration.

The issue is who pays for [medical care](#) when a patient receives a surprise medical bill, and how to decide how much they owe—an issue that has long divided lawmakers and the health care industry.

The surprise medical bills at issue include charges as a result of emergency care at an out-of-network hospital or when an out-of-network doctor treats a patient at an in-network facility. The law that took effect Saturday calls for an arbitration process that is based on the median in-network rate for a service.

Insurers argue this was Congress' intent. But lobbyists for hospitals and physicians say it's crucial the arbiter considers more factors than just whatever the median in-network insurance payment is for a service when determining final payments.

Some lawmakers agree with the insurers, while others agree with providers' interpretation of congressional intent and want the agency to change the policy.

Surprise medical bills are extremely common among Americans with private insurance. Nearly 1 in 5 patients who go to the emergency room, have an elective surgery or give birth in a hospital receive a surprise bill, with an average cost of \$750 to \$2,600 per incident, according to a November report from the Department of Health and Human Services.

Cassidy and Sen. Roger Marshall, R-Kan., along with 24 other Republican senators, last week asked the Biden administration to alter its interim final rule to ban surprise [medical bills](#) before the implementation date. The lawmakers said HHS' interpretation of the law deviates from congressional intent when it comes to how payment disputes are settled. No Democrats signed the letter, however.

Senate Health, Education, Labor and Pensions Chair Patty Murray, D-Wash., has said she supports the administration's current plan to implement the law.

House Energy and Commerce Chairman Frank Pallone Jr., D-N.J., followed Cassidy and Marshall's letter with a Dec. 29 statement praising Biden for swiftly implementing the law, calling it "the most significant expansion of consumer protections since the Affordable Care Act" of 2010.

Back in November, Rep. Brad Wenstrup, R-Ohio, led 150 bipartisan lawmakers in a letter asking the secretaries of HHS, Treasury and Labor to change the rule's arbitration process.

In some states, insurers cut back their contracted rates to providers in anticipation of the law's implementation. Blue Cross Blue Shield of North Carolina mandated a 15 percent cut in contracted rates for 2022, citing the surprise billing law as impetus, effectively acting as a cap to payments, according to a November letter from BCBSNC Vice President of Provider Networks Mark Werner that was obtained by CQ Roll Call.

Prognosis

Cassidy doesn't anticipate the Biden administration taking any action to change the policy unless a court tells it to do so.

"I think we have to allow the courts to play out, and I think that the administration is going to lose," Cassidy said. "The intent of the law is very clear. It's very clear, and [the administration] very clearly violated it."

Several lawsuits on the issue, mostly brought by hospitals and physicians, are moving through the courts at the moment. The suits are all narrowly focused and aim to change the arbitration mechanism of the law without preventing the surprise billing ban from going into effect.

The following groups have recently challenged the rule:

- American College of Emergency Physicians and radiology-related groups.
- American Hospital Association and American Medical Association, along with other providers.
- Texas Medical Association, with support from the Physicians Advocacy Institute, along with 13 state medical associations.
- Association of Air Medical Services.

Court decisions could potentially come in the next few months, said Katie Keith, an associate research professor with the Georgetown University Center on Health Insurance Reforms. Plaintiffs are pushing for an expedited briefing and decision, with court arguments scheduled for February in several of the cases.

"Clearly, the tactic was to try to jam the administration by filing these [lawsuits] right before the holidays, in addition to the patient and consumer groups who normally would be filing amicus briefs in defense of the No Surprises Act and its rule-making," said Loren Adler, associate

director of the USC-Brookings Schaeffer Initiative for Health Policy.

The groups suing are arguing for national injunctions against the administration's arbitration guidance and asking the courts to rule by March. Even though the surprise billing ban is already in effect, the first instances of arbitration under the law may not occur until March at the earliest because of the law's built-in waiting periods and policies.

Many experts anticipate that the longer the surprise billing ban is in place, the less often payment disputes will go to arbitration. Over time, insurers and providers will likely begin to rely on past payment precedent rather than going through a somewhat cumbersome arbitration process.

"It will take some time to form those expectations, and the current set of lawsuits may be particularly relevant to that process," noted Ben Ippolito, an economist who focuses on health policy for the right-leaning American Enterprise Institute.

The outcome of the cases will largely rely on how the courts interpret the Chevron doctrine, a Supreme Court precedent that says courts must defer to government agencies when a law's language is unclear or ambiguous.

If the providers prevail in court, the Biden administration likely will have to rewrite the vacated part of the rule through the formal notice-and-comment rule-making process in compliance with the court's ruling.

This process could take a long time, and the uncertainty over how disputed out-of-network charges are paid for could continue for several years, noted Spencer Perlman of Veda Partners, an investment advisory firm.

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