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Agencies Propose Rules to Implement No Surprises Act Federal IDR Process

By Gary S. Qualls and Alexander B. Corson

This article summarizes recent rules implementing the federal independent dispute resolution ("IDR") process under the No Surprises Act (the "Act"). In a nutshell, the federal IDR process is the process in which arbitrators decide certain disputes between providers and payors that qualify as "surprise billing" situations under the Act.

Background

Congress enacted the Act in December of 2020, with an effective date starting January 1, 2022. The Act seeks to protect patients from what has become referred to as "surprise medical bills" in certain emergency and nonemergency settings for out-of-network patients.

In a nutshell, the federal IDR process is the process in which arbitrators decide certain disputes between providers and payors that qualify as "surprise billing" situations under the Act.

On July 1, 2021, several federal agencies (the "Agencies")[1] issued an Interim Final Rule (the "July IFR"), implementing certain aspects of the Act. The July IFR, among other things, implemented methods of calculating the so-called Qualifying Payment Amount ("QPA"), which plays an important part in the new rules discussed below.

On October 7, 2021, the Agencies published a second Interim Final Rule (the" October IFR" or the "IDR Rule") detailing, among other things, the specific mechanics of the federal IDR process. This article focuses on those mechanics. Key takeaways include:

- The IDR Rule establishes the QPA as the presumptive reimbursement amount to be selected by IDR arbitrators.
- An IDR arbitrator may only select a different reimbursement amount if the QPA presumption is rebutted by credible evidence, using one or more factors established in the Act and described in the IDR Rule.
- The IDR Rule confirms and fills in gaps in the Act's IDR process.

As explained in the Act and the IDR Rule, arbitrators will be employed or contracted by "certified IDR entities," which simply means arbitration service providers approved by the Agencies. Thus, this article will interchangeably use the terms "certified IDR entity" or "arbitrator."

Key Aspects of the IDR Process

QPA

The most unexpected and controversial aspect of the IDR Rule is the emphasis on the QPA as the presumptive determinative amount. The QPA is the payor's median contracted rate, as calculated according to the methodology at 45 C.F.R. § 149.140. In the July IFR, the Agencies explained that the QPA will generally be a payor's median in-network rate for: (a) the same or similar services; (b) furnished in the same or a similar facility; (c) by a provider of the same or similar specialty; (d) in the same or similar geographic area. Calculation of the median rate will be based on payors' rates as of January 31, 2019, adjusted for inflation going forward.[2]

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The most significant takeaway from the IDR Rule is that the QPA is now the presumptive out-of-network rate that an IDR entity must select absent credible evidence that the payor's QPA would be inappropriate under the circumstances. Providers have argued that placing so much emphasis on the QPA is problematic in numerous respects. First, the payor's median contracted rate could potentially be a black box, over which payors have access and control and providers do not. Second, what are considered "similar services" in this calculation? Moreover, the relevant "geographic area" will be a point of contention. All of these points will be areas of argument and debate in arbitrations conducted under this IDR process.

Per the IDR Rules, the certified IDR entity must provide the underlying rationale for its determination in a written decision submitted to the parties and the Agencies. If a certified IDR entity does not choose the offer closest to the QPA, the written decision's rationale must include an explanation of the credible information that the certified IDR entity determined demonstrated that the QPA was materially different from the appropriate out-of-network rate, based on the considerations made by the arbitrator.

Parties may submit evidence to arbitrators in an effort to rebut the QPA presumption.

Other Factors Arbitrators May Consider

Parties may submit evidence to arbitrators in an effort to rebut the QPA presumption. Such evidence may relate to the following factors:

1. The level of training or experience of the provider or facility.
2. The quality and outcomes measurements of the provider or facility.
3. The market share held by the out-of-network provider or facility or by the plan or issuer in the geographic region in which the item or service was provided.
4. The patient acuity and complexity of services provided.
5. The teaching status, case mix, and scope of services of the facility.
6. Any good faith effort—or lack thereof—to join the insurer's network.
7. Any prior contracted rates over the previous four plan years.[3]

The same general factors apply to air ambulance providers, with additional factors such as: (a) the location where the patient was picked up and the population density of that location, and (b) the air ambulance vehicle type and medical capabilities.[4] These factors were set forth in the Act and reiterated in the IDR Rule.

Factors Arbitrators May Not Consider

The IDR Rule implements the Act's provisions that specifically preclude federal IDR arbitrators from considering the following factors:

1. The arbitrating provider's usual and customary charge or billed charge.
2. The public payor reimbursement rates (e.g., Medicare, Medicaid, CHIP, or TRICARE).[5]

Thus, although the providers are precluded from advocating their charges as a factor, payors are precluded from advocating the increasingly common "Medicare-plus" reference-based pricing used by payors in some out-of-network disputes.

Party Submissions and Arbitrator's Award

Once the certified IDR entity is confirmed, the parties must submit to the appointed arbitrator an offer for a payment amount. The offers must be submitted within 10 business days after selection of the IDR entity and must be expressed as both a dollar amount and a percentage of the QPA. The appointed arbitrator must then select the offer closest to the QPA unless the arbitrator determines that credible information submitted by either party clearly demonstrates that the QPA is materially different from the appropriate out-of-network rate, based on evaluation of the factors described above.

Other Aspects of the Arbitration Process

The IDR Rule fills in some of the interstices in other arbitration process aspects of the Act.

The 30-Day Negotiation Period

The IDR Rule fills in some detail regarding the 30-day negotiation period without appearing to make substantive changes in that area. The IDR Rule clarifies that, because the Act is silent on whether to calculate deadlines using calendar days or business days, IDR process time frames will be calculated in business days unless there is a specific reason to use calendar days. The IDR Rule specifies where the parties are to use business days or calendar days.[6] Thus, providers that wish to challenge an out-of-network reimbursement must first initiate an open negotiation period ("Open Negotiation Period") in writing within 30 business days after receiving an initial payment or denial of service (the "Open Negotiation Notice"). The Open Negotiation Period begins when the Open Negotiation Notice is sent, and it lasts for 30 business days.[7]

Notice of IDR Initiation

If the parties are unable to reach agreement on the out-of-network rate by the last day of the Open Negotiation Period, either party may initiate the IDR process within four business days after the close of the Open Negotiation Period. To initiate the IDR process, a party must notify the other party and notify the Agencies through the Federal IDR Portal ("Notice of IDR Initiation"). The parties may jointly select an IDR arbitration service provider or the Agencies will select a certified IDR arbitration service provider within six business days following the Notice of IDR Initiation.[8]

Who Is the Arbitrator?

The arbitration process will be administered by IDR entities (i.e., arbitration service providers) subject to conflict-of-interest standards. The IDR Rule articulates specific standards that the service providers must meet, including arbitrator training equivalent to arbitrator training administered by the American Health Law Association or American Arbitration Association.[9]

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What Type of Arbitration

As previously referenced, the IDR Rule confirms that the "baseball-style" arbitration process described in the Act will be implemented.[10] This is a very specific type of arbitration that is not the typical process. In a baseball arbitration:

1. Each party offers a single payment amount to resolve the dispute.
2. The arbitrator selects one amount or the other with no ability to split the difference or arrive at any other conclusion.[11]

Like most arbitrations pursuant to an arbitration agreement, the arbitration decision is binding on the parties.[12] However as with any other arbitration decision subject to confirmation[13] or vacatur[14] by the courts, the parties can continue to negotiate or settle after the arbitration decision.

Batching Cases for Arbitration

The IDR Rule confirmed the case batching method set forth in the Act. That is, multiple cases can be batched together in a single arbitration proceeding to encourage efficiency, but those batched cases must involve:

1. The same provider or facility.
2. The same insurer.
3. The treatment of the same or similar medical condition.
4. Cases occurring within a single 30-day period.[15]

However, the IDR Rule preamble notes that the Agencies are soliciting comments on potential alternative batching periods under certain circumstances.[16]

Loser Pays Arbitration Costs

The IDR Rule confirms the "loser pays" model imposed in the Act, where the administrative costs of arbitration are imposed on the losing party. Presumably, this is intended to encourage settlement and deter overly aggressive positions on either side. The IDR Rule provides that both sides pay the certified IDR entity's fee upon filing their respective submissions. Then, within 30 business days of the award, the prevailing party is rebated its fee.[17]

90-Day Lockout Period Following a Decision

Per the Act, the party that initiates the arbitration process is "locked out" from taking the same party to arbitration for the same item or service for 90 days following a decision. The goal of this provision is to encourage settlement of similar claims. Any claims that occur during the lockout period, however, qualify for arbitration after the period ends. The IDR Rule confirmed this process and specified that the 90-day period will be calculated as 90 calendar days.[18]

Other Provisions

The October IFR also contains several other notable provisions. The October IFR sets forth various

protections for uninsured individuals.[19] Under 45 C.F.R. § 149.610, providers are required to inquire about an individual's health coverage status and provide a good faith estimate to uninsured individuals. The rule at 45 C.F.R. § 149.620 sets forth a separate patient-provider dispute resolution process for instances where the uninsured individual is billed substantially more than the good faith estimate provided pursuant to § 149.610.

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The October IFR also sets forth a separate IDR process specifically for air ambulance services in 45 C.F.R. §§ 149.510 and 149.520. That process incorporates the previously discussed IDR process, but it adds some additional considerations unique to air ambulances.[20]

What to Expect Next

Although the Agencies accepted comments during the 60-day period between October 7 and December 6, 2021, the October IFR became effective January 1, 2022. Accordingly, providers with any level of out-of-network exposure now should be assessing how to approach this arbitration process.

Notes

1. The Office of Personnel Management, Internal Revenue Service, Department of the Treasury, Employee Benefits Security Administration, Department of Labor, Centers for Medicare & Medicaid Services, and Department of Health and Human Services.
2. 86 Fed. Reg. 36,888 (Oct. 7, 2021).
3. *Id*. at 56,128.
4. *Id*. at 56,134.
5. *Id*. at 56,129.
6. *Id*. at 55,989.
7. *Id*. at 56,126.
8. *Id*. at 56,102.
9. *Id*. at 56,118.
10. *Id*. at 56,050.
11. *Id*. at 56,103-14.
12. *Id*. at 56,130.
13. If a losing party in arbitration refuses to comply with the arbitration award, the award is enforceable in a court (i.e., confirming an award).
14. In rare circumstances, arbitration awards are vacated by courts.
15. 86 Fed. Reg. 55,994 (Oct. 7, 2021).
16. *Id*.
17. *Id*. at 56,130.
18. This diverges from the business day calculation that the IDR Rules imposes for most time frames.
19. 86 Fed. Reg. 56,134-42 (Oct. 7, 2021).
20. *Id*. at 56,134 (as discussed).

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