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# No Surprise Billing Rules: Co-Provider Requirements Begin in 2023

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***Update: On December 2, 2022, HHS issued new guidance extending the January 1, 2023 compliance deadline for co-provider requirements until further rulemaking. For more information, click here. The new guidance affects the remaining content below.***

Since January 1, 2022, the No Surprise Billing Rules (NSBR) have required virtually all healthcare providers to give a good faith estimate of anticipated charges to uninsured (self-pay) patients.[1] Unless the Department of Health and Human Services (HHS) changes its rules, beginning January 1, 2023, the good faith estimate provided to patients will need to include the anticipated charges from co-providers or co-facilities in addition to the convening provider's own charges.

**Convening Providers and Co-Providers.** The NSBR distinguishes between convening providers and co-providers:

1. ***Convening health care provider or convening health care facility (convening provider or convening facility)*** means the provider or facility who receives the initial request for a good faith estimate from an uninsured (or self-pay) individual and who is or, in the case of a request, would be responsible for scheduling the primary item or service.
2. ***Co-health care provider or co-health care facility (co-provider or co-facility)*** means a provider or facility other than a convening provider or a convening facility that furnishes items or services that are customarily provided in conjunction with a primary item or service.

(45 CFR § 149.610(a)(2)(ii)-(iii)). A "primary item or service" is "the item or service to be furnished by the convening provider or convening facility that is the initial reason for the visit." (*Id.* at § 149.610(a)(2)(xi)). For example, in the case of a surgery scheduled through a hospital, the hospital may be the convening facility while those independent providers rendering services related to the surgery (e.g., anesthesia, labs tests, pathology, *etc.*) may be co-providers. (See CMS, "Guidance on Good Faith Estimates" (12/21/21), available here.)

**Convening Provider Requirements.** A convening provider must provide a good faith estimate to the self-pay patient (i) upon scheduling the patient for services, or (ii) if the patient requests a good faith estimate. (45 CFR §

149.610(b)(v)). Under the regulations, "[c]onvening providers and convening facilities shall consider any discussion or inquiry regarding the potential costs of items or services under consideration as a request for a good faith estimate." (*Id.* at § 149.610(b)(iv)).

Throughout 2022, HHS only required that the good faith estimate contain the estimated charges for the convening provider's own items or services, but the rule actually requires that the good faith estimate include "[i]tems or services reasonably expected to be furnished by co-providers or co-facilities." (*Id.* at § 149.610(c)(1)(iii)(B)). To obtain that information, the rule requires the following:

> Upon the request for a good faith estimate from an uninsured (or self-pay) individual or upon scheduling a primary item or service to be furnished for such an individual, the convening provider or convening facility must contact, no later than 1 business day of such scheduling or such request, all co-providers and co-facilities who are reasonably expected to provide items or services in conjunction with and in support of the primary item or service and request that the co-providers or co-facilities submit good faith estimate information … to the convening provider or facility; the request must also include the date that good faith estimate information must be received by the convening provider or facility.

(*Id.* at § 149.610(b)(v), emphasis added).[2] The convening provider would then need to add the co-provider's information to the estimate that the convening provider gives to the patient. For example,

> if a patient schedules a surgery, the convening provider or facility might include in the good faith estimate the cost of the surgery, and the co-provider or co-facility might include the costs of any labs, tests, or anesthesia that might be used during the operation.

(CMS, "Guidance on Good Faith Estimates," available here.)

In addition, if there are changes to the estimate, the convening facility must provide a new good faith estimate to the patient, *i.e.*,

> A convening provider or convening facility must provide an uninsured (or self-pay) individual who has scheduled an item or service with a new good faith estimate if a convening provider, convening facility, co-provider, or co-facility anticipates or is notified of any changes to the scope of a good faith estimate (such as anticipated changes to the expected charges, items, services, frequency, recurrences, duration, providers, or facilities) previously furnished at the time of scheduling; a new good faith estimate must be issued to the uninsured (or self-pay) individual no later than 1 business day before the items or services are scheduled to be furnished.

(*Id.* at 149.610(b)(vii)).

To give convening and co-providers time to implement the rule, HHS

exercised its discretion not to enforce the co-provider rules during 2022 (86 FR 56023 and 56030);[3] however, absent contrary direction from HHS, it appears that the co-provider rules may be enforced beginning January 1, 2023.

**Co-Provider Requirements.** The NSBR imposes the following requirements on co-providers:

> Co-providers and co-facilities must submit good faith estimate information … upon the request of the convening provider or convening facility. The co-provider or co-facility must provide, and the convening provider or convening facility must receive, the good faith estimate information no later than 1 business day after the co-provider or co-facility receives the request from the convening provider or convening facility.

(45 CFR § 149.610(b)(2)(i); *see also* 86 FR 56018). The information submitted by co-providers must include:

1. Patient name and date of birth;
2. Itemized list of items or services expected to be provided by the co-provider or co-facility that are reasonably expected to be furnished in conjunction with the primary item or service as part of the period of care;
3. Applicable diagnosis codes, expected service codes, and expected charges associated with each listed item or service;
4. Name, National Provider Identifiers, and Tax Identification Numbers of the co-provider or co-facility, and the State(s) and office or facility location(s) where the items or services are expected to be furnished by the co-provider or co-facility; and
5. A disclaimer that the good faith estimate is not a contract and does not require the uninsured (or self-pay) individual to obtain the items or services from any of the co-providers or co-facilities identified in the good faith estimate.

(*Id.* at § 149.610(d)(1); *see also* 86 FR 56019). After submitting the initial estimate, the co-provider must also notify the convening provider of any changes to the good faith estimate:

1. Co-providers and co-facilities must notify and provide new good faith estimate information to a convening provider or convening facility if the co-provider or co-facility anticipates any changes to the scope of good faith estimate information previously submitted to a convening provider or convening facility (such as anticipated changes to the expected charges, items, services, frequency, recurrences, duration, providers, or facilities).
2. If any changes in the expected co-providers or co-facilities represented in a good faith estimate occur less than 1 business day before that the item or service is scheduled to be furnished, the replacement co-provider or co-facility must

> accept as its good faith estimate of expected charges the good faith estimate for the relevant items or services included in the good faith estimate for the item or service being furnished that was provided by the replaced provider or facility.

(*Id.* at § 149.610(b)(2)).

If the patient schedules services directly with the co-provider, the co-provider becomes a convening provider and must comply with the convening provider rules:

> In the event that an uninsured (or self-pay) individual separately schedules or requests a good faith estimate from a provider or facility that would otherwise be a co-provider or co-facility, that provider or facility is considered a convening provider or convening facility for such item or service and must meet all requirements in paragraphs (b)(1) and (c)(1) of this section for issuing a good faith estimate to an uninsured (or self-pay) individual.

(*Id.* at § 149.610(b)(2)(iv)).

**Enforcement.** Co-providers who fail to provide the information necessary for a good faith estimate may be limited in their ability to recover reimbursement if the patient initiates the provider patient dispute resolution (PPDR) process. (45 CFR § 149.620; 86 FR 56028). Convening providers are not liable for the co-provider's non-compliance or deficient estimates so long as the convening provider fulfills its obligations by requesting the information from the co-provider and including the information provided in its good faith estimate to the patient. (86 FR 56016 and 56022). However, aside from the PPDR process, both the convening provider and co-provider may be liable for state or federal penalties if they fail to comply with the NSBR. States have the primary responsibility for enforcing the NSBR, but if the state fails to do so, HHS may impose civil penalties of up to $10,000 per violation. (42 USC 300gg-134(a)-(b)). So far, it appears that most states and HHS have been focusing more on education and encouraging corrective action rather than imposing penalties, but that may end now that providers have been given a year to comply with NSBR requirements. In the short run, non-compliance will likely not result in significant risk to providers, but that could change at any time. Accordingly, convening and co-providers should get their NSBR ducks in a row.

**Action Items.** The co-provider requirements seem overly burdensome and the time limits unworkable, but those are the current rules. Unless and until the rules are changed, convening and co-providers should implement appropriate processes to ensure compliance, including the following:

- Initially, providers should remember the limits to the NSBR good faith estimate rules. The good faith estimate requirements only apply to self-pay patients, not government beneficiaries or patients for whom claims are submitted to third-party payers. Also, the requirements for good faith estimates do not apply to walk-ins, urgent care, or emergent services that are not scheduled in advance unless the patient requests a good faith

estimate in advance). (HHS, FAQs About Good Faith Estimates (4/5/22), available here). For most providers, the good faith estimate rules apply to a relatively small percentage of patients; nevertheless, providers must put in place processes to address self-pay situations when they arise.

- If they have not done so, convening providers should take steps now to identify common co-providers and reach out to confirm that the co-providers are aware of their obligations and work together to establish a process for obtaining the information required by the NSBR.
- Convening providers may need to review and update their standard good faith estimate templates to include the required information from co-providers. Convening providers should compare their estimate against HHS's most recent template and other resources available here.
- Both convening and co-providers should implement policies and train staff concerning the rules, including those concerning changes to good faith estimates.
- Both convening and co-provides should watch for further HHS guidance and/or potential modification to the co-provider rules. Hopefully, HHS will change the rules, but do not count on it…

**Additional Information.** For more information concerning the NSBR requirements, see our article here.

Endnotes:

[1] Uninsured (or self-pay) patients means:

> (A) An individual who does not have benefits for an item or service under a group health plan, group or individual health insurance coverage offered by a health insurance issuer, Federal health care program …, or a health benefits plan under chapter 89 of title 5, United States Code; or
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> (B) An individual who has benefits for such item or service under a group health plan, or individual or group health insurance coverage offered by a health insurance issuer, or a health benefits plan under chapter 89 of title 5, United States Code but who does not seek to have a claim for such item or service submitted to such plan or coverage.

(45 CFR § 149.60(a)(2)(xiii)).

[2] As explained in the NSBR preamble:

> the convening provider or facility [must] contact all applicable co-providers and co-facilities no later than 1 business day after the request for the good faith estimate is received or after the primary item or service is scheduled, and request submission of expected

> charges for items or services that meet the requirements for co-providers and co-facilities under 45 CFR 149.610(b)(2) and (c)(2). The convening provider or convening facility must indicate in their request the date that the good faith estimate information must be received from the co-provider or co-facility. The co-provider or co-facility is responsible for providing timely information to the convening provider or convening facility as discussed later in this preamble. HHS is of the view that the convening provider or convening facility would not have accurate estimates to include in the good faith estimate without information being provided in a timely manner by the co-provider or co-facility.

(86 FR 56017).

[3] In its commentary accompanying the NSBR rules, HHS explained:

> HHS understands that it may take time for providers and facilities to develop systems and processes for receiving and providing the required information from co-providers and co-facilities. Therefore, for good faith estimates provided to uninsured (or self-pay) individuals from January 1, 2022 through December 31, 2022, HHS will exercise its enforcement discretion in situations where a good faith estimate provided to an uninsured (or self-pay) individual does not include expected charges from co-providers or co-facilities.

(86 FR 56023).

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