

# Enforcement of the No Surprises Act: Considerations for States

Georgetown University Center on Health Insurance Reforms (CHIR) and GMMB

November 4, 2021, 1:00-2:00 PM ET

**STATE**  
Health & Value  
**STRATEGIES**

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State Health and Value Strategies (SHVS) assists states in their efforts to transform health and healthcare by providing targeted technical assistance to state officials and agencies. The program is a grantee of the Robert Wood Johnson Foundation, led by staff at Princeton University's School of Public and International Affairs. The program connects states with experts and peers to undertake healthcare transformation initiatives. By engaging state officials, the program provides lessons learned, highlights successful strategies, and brings together states with experts in the field. Learn more at [www.shvs.org](http://www.shvs.org).

**Questions?** Email Heather Howard at [heatherh@Princeton.edu](mailto:heatherh@Princeton.edu).

*Support for this webinar was provided by the Robert Wood Johnson Foundation.  
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# Housekeeping Details

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All participant lines are muted. If at any time you would like to submit a question, please use the Q&A box at the bottom right of your screen.

After the webinar, the slides and a recording will be available at [www.shvs.org](http://www.shvs.org).

# About Georgetown University's Center on Health Insurance Reforms

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- A team of experts on private health insurance and health reform.
- Conduct research and policy analysis, provide technical assistance to federal and state policymakers, regulators, and consumer advocates.
- Based at Georgetown University's McCourt School of Public Policy.
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# Agenda

<b>Welcome and Introductions</b>	<b>1:00 – 1:05 pm ET</b> <i>(5 mins)</i>
<b>Level-Setting: NSA Enforcement under the NPRM</b>	<b>1:05 – 1:10 pm ET</b> <i>(5 mins)</i>
<b>Presentations on State Approaches: Maryland, Texas and Pennsylvania</b>	<b>1:10 – 1:40 pm ET</b> <i>(30 mins)</i>
<b>Communications Planning</b>	<b>1:40 – 1:45 pm ET</b> <i>(5 mins)</i>
<b>Questions &amp; Answers</b>	<b>1:45 – 1:55 pm ET</b> <i>(10 mins)</i>
<b>Next Steps</b>	<b>12:55 – 1:00 pm ET</b> <i>(5 mins)</i>

# Webinar Objectives



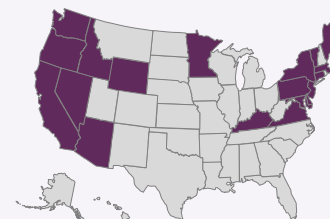
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Review the federal guidance on enforcement of the No Surprises Act on insurers and healthcare facilities and providers




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Hear from states on their approaches to implementing the No Surprises Act, two of which have state laws banning balance billing



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Identify communication needs and plans to educate stakeholders on new federal protections



# Level-Setting

# No Surprises Act Overview

- Protects patients from out-of-network surprise medical bills for emergency services, including air ambulances, and for non-emergency services at an in-network facility
  - Insurers, health plans, providers and facilities must provide patients with disclosure of NSA rights
  - Patients can consent to receive care from an out-of-network provider in some situations, though not for services from designated ancillary specialists, when care is urgent or unforeseen, and when no in-network provider is available
  - HHS will administer a complaints process and refer complaints to state regulators where appropriate
  - States with their own method for determining payment for out-of-network care (a “state specified law”) can continue to use those processes for balance bills involving **fully** insured plans. HHS-administered independent dispute resolution (IDR) process will apply to those in self-funded plans and to **fully** insured plans in states without a state specified law

# Enforcement of the No Surprises Act: Insurer Provisions

- Notice of Proposed Rulemaking (NPRM) issued 9/16/21
  - States are the primary enforcers of provisions that apply to insurers
    - HHS will enforce where a state fails to “substantially enforce” the provisions
    - CMS will follow a prescribed process for determining whether a state is failing to substantially enforce federal law
  - States that lack authority or ability to enforce the insurer provisions can enter into a collaborative enforcement agreement (CEA) with HHS.

# Enforcement of the No Surprises Act: Provider Provisions

- NPRM proposes same approach for provisions that apply to providers and facilities
  - NPRM recognizes that providers and facilities may not be regulated by the same entities responsible for provisions that apply to insurers
    - May include officials who regulate HMOs, directors of public health, or any other state department, agency, or board with applicable oversight authority over facilities and providers subject to NSA

# Enforcement Against Providers and Facilities: State Approaches

- *Insurance Depts.:* DOIs generally do not have regulatory authority over healthcare providers or facilities, so may be limited in their ability to enforce. States may authorize the DOIs to enforce against providers and facilities or report violations to the appropriate enforcement agency.
- *Health Depts.:* States may regulate managed care products under their health laws, which could provide health depts. that also regulate providers with implicit authority; could also codify ban on surprise bills in health code. However, DOHs may not have authority over all providers
- *Medical Licensing Boards:* Occupational licensing codes may prohibit physicians (but not facilities) from sending balance bills, with authority to suspend or revoke license for failing to comply
- *Consumer Protection Agencies:* Sending an unauthorized bill could be enforced as violation of unfair trade practices or consumer protection laws.

# Stakeholder Communications and Enforcement

- Broad education campaign for stakeholders can raise awareness of new law and help with enforcement
  - Provider education on new responsibilities under law
  - Consumer education on new rights under law, including notice and consent provisions
- Assisting consumers with billing problems
  - May be part of a state agency or in partnership with community-based organizations



# **State Presentations on Enforcement Approaches**

## Presenters

- **David Cooney**, MD Insurance Administration, and **Kimberly Cammarata**, MD Office of the AG, Health Education and Advocacy Unit
- **Chris Herrick** and **Rachel Bowden**, TX Dept. of Insurance
- **Sandy Ykema** and **Dave Buono**, PA Dept. of Insurance



# ***Enforcement of the No Surprises Act: Considerations for States***

State Health and Value Strategies Program

**Kimberly Cammarata**

Senior Assistant Attorney General  
Director, Health Education and Advocacy Unit  
Consumer Protection Division  
Maryland Attorney General's Office



# Health Education and Advocacy Unit

Consumer Protection Division

Created by the Maryland General Assembly

Mediates Healthcare Related Business Disputes

- Medical billing disputes
- Medical equipment/device disputes
- Medical records disputes
- Private health insurance appeals assistance (internal and external)
- APTC/CSR and exchange-related enrollment disputes

*Refer improper billing or coverage determinations to appropriate enforcement entity, including the AG's Consumer Protection Division.*



# Voluntary Mediation of Individual Consumer Complaints

- Using medical authorization signed by consumer, we obtain records from carrier and provider
- Review records to see if problem is on the carrier side, provider side, or both
- Sometimes just a consumer education issue

If carrier side, we work with carrier to resolve (using appeals process)

- ▶ Deemed service as not emergent
- ▶ Processed emergency claim as OON (applying OON deductible, other OON cost-share)
- ▶ EOB inappropriately places amounts in patient responsibility column
- ▶ Underpays non-par provider prompting provider to BB patient

*This generally works for us because we can refer the carrier to the MIA if the carrier is non-responsive or uncooperative.*

***Query: how will we enlist federal help for ERISA, FEHBP and non-federal governmental plans that refuse to respond to requests or to resolve improper claims processing vis a vis the provider-enforcement side?***



# Voluntary Mediation of Individual Consumer Complaints

If provider side, we work with provider to resolve

- ▶ Seek a response to consumer's complaint
- ▶ Educate provider about BB law
- ▶ Obtain refund, seek written documentation that patient balance is \$0 (or only the appropriate cost-share)



# Complaint Patterns: Mediate Compliance

## COVID-related PPE Charges and COVID Testing Charges

- Contacted licensing boards and trade associations – issued compliance alert
- Contacted carriers
- Issued press release alerting consumers and providers
- Informally resolved cases with providers improperly billing
- Worked with MIA to coordinate message

## Ambulance BB Law

- When our ambulance balance billing law passed, we had to work with several county attorneys' offices to address ongoing improper balance billing by their hired 3<sup>rd</sup> party billing agents



# Complaint Patterns: Enforcement Referral

- Intractable provider
- Pattern of improper billing by single provider/entity
- Pattern of improper billing by providers generally
- Large number of impacted consumers

Refer to CPD for investigation/enforcement under Consumer Protection Act, Consumer Debt Collection Act



# Consumer Protection Act

- **Prohibits unfair, abusive, or deceptive trade practices in a variety of circumstances, including the “sale of consumer services” and the “collection of consumer debts.”**
- **Unfair, abusive or deceptive trade practices include:**
  - ▶ **Misrepresentations**
  - ▶ **Omissions of important information**
  - ▶ **Violations of various other specific statutory provisions designed to protect consumers**
  - ▶ **Other unfair practices**
  - ▶ **Abusive practices**

<https://law.justia.com/codes/maryland/2010/commercial-law/title-13/>



# Consumer Protection Act

## What are misrepresentations?

False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers.

- Do not have to prove actual harm.
- Do not have to prove intent.
- Providers that seek to obtain payment of amounts prohibited by federal or state law or contractual terms intended to benefit the consumer, are misrepresenting their right to collect those sums.



# Consumer Protection Act

- What are material omissions?
  - ▶ Failure to state a material fact if the failure deceives or tends to deceive.
- How do you prove materiality?
  - ▶ Fact that is not disclosed would have impacted a consumer's decision
  - ▶ Significant number of unsophisticated consumers would attach importance to the information
- Examples
  - Advertising and renting an apartment without disclosing lack of licensure to do so was a failure to disclose a material fact.
  - Transmission repair shop franchisor's directive to withhold diagnostic and price information when such information was known and material, was a deceptive trade practice.
  - Failing to disclose unexpected Outpatient Facility Fee – [MA CPD Action \(2018\)](#)



# Consumer Protection Act

- **Maryland's CPA does not apply to the *professional services* of a certified public accountant, architect, clergyman, professional engineer, lawyer, veterinarian, insurance company authorized to do business in the State, insurance producer licensed by the State, Christian Science practitioner, land surveyor, property line surveyor, chiropractor, optometrist, physical therapist, podiatrist, real estate broker, associate real estate broker, or real estate salesperson, or medical or dental practitioner.**

<https://law.justia.com/codes/maryland/2010/commercial-law/title-13/subtitle-1/13-104/>

- Medical practitioner does not include hospitals, nursing homes, and other health care facilities.
- The exclusion applies only to *professional services*. The commercial aspects of a medical practice, such as laws concerning who may be billed and how, are not exempt. *Scull v. Groover*, 435 Md. 112 (2013)(private class action lawsuit against radiology provider that balance billed an HMO member).



# Maryland Consumer Debt Collection Act

In attempting to collect an alleged debt a collector may not, among other things:

- Claim, attempt, or threaten to enforce a right with knowledge that the right does not exist.
- Disclose or threaten to disclose information which affects the debtor's reputation for credit worthiness with knowledge that the information is false.
- Engage in any conduct that violates sections 804-812 of the federal Fair Debt Collection Practices Act.

<https://law.justia.com/codes/maryland/2010/commercial-law/title-14/subtitle-2/>

- *Providers that seek to obtain payment of amounts prohibited by federal or state law, or contractual terms intended to benefit the consumer, are claiming a right to bill that does not exist.*
- *Providers that threaten to file a negative credit report for the consumer's failure to pay amounts not owed, are violation the Consumer Debt Collection Act. misrepresenting their right to collect those sums.*



# Relief

- Injunctions
- Restitution
- Attorneys Fees and Costs
- Performance Bond or other Security
- Penalties of up to \$10,000 -\$25,000 per violation
  - ▶ Severity
  - ▶ Good Faith
  - ▶ Prior History
  - ▶ Deterrence
  - ▶ Whether Cease and Desist Order, Restitution Alone are Sufficient



# Enforcement

- Maryland has the current ability to enforce most NSA provisions against providers and facilities under the CPA and CDCA but will likely seek legislation to affirmatively state that violations of the NSA are CPA violations.
- Maryland will enter into a Collaborative Enforcement Agreement with CMS to fill in any enforcement gaps and to use federal IDR resources.
  - ▶ Certain out-of-state providers
  - ▶ Non-responsive non-state regulated health plan information needed
- Maryland will need additional mediation and enforcement resources.

# Texas approach to the No Surprises Act

Texas Department of Insurance

Chris Herrick, Deputy Commissioner, Life and Health Division

Rachel Bowden, Director, Regulatory Initiatives

# TDI | Texas approach to the No Surprises Act

- Texas enacted [SB 1264](#) in 2019 and balance billing protections and independent dispute resolution (IDR) processes have been in place since 2020;
- The Texas law is considered a “specified state law” under the No Surprises Act and will continue to apply, with respect to state-regulated plans. No changes expected.
  - The federal surprise billing protections and IDR processes will apply to air ambulance claims and to plans that are exempt from state regulation by ERISA.
- Other than the surprise billing protections for emergency care and care within an in-network facility, Texas does not have corresponding state laws, or authority to enforce the federal law.

# TDI | Responsibility for enforcement (plans)

Federal provisions (PHSA/CAA/42 USC)	Enforcement by State vs. CMS?
<b>Appeals for surprise bills</b> <a href="#">PHSA 2719 / Sec. 110 / §300gg-19</a>	Defer to CMS (as with external appeals under the ACA more broadly).
<b>Agent commission disclosures for individual and short-term limited duration</b> <a href="#">PHSA 2746 / Sec. 202 / §300gg-46</a>	Defer to CMS.
<b>Surprise billing protections for emergency care and providers within in-network facilities</b> <a href="#">PHSA 2799A-1(a) and (b) / Sec. 102 / §300gg-111(a) and (b)</a>	Texas will continue to enforce state surprise billing protections for consumers in state-regulated health plans.
<b>Independent Dispute Resolution (IDR)</b> <a href="#">2799A-1(c) / Sec. 103 / §300gg-111(c)</a>	Texas will continue to enforce state surprise billing protections; federal IDR process would be inapplicable for consumers in state-regulated health plans.

# TDI | Responsibility for enforcement (plans)

Federal provisions (PHSA/CAA/42 USC)	Enforcement by State vs. CMS?
<b>Database access fees; ID cards; Advanced explanation of benefits</b> <a href="#">2799A-1(d)- (f) / Sec. 102, 107, 111 / §300gg-111(d) - (f)</a>	Defer to CMS.
<b>Air ambulance surprise billing protections and IDR</b> <a href="#">2799A-2 / Sec. 105 / §300gg-112</a>	Defer to CMS.
<b>Continuity of care</b> <a href="#">2799A-3 / Sec. 113 / §300gg-113</a>	Defer to CMS. (Texas provisions are similar but not identical.)
<b>Price comparison tool</b> <a href="#">2799A-4 / Sec. 114 / §300gg-114</a>	Defer to CMS.
<b>Provider directory accuracy by health plans</b> <a href="#">2799A-5 / Sec. 116 / §300gg-115</a>	Defer to CMS.
<b>Removing gag clauses on price and quality info</b> <a href="#">2799A-9 / Sec. 201 / §300gg-19</a>	Defer to CMS.

# TDI | Responsibility for enforcement (providers)

Federal provisions (PHSA/CAA/42 USC	Enforcement by State vs. CMS?
<b>ER providers cannot balance bill</b> <a href="#">2799B-1 / Sec. 104 / §300gg-131</a>	Texas will continue to enforce state surprise billing protections for consumers in state-regulated health plans.
<b>Facility-based providers in in-network facilities cannot balance bill</b> <a href="#">2799B-2 / Sec. 104 / §300gg-132</a>	Texas will continue to enforce state surprise billing protections for consumers in state-regulated health plans.
<b>Provider disclosure of balance billing protections</b> <a href="#">2799B-3 / Sec. 104 / §300gg-133</a>	Defer to CMS for some providers, depending on authority of various regulatory agencies.
<b>Air ambulance providers cannot balance bill</b> <a href="#">2799B-5 / Sec. 105 / §300gg-135</a>	Defer to CMS.

# TDI | Responsibility for enforcement (providers)

Federal provisions (PHSA/CAA/42 USC)	Enforcement by State vs. CMS?
<b>Providers must give cost estimates</b> <a href="#">2799B-6 / Sec. 112 / §300gg-136</a>	Defer to CMS for some providers, depending on authority of various regulatory agencies.
<b>IDR for uninsured consumers whose costs substantially exceed estimate</b> <a href="#">2799B-7 / Sec. 112 / §300gg-137</a>	Defer to CMS for some providers, depending on authority of various regulatory agencies.
<b>Provider continuity of care requirements</b> <a href="#">2799B-8 / Sec. 113 / §300gg-138</a>	Defer to CMS for some providers, depending on authority of various regulatory agencies.
<b>Provider directory accuracy by providers</b> <a href="#">2799B-9 / Sec. 116 / §300gg-139</a>	Defer to CMS for some providers, depending on authority of various regulatory agencies.

- The Texas Department of Insurance ensures that health plans comply with the balance billing law and IDR processes
- We've been successful in educating the industry and helping them come into compliance and have not needed to take enforcement action
- Provider regulatory agencies are charged with ensuring that health care providers comply with the balance billing prohibition and participate in IDR processes in good faith
- Agencies may also refer issues to the Attorney General

# TDI | Provider requirements

- The Texas Medical Board issued a [guidance statement](#) related to surprise billing protections and the authority of the Board to enforce compliance under Occupations Code §§ [164.051\(a\)\(1\)](#), [164.052\(a\)\(5\)](#), and [164.053\(a\)\(1\)](#).
- The Texas Board of Nursing adopted rules to conform to the balance billing prohibitions in [22 TAC §217.23](#); and, under [§217.11](#), nurses must know and conform to all federal, state, and local laws and regulations.
- The Texas Health and Human Services Commission regulates Texas facilities. HHSC rules require provider compliance with applicable sections of SB 1264 and TDI rules.

[25 TAC §133.46](#) Hospitals

[25 TAC §229.144](#) Narcotic Treatment Programs

[25 TAC §135.4](#) Ambulatory Surgical Centers

[26 TAC §507.50](#) End Stage Renal Disease Facilities

[25 TAC §137.39](#) Birthing Centers

[26 TAC §510.45](#) Crisis Stabilization Units

[25 TAC §139.60](#) Abortion Facilities

[26 TAC §510.45](#) Private Psychiatric Hospitals

[26 TAC §506.37](#) Special Care Facilities

[26 TAC §564.28](#) Chemical Dependency Treatment Facilities

[26 TAC §509.67](#) Freestanding Emergency Medical Centers

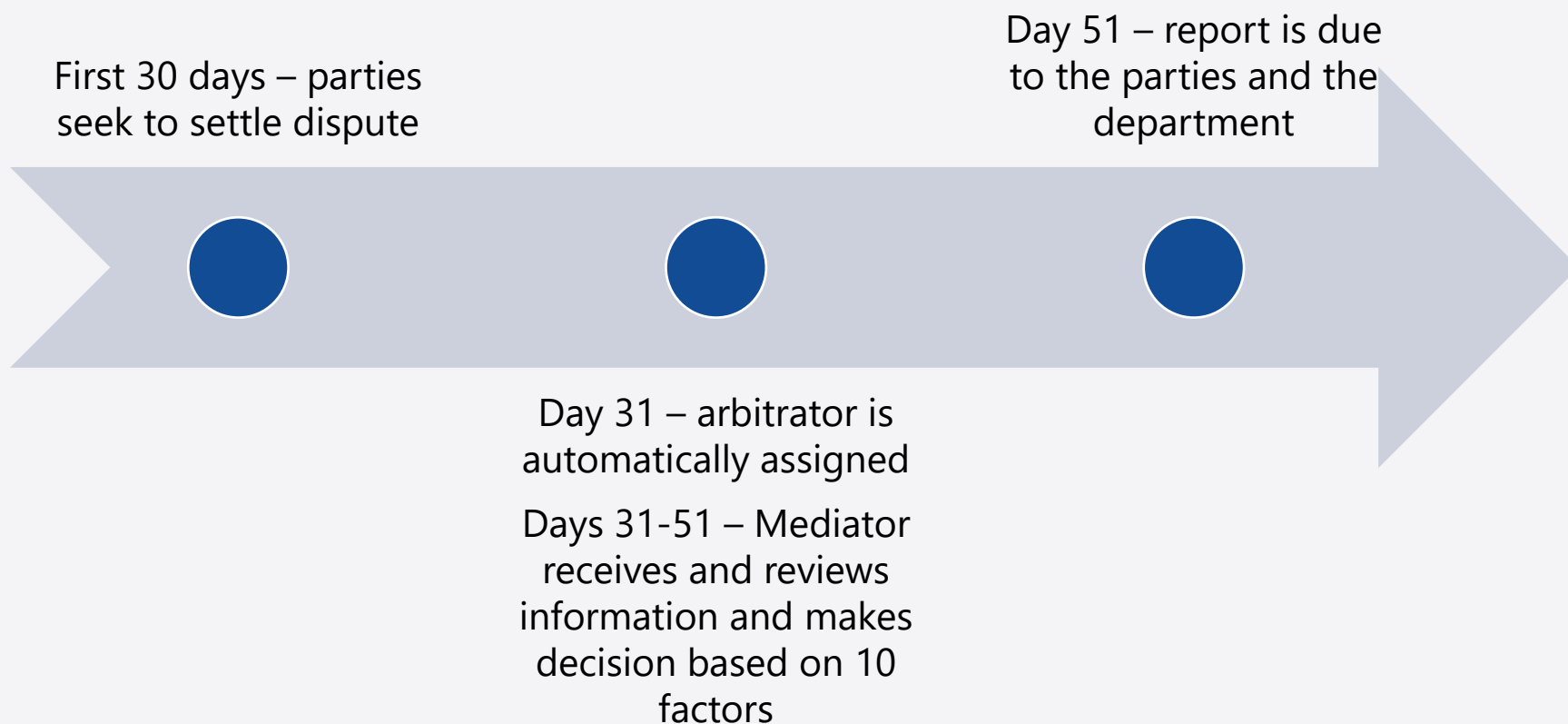
- Applies to fully Insured plans, ERS, and TRS
- Balance billing is prohibited for amounts due beyond cost sharing amounts for:
  - Emergency care
  - Care provided at an in-network facility by an out of network provider
  - Labs & imaging (in connection with in-network care)
- Two distinct processes for settling payment disputes
  - Arbitration – Provider claims
  - Mediation – Facility claims
- Parties can agree to settle their payment dispute
  - Through the health plans appeals process
  - On their own outside of the statutory process
  - By submitting a case through the Texas IDR Process

1. Care is provided
2. Payment is made
3. Dispute exists between the allowable amount and the billed charge

After 20 days from date payment is received, either party can submit a case into the Texas IDR process

- The first 30 days, the parties:
1. attempt to reach an informal settlement
  2. review list of 5 arbitrators / mediators and strike up to 2 each (or the parties can agree on who to use)

## 51 days from submission to decision required



## 180 days from submission to decision required

First 30 days – parties seek to settle dispute

Day 180 – report is due to the department on whether an agreement was reached

Day 31 – mediator is automatically assigned

Days 31-180 – Mediator attempts to bring parties to a mediated agreement



- TDI resources: [www.tdi.texas.gov/medical-billing/index.html](http://www.tdi.texas.gov/medical-billing/index.html)
- [SB 1264 \(86R\) text and legislative history \(capitol.Texas.gov\)](http://capitol.Texas.gov)
- [IDR statute: Insurance Code Chapter 1467](#)
- Rules in Title 28, Texas Administrative Code:
  - [Chapter 21, Subchapter OO](#): Disclosures by Out-of-Network Providers (to waive balance billing protection for voluntary out-of-network care)
    - [Form AH025](#) (waiver of balance billing protections)
  - [Chapter 21, Subchapter PP](#): Out-of-Network Claim Dispute Resolution

# Pennsylvania Implementation and Enforcement

# State Agency Coordination:

- The Insurance Department (PID) is the Commonwealth agency coordinating enforcement with state agencies that have oversight over Providers, including Facilities.
  - Dept. of State - provider licensure
  - Dept. of Health - facilities (and ambulance)
  - Dept. of Drug and Alcohol Programs - some provider oversight
  - PID/DOH - managed care plans
- The PID has a process set up to quickly review a complaint and make sure it is handled in the best way possible.
- The Federal government and state government will collaborate to enforce where appropriate.
  - Consumers may use the federal complaint process, though response time will likely be delayed.
  - The Federal government will enforce if the state is unable to or lacks authority.

# State Oversight Authority

- General Standard: State law applies unless it “prevents the application” of the federal law.
- PA state agencies will exercise their responsibilities to protect Pennsylvanians primarily through insurance, professional conduct, and licensure laws.
- PA will collaborate with federal agencies to coordinate enforcement efforts as necessary and appropriate:
  - HHS (for insurance plans and providers/facilities)
  - DOL (for self-funded plans)
  - Office of Personnel Management (for Federal Employee Health Benefit Plan)

# Our Webpage

- ▶ The webpage is currently in development. The page will include:
  - ▶ A description of the No Surprises Act.
  - ▶ Information related to Patient, Provider and Health Plan roles.
  - ▶ A link to the reporting form.

# Reporting to the Insurance Department

- ▶ When a State Agency receives a call related to balance billing and the No Surprises Act, they can visit our webpage for the guidance needed to assist the patient.
- ▶ Included on the page is a No Surprises Act Referral Form with necessary questions to ask while the patient is on the phone.
- ▶ Once the information is received, the State Agency may forward the document to (RA Account in development) for the PID to review and follow-up as appropriate.

*\*\* The form is in the process of being finalized*

AGENCY SUBMITTING THE REFERRAL: \_\_\_\_\_ AGENCY FILE NO: \_\_\_\_\_

**NO SURPRISES ACT - PENNSYLVANIA INSURANCE DEPARTMENT REFERRAL**

1. Person/Entity suspected of violation, address and phone number:  
\_\_\_\_\_

2. Name, address and telephone number of complainant:  
\_\_\_\_\_

3. Nature of suspected violation:  
\_\_\_\_\_

4. Section of law or regulation violated:  
\_\_\_\_\_

5. Description of information that has been developed or evidence assembled:  
\_\_\_\_\_

6. History of this type of activity from the provider/facility:  
\_\_\_\_\_

7. Details of communication to provider/facility:  
\_\_\_\_\_

8. Description of the attached documents:  
\_\_\_\_\_

9. Contact for the person most knowledgeable about the complaint:  
\_\_\_\_\_

# Once the Complaint is Received....

- ▶ The reporting form will be assigned to a consumer services representative and uploaded for tracking
  - ▶ The complaint will be marked as "No Surprises"
- ▶ The representative will complete outreach to obtain necessary information
- ▶ The outreach will potentially be to:
  - ▶ Patient,
  - ▶ Provider,
  - ▶ Health Plan
- ▶ The representative will work with the other state agencies if determined in the investigation their regulated entity may have acted inappropriately



# **Communications Strategies & Tactics**

# Communications Goals and Objectives

States should develop a plan to equip stakeholders with information such as the plan for implementation, what they need to know, and the enforcement process ahead of Jan. 1, 2022.

**Communications strategies are important to make sure key information reaches those who will assist with implementation and can lay the groundwork for future consumer questions.**

**Key questions communications must answer include:**

- Summary of rights and requirements in federal law and any state laws
- What are the details of the state's implementation plan?
- How do parties determine which laws apply (state vs. federal)?
- Where do parties direct their questions and complaints?

**Engage priority audiences now and establish ongoing conduit to reach consumers via:**

- Providers
- Healthcare Facilities
- Health Plan Carriers
- Trade Associations
- Consumer Advocacy Organizations
- Navigators/Assisters

**NOTE: Direct to Consumer messaging can come later, as enforcement begins**

# Communications Strategies and Tactics

Strategies and tactics to engage stakeholders now can be established to share information about state implementation and share information with consumers over time.

## Tactics to consider now, as implementation plans take shape:

- Create a specific dedicated webpage including details on state plans for implementation as decisions are made and the final rules, any related state laws, FAQ, model consumer notices, targeted fact sheets. See [CMS' dedicated webpage](#)
- Host webinars and calls targeting industry participants to provide an overview of the implementation plan, requirements, and resources
- Share email updates to partners

## Additional tactics to consider as enforcement begins:

- Issue a press release regarding January 1, 2022, effective date
- Create “consumer tips or checklist” to share with stakeholders, reporters and state partners
- Use social channels to share posts and graphics with information

# Discussion

The slides and a recording of the webinar will be available at [www.shvs.org](http://www.shvs.org) after the webinar

# Thank You

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