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Agency FAQS Defer Enforcement of Numerous Transparency and Surprise Billing Requirements and Provide Compliance Timeline

https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-49.pdf

The DOL, HHS, and IRS have issued FAQ guidance (Part 49) on implementation of the transparency in coverage (TiC) regulations and overlapping transparency provisions in the Consolidated Appropriations Act, 2021 (CAA). As background, TiC final regulations issued in November 2020 require, among other things, plans and insurers to publicly disclose price information in machine-readable files for plan years beginning on or after January 1, 2022. The disclosures must show (1) applicable rates for in-network providers; (2) allowed amounts and billed charges for out-of-network providers; and (3) prescription drug price information. Shortly after the TiC regulations were finalized, Congress passed the CAA, which, in addition to protections against surprise medical bills from nonparticipating providers or facilities, includes transparency requirements that overlap with the TiC regulations. These FAQs provide guidance on some of the CAA requirements and address the overlap and implementation timelines for the TiC and CAA transparency requirements. Here are highlights:

Machine-Readable Files

The agencies defer, until July 1, 2022, enforcement of the requirement to publicly disclose machine-readable files for in-network rates and out-of-network allowed amounts and billed charges. The agencies defer, pending further rulemaking, enforcement of the TiC regulations' requirement that plans and insurers publish machine-readable files with prescription drug pricing.

Price Comparison Tools

Noting that the price comparison requirements in the CAA (applicable to plan years beginning on or after January 1, 2022) are "largely duplicative" of the internet-based self-service tool component of the TiC regulations (effective for plan years beginning on or after January 1, 2023), the agencies intend to propose regulations addressing whether compliance with the TiC regulations satisfies the analogous CAA requirements and requiring price comparison information to be available by phone. The agencies will align the enforcement dates of the TiC and CAA requirements by deferring enforcement of the CAA price comparison requirement to plan years beginning on or after January 1, 2023.

ID Cards

The agencies confirm that regulations will not be issued before the January 1, 2022 effective date of the CAA requirement that plans and insurers include on all physical or electronic identification (ID) cards any applicable deductibles and out-of-pocket maximum limitations. Plans and insurers are expected to implement the requirements using a good faith, reasonable interpretation of the statute until regulations are adopted. For example, a plan or insurer will not be out of compliance with the ID card requirements if physical or electronic ID cards include the applicable major medical deductible and out-of-pocket maximum, with a consumer assistance phone number and website, or a Quick Response (QR) code or hyperlink, to access additional deductibles and out-of-pocket maximum limits.

Good Faith Estimates and Advanced EOBs

Acknowledging that compliance with the CAA requirement that providers furnish plans with good faith estimates of expected charges "is likely not possible by January 1, 2022," the agencies will defer enforcement until regulations to fully implement the requirements are adopted and applicable. Likewise, enforcement will be deferred for the CAA requirement that plans and insurers, upon receiving a provider's good faith estimate, send an advanced explanation of benefits (EOB) to participants and beneficiaries. The agencies intend to undertake rulemaking "in the future" to implement advanced EOBs, including "establishing appropriate data transfer standards." The delays are attributed to "complexities of developing the technical infrastructure for transmission of the necessary data" from providers to plans and insurers.

Gag Clauses

The agencies do not expect to issue regulations "at this time" on the CAA's "self-implementing" gag clause provision, which, among other things, prohibits group health plans from entering into agreements that preclude specified disclosures of provider-specific cost or quality-of-care information. Until guidance is issued, plans and insurers are expected to implement the requirements prohibiting gag clauses using a good faith, reasonable interpretation of the statute.

Provider Directories

Enforcement is deferred for the CAA requirement that group health plans establish and periodically update a database on the plan's public website that contains a list of contracted providers and facilities, with provider directory information for each. Although the requirement applies to plan years beginning on or after January 1, 2022, rulemaking will not be issued until after the effective date. Plans and insurers are expected to implement these provisions using a good faith, reasonable interpretation of the statute. In the meantime, the agencies will not deem plans or insurers to be out of compliance if, when an individual is inaccurately informed that a non-participating provider or facility is a participating provider or facility, the plan or insurer (1) imposes a cost-sharing amount that is not greater than the cost-sharing amount for a participating provider, and (2) counts those cost-sharing amounts toward any deductible or out-of-pocket maximum.

Balance Billing Protections Disclosures

The agencies confirm that they may address the disclosure requirements for the CAA balance billing protections in more detail in future guidance or rulemaking, but until then, plans and insurers are expected to implement the requirements using a good faith, reasonable interpretation of the statute. Use of the previously issued model disclosure notice in accordance with the accompanying instructions will be considered good faith compliance.

Pharmacy Benefits and Drug Costs Reporting

The agencies intend to issue regulations that will address the CAA's pharmacy benefit and drug cost reporting requirements, but they will defer enforcement of the first reporting deadline of December 27, 2021, or the second reporting deadline of June 1, 2022, pending the issuance of regulations or further guidance. The agencies strongly encourage plans and insurers to start working to ensure they will be able to begin reporting 2020 and 2021 data by December 27, 2022.

Continuity of Care

With regard to the CAA protections that ensure continuity of care in instances when a plan or insurer's termination of contractual relationships results in changes in provider or facility network status, the agencies do not expect rulemaking to implement the requirements until after the January 1, 2022 effective date. Until rulemaking to fully implement these provisions is adopted and applicable, plans and insurers are expected to implement the requirements using a good faith, reasonable interpretation of the statute.

These sweeping deferrals contain nuanced timelines and interim compliance details that are a must read for plan sponsors and advisors. Although compliance with some requirements is deferred, good faith compliance is still required in most instances.

Please visit www.moreton.com/news-events/ for more information and to view other client alerts. This Client Alert was written by Carolyn Cox, who provides our clients with compliance services. For additional questions, please contact Carolyn at 801-715-7110 or ccox@moreton.com.