EPSTEIN BECKER GREEN | Health Care & Life Sciences

CLIENT ALERT

New Jersey's Surprise Medical Bill Law:

Part 2: Comparison to New York's and California's "Surprise Bill" Laws

By Tzvia Feiertag, Christopher A. McMican, Jackie Selby, Lauren A. Farruggia, and Kevin J. Malone

October 2018

New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")[1] creates a statutory framework that attempts to protect consumers from medical bills for out-of-network services that they had no choice in selecting, often referred to as "surprise bills" in similar legislation in other jurisdictions.

This Client Alert, which is Part 2 of a two-part series, compares the provisions of the NJ Law to New York's Emergency Medical Services and Surprise Bills Law (Financial Services Law, Article 6)[2] and California's Surprise Bill Law (Assembly Bill 72),[3] two recently adopted statutes that sought to address the surprise bills issue, which has garnered significant national attention, and were the subject of prior Client Alerts.[4] (Part 1 of this series focused on regulatory issuances by the New Jersey Division of Consumer Affairs and the New Jersey Department of Banking and Insurance in response to the NJ Law.[5])

---

[1] Assembly Bill No. 2039, signed by Governor Murphy on June 1, 2018, *available at:* http://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A2039.

[2] Emergency Medical Services and Surprise Bill, Financial Services Law Article 6, signed March 31, 2014, *available at*: http://www.dfs.ny.gov/consumer/hprotection.htm.

[3] Assembly Bill No. 72, Approved by Governor Sep. 23, 2016, *available at:* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB72.

[4] *See* Epstein Becker Green *Health Care & Life Sciences Client Alerts*, "New York's 'Emergency Medical Services and Surprise Bills' Law" (Oct. 22, 2014), *available at:* https://www.ebglaw.com/news/new-yorks-emergency-medical-services-and-surprise-bills-law/; "California's Surprise Medical Bill Statute: Part 1: Implications and National Trends" (Dec. 6, 2016), *available at:* https://www.ebglaw.com/news/californias-surprise-medical-bill-statute-part-1-implications-and-national-trends/; and "California's Surprise Medical Bill Statute: Part 2: Comparison to New York's Emergency Medical Services and Surprise Bills Law" (Dec. 12, 2016), *available at:* https://www.ebglaw.com/news/californias-surprise-medical-bill-statute-part-2-comparison-to-new-yorks-emergency-medical-services-and-surprise-bills-law/.

[5] *See* Epstein Becker Green *Health Care & Life Sciences Client Alert*, "New Jersey's Surprise Medical Bill Law: Part 1: Regulatory Issuances by New Jersey Agencies" (Oct. 3, 2018), *available at:* https://www.ebglaw.com/news/new-jerseys-surprise-medical-bill-law-part-1-regulatory-issuances-by-new-jersey-agencies/. This series supplements to two other Client Alerts on the NJ Law, which are available at https://www.ebglaw.com/news/new-jerseys-surprise-medical-bill-law-implications-and-national-trends/ and https://www.ebglaw.com/news/self-funded-erisa-health-plans-and-new-jerseys-surprise-out-of-network-medical-bill-law-are-you-in-or-out-its-time-to-decide/.

The NJ Law tracks some of the key provisions found in the earlier New York and California surprise bill laws, such as exclusion of Medicare Advantage plans and Medicaid managed care plans. But the NJ Law differs in a few respects. Notably, the NJ Law does not actually use the term "surprise bill," unlike the New York and California provisions. Like New York (but unlike California), the NJ Law includes coverage for emergency services and provides significant disclosure requirements for health care facilities and health care professionals. In addition, the NJ Law also includes an "opt in" provision that allows self-funded Employee Retirement Income Security Act of 1974 ("ERISA") health plans to elect to be subject to the NJ Law's arbitration and certain other provisions. Providers, plans, and insurers operating in other states, especially in those states where legislation has been proposed and debated but not yet enacted, should take careful note of the provisions of these laws as a model that other states or Congress may soon adopt.

Comparing the "Surprise Bill" Laws in New Jersey, New York, and California

Surprise Bill Policy Element	New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")	New York's Emergency Medical Services and Surprise Bills Law ("NY Law")	California's Surprise Bill Law ("CA Law")
Definition of "Surprise Bill"	The NJ Law does not use the term "surprise bill." However, the NJ Law defines "inadvertent out-of-network services" as health care services that are (i) covered under a managed care health benefits plan that provides a network and (ii) provided by an out-of-network ("OON") health care provider in the event that a covered person utilizes an in-network health care facility for covered health care services and, for any reason, in-network health care services are unavailable in that facility. This includes laboratory testing ordered by an in-network provider but performed by an OON bioanalytical laboratory.	The NY Law defines "surprise bill" as charges for (i) services from an OON physician at an in-network hospital or surgical center when a participating physician is not available, the service is rendered without the patient's knowledge, or an unforeseen service need arose; (ii) services from OON providers (including laboratory and pathology services) when resulting from a referral from an in-network physician without a signed patient form consenting to the OON status of the provider; or (iii) any physician service to an uninsured patient at any hospital or ambulatory surgery center when the patient has not received all disclosures.	The CA Law defines "surprise bill" as charges for (i) covered services provided by an OON individual health professional at a contracted health facility where the beneficiary is receiving a covered service or (ii) services provided by an OON individual health professional "resulting from" a covered service delivered at a contracted health facility.

Surprise Bill Policy Element	New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")	New York's Emergency Medical Services and Surprise Bills Law ("NY Law")	California's Surprise Bill Law ("CA Law")
Inclusion of Emergency Services	Yes. Health care facilities are prohibited from billing a covered person for emergency services in excess of any deductible, copayment, or coinsurance amount applicable to in-network services under that person's health care plan.	Yes. Some emergency services are excluded from the independent dispute resolution process ("IDRP") if the bill does not exceed 120% of the usual and customary cost and the fee disputed is $631.72 (adjusted annually for inflation rates) or less after any applicable co-insurance, co-payment, and deductible.	No. Existing California law requires a health plan to reimburse providers for emergency services and care provided to its enrollees and insurers to cover OON emergency services subject to in-network cost sharing.
Covered Insurers/Plans	A "carrier" is defined as "an entity that contracts or offers to contract to provide, deliver, arrange for, pay for, or reimburse any of the costs of health care services under a health benefits plan." Applicable carriers include an insurance company authorized to issue health benefits plans; a health maintenance organization; a health, hospital, or medical service corporation; a multiple employer welfare arrangement ("MEWA"); the State Health Benefits Program and the School Employees' Health Benefits Program; or any other entity providing a health benefits plan. Medicaid (including Medicaid managed care organizations), Medicare (including Medicare Advantage plans), and TRICARE are not impacted by the NJ Law.	Health maintenance organizations and insurance plans are subject to New York State regulation. Exclusions include Medicare Advantage plans, Medicaid managed long-term care plans, Medicaid fee-for-service coverage, no fault, and workers' compensation coverage.	Health care service plans are regulated by the California Department of Managed Health Care ("DMHC") and health insurers are regulated by the California Department of Insurance ("CDI"). Exclusions include Medicare Advantage plans, Medicaid managed care plans, Medicaid fee-for-service coverage, no fault, and workers' compensation coverage.

Surprise Bill Policy Element	New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")	New York's Emergency Medical Services and Surprise Bills Law ("NY Law")	California's Surprise Bill Law ("CA Law")
Covered Providers	Covered providers include individual health care professionals and health care facilities. "Health care professional" means "an individual, acting within the scope of his licensure or certification," who provides a covered service defined by a health care plan. "Health care facility" means a licensed "general acute care hospital, satellite emergency department, hospital based off-site ambulatory care facility in which ambulatory surgical cases are performed, or ambulatory surgery facility."	Bills from many types of providers may constitute surprise bills, including laboratory and pathology services.	Only bills from "individual health professionals" may constitute surprise bills. An "individual health professional" includes a physician, a surgeon, and any other professional who is licensed by California to deliver or furnish health care services in California (other than dentists). The definition of "contracted health facility," where the in-network service begins and which results in the surprise bill, includes hospitals, ambulatory surgeries, "other outpatient settings," laboratories, and radiology/imaging centers.
Limitations on Patient Costs	The NJ Law requires health plans and insurers to limit a covered person's cost to any deductible, copayment, or coinsurance amount applicable to in-network services under that person's health care plan.	The NY Law requires providers of surprise bills to take any dispute as to the amount offered by the plan to the independent dispute resolution process. A beneficiary must be held harmless to the level of cost sharing for in-network services. For self-insured plans and the uninsured, there is no limit on the balance billing, but patients may dispute charges to the independent dispute resolution process.	The CA Law requires health plans and insurers to limit beneficiary cost exposure to the copay, coinsurance, and deductible amounts provided for in-network providers.

Surprise Bill Policy Element	New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")	New York's Emergency Medical Services and Surprise Bills Law ("NY Law")	California's Surprise Bill Law ("CA Law")
Consent Safe Harbor	There is no inadvertent OON service where a covered person "knowingly, voluntarily, and specifically" selects an OON provider for services with full knowledge that the provider is OON with respect to the covered person's health benefits plan, under circumstances that indicate that the covered person had the opportunity to be serviced by an in-network provider, but instead selected the OON provider.	For OON providers receiving a referral from an in-network provider, it is not a surprise bill if a patient explicitly consented in writing that the referral was to an OON provider and that such referral may result in costs not being covered by the patient's plan.	Providers can submit a full bill when a patient consents in writing in advance of the OON service. The consent must be collected separately from other consents to treat or share medical information. The OON health professional must furnish a written estimate of the patient's total out-of-pocket costs, and the billed charges must be limited to the estimate, absent a separate updated consent.
Reimbursement Rate Provisions	If a carrier and a health care provider cannot agree on a reimbursement rate for OON services provided to a covered person, then either the carrier, health care professional, or covered person can initiate binding arbitration to come to a reimbursement agreement.	For OON physician services where a patient assigns benefits, the health plan must pay the billed amount or attempt to negotiate a different amount. If the latter fails to resolve any payment dispute, the plan must pay an amount that the plan determines is reasonable, and either party may submit the dispute to an independent dispute resolution entity. The entity will select either the plan's payment or the physician's fee. For OON physician services without an assignment of benefits, or for services provided to an uninsured patient or a beneficiary of a self-insured plan, the patient or	Plans and insurers must reimburse such OON professional services the greater of the average contracted rate or 125% of the Medicare payment for the same service in that geographic region. In addition, the CA Law creates a new regime of rate oversight and regulation.

Surprise Bill Policy Element	New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")	New York's Emergency Medical Services and Surprise Bills Law ("NY Law")	California's Surprise Bill Law ("CA Law")
		beneficiary may submit the dispute regarding the surprise bill for review to an independent dispute resolution entity. The entity will determine a reasonable fee.	
Independent Dispute Resolution Process	The NJ Law establishes a binding arbitration process for carriers and health care providers that cannot agree on a reimbursement rate for OON services provided to a covered person.	The NY Law allows providers to dispute the amount offered by the plan for surprise bills through a binding independent process. For state-regulated plans, the independent resolution entity determines whether a provider's bill or the health plan's payment will be paid, and the losing party is responsible for the costs associated with the dispute.	The CA Law requires the individual health professional to exhaust any internal appeals process prior to going to the IDRP. Other details are identified in DMHC and CDI rules and procedures for fees and process.
Disclosure Obligations	The NJ Law requires health care facilities to disclose to covered persons whether they are in-network for non-emergency services. Facilities must also make available to the public a list of their standard charges, consistent with federal law. A health care facility must also post on its website the health benefits plans in which the facility is a participating provider; a statement that physician services are not included in the facility's charges; a statement that physicians may or may	The NY Law requires specific disclosures by hospitals, diagnostic and treatment facilities, and physicians regarding the health plans in which the provider is a participating provider and, in some cases, requires a list of standard charges and statements to patients, in public locations, to check with physicians to determine whether all providers are in-network.	The only disclosure obligations are those pursuant to the establishment of the consent safe harbor.

Surprise Bill Policy Element	New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")	New York's Emergency Medical Services and Surprise Bills Law ("NY Law")	California's Surprise Bill Law ("CA Law")
	not participate with the same health benefits plans as the facility; a statement that the covered person should contact a physician to determine the health benefits plans in which the physician participates; the name, mailing address, and telephone number of the hospital-based physician groups that the facility has contacted with; and the name, address, and telephone number of the physicians employed by the facility and the health benefits plans in which they participate. Individual health care professionals must (i) disclose the health benefit plans with which they participate; (ii) disclose to a particular covered person if they are OON with the person's plan; (iii) provide the covered person with a billing estimate and with affiliated CPT codes, if requested; (iv) advise the covered person that he or she has the financial responsibility to pay for any OON services; and (v) promptly notify the covered person if their network status changes during the course of treatment.		

Surprise Bill Policy Element	New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")	New York's Emergency Medical Services and Surprise Bills Law ("NY Law")	California's Surprise Bill Law ("CA Law")
	Self-funded ERISA health plans, should they elect to be subject to the NJ Law, must amend their employee benefit plan, coverage policies, contracts, and other related documents to explain their adherence to the NJ Law.		
Network Adequacy Provisions	The NJ Law grants authority to the New Jersey Department of Health to subject carriers to penalties if they fail to achieve provider network adequacy.	The New York State Department of Financial Services promulgated new network adequacy regulations following the passage of the NY Law that added the requirements for specific provider composition and provided time and distance standards for insurance products.	The CA Law grants additional authority to DMHC and/or CDI to promulgate additional network adequacy regulations. Also, the CA Law requires DMHC to annually review health plan compliance with newly developed timely access standards and to post the findings on its website.
Approach to Beneficiaries of Medicare Advantage and Medicaid Managed Care Plans	Medicare Advantage is not covered because it is preempted by federal requirements; Medicaid managed care is statutorily excluded.	Medicare Advantage is not covered because it is preempted by federal requirements; Medicaid managed care is included, except for the managed long-term care programs.	Medicare Advantage is not covered because it is preempted by federal requirements; Medicaid managed care statutorily is excluded.
Approach to Beneficiaries of Self-Insured Plans and the Uninsured	The NJ Law does not contain provisions for uninsured persons. Certain self-funded ERISA health plans may elect to be subject to the NJ Law's requirements by notifying the Department of Health ("Electing Self-Funded Plans"). Some of the NJ Law's provisions, such as arbitration and identification cards, also	The independent dispute resolution process is available if a provider disputes OON reimbursement or the uninsured or self-insured patient disputes the charge.	None.

Surprise Bill Policy Element	New Jersey's Out-of-Network Consumer Protection, Transparency, Cost Containment and Accountability Act ("NJ Law")	New York's Emergency Medical Services and Surprise Bills Law ("NY Law")	California's Surprise Bill Law ("CA Law")
	appear to apply to self-funded health plans that do not "opt into" the NJ Law (albeit in a different manner than as applied to Electing Self-Funded Plans).		

* * *

This Client Alert was authored by attorneys from Epstein Becker Green's Health Care & Life Sciences and Employee Benefits & Executive Compensation practices—namely, **Tzvia Feiertag, Christopher A. McMican, Jackie Selby, Lauren A. Farruggia,** *and* **Kevin J. Malone.** *For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*