

Issue Brief: New York's Efforts to Reform Surprise Medical Billing

February 2019





Overview

Surprise health care bills have recently been front-and-center at the national level. In January 2019, the Trump administration met with a group of patients to hear their personal stories and concerns, U.S. senators have introduced bills to address the problem, and the American College of Emergency Physicians has released its own framework to protect patients from what has been an area of frustration for so many of them. A surprise bill generally refers to an insured patient being charged for services inadvertently received by an out-of-network health care provider. This situation can occur when the patient was not aware the physician was out-of-network, or when circumstances required the use of an out-of-network physician. For example, a patient could have a scheduled surgery with an in-network surgeon but be unaware that the anesthesiologist was out-of-network. Or a patient having a severe cardiac event could be billed for out-of-network care administered at the nearest hospital, even though the patient was in an emergency situation and could not have safely sought an in-network provider.

These surprise charges can be substantially higher than when the same service is provided by an in-network provider. This can happen to insured patients for two reasons: (1) the insurance plan provides minimal or no coverage for services delivered by out-of-network providers and (2) the out-of-network provider charges a higher amount for the service than the amount that would have been negotiated between the network providers and the insurer. These full charge amounts have been shown to be an average of 2.5 times higher than what most health insurers typically pay.¹ Examples of high-cost transactions included in surprise bills include a \$2,000 bill for three stitches and more than \$100,000 for a surgical procedure that would have cost a small fraction of that amount in-network.²

Congress previously considered several proposals related to surprise medical expenses. If enacted, these laws would have protected consumers nationally from paying for out-of-network care if the patient could not have reasonably sought care from an in-network provider. There are signs that the new Congress may take up this issue.

Absent federal action, several states—most notably New York, with its passage of the nation's very first surprise bill law in 2014—have taken the lead on legislation that attempts to shield

¹ Richman, B. D.; Kitzman, N.; Milstein, A.; and Schulman, K. A. (2017). Battling the Chargemaster: A Simple Remedy to Balance Billing for Unavoidable Out-Of-Network Care. *American Journal of Managed Care*, 23(4), e100–e105; Anderson, G.F. (2007). From 'Soak the Rich' to 'Soak the Poor': Recent Trends on Hospital Pricing. *Health Affairs*: 26(3):780–789.

² Elisabeth Rosenthal, "As Hospital Prices Soar, a Stitch Tops \$500," The New York Times, <http://www.nytimes.com/2013/12/03/health/as-hospital-costs-soar-single-stitch-tops-500.html>, accessed February 2019.



Overview (continued)

consumers from surprise bills. Although states continue to take various steps to shield consumers, New York is one of only nine states found to have comprehensive protections from surprise bills.³

While much progress has been made at the State level, there are opportunities to build upon the success of New York's law. This issue brief provides details on New York's groundbreaking 2014 surprise bill legislation, the impact of the law to date, and further enhancements that can be made to continue New York's leadership on an issue that is increasingly receiving attention as a pro-consumer and pro-price transparency priority.

³ The Commonwealth Fund, "State Efforts to Protect Consumers from Balance Billing," <https://www.commonwealthfund.org/blog/2019/state-efforts-protect-consumers-balance-billing>, accessed February 2019.



Surprise Bills in New York State

New York was the first state to enact a surprise bill law, which put it at the forefront of early efforts to address a growing area of frustration and concern for consumers. Legislation protecting consumers from financial responsibility for surprise bills passed in October 2014 and went into effect on March 31, 2015.⁴ Prior to the law being passed, the New York State Department of Financial Services (DFS), the agency responsible for overseeing insurance companies in New York, conducted a review of more than 2,000 complaints received regarding surprise bills. It found that 90% of surprise bills were not for emergency services but for other in-hospital services. For example, out-of-network assistant surgeons—who often were called in without the patient’s knowledge—billed an average of \$13,914, of which insurers paid \$1,794. Surprise bills by out-of-network radiologists averaged \$5,406, with insurers paying \$2,497.⁵ Patients were billed the difference, even though they may not have had the knowledge or choice of who the provider was or what service was being delivered.

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- If the patient was treated at any point by an out-of-network provider without giving written consent to be treated out-of-network.
- If no in-network physician was available at the time to provide care, or if an in-network physician provided a referral to an out-of-network provider without explaining that the provider was out-of-network.

⁴ NY Fin Serv L § 605 (2014).

⁵ New York State Department of Financial Services, “An Unwelcome Surprise: How New Yorkers Are Getting Stuck with Unexpected Medical Bills from Out-of-Network Providers,” http://www.statecoverage.org/files/NY-Unexpected_Medical_Bills-march_7_2012.pdf, accessed February 2019.



Surprise Bills in New York State (continued)

- If any emergency or unforeseen medical needs that arose over the course of a visit required the immediate attention of an out-of-network provider.⁶

Another important element of the law was the establishment of an **independent dispute resolution (IDR) process**. When a patient receives surprise out-of-network care, the health plan makes a payment to the provider. If the provider believes the amount is incorrect or too low, the plan and provider go through an IDR process to determine the final amount to be paid. The patient is not held responsible, so long as the care that was received was in line with the surprise billing circumstances outlined in the law.

In an effort to make in-network and out-of-network information readily available to consumers, New York's surprise bill law also requires hospitals and other health care facilities to specifically disclose to patients a list of providers and the plans they participate in. New York's surprise bill law also required that, in some cases, hospitals make their standard charge information publicly available to patients. Starting January 1, 2019, this requirement was subsequently included in federal regulations.

⁶ Colloquially, the term "surprise bills" is used to refer to unexpected out-of-network charges for both emergency and nonemergency care. Within the legislation, protections for surprise emergency service bills are separated from protections from general surprise bills for regular, scheduled, or nonemergency medical care. Under the law, care provided within a hospital emergency department will generally be protected from out-of-network billing, regardless of the hospital's status in the network. Emergency care protections are included in the general surprise bill legislation, but also codified separately as [Insurance Law Section 3241\(c\)](#).



Impact of New York's Current Surprise Bill Law

The main goal of the New York State law is to protect consumers from out-of-network charges in circumstances beyond their control. The law has been effective at reducing out-of-network billing for emergency services. According to an analysis by researchers at Yale University, the percent of out-of-network emergency department services that were billed decreased from 20.1% in 2013, before the law was passed, to 6.4% in 2015, after its implementation.⁷ New York's drop in out-of-network billing for emergency care was significant, especially when compared with neighboring states Massachusetts, Connecticut, New Jersey, Vermont, and Pennsylvania, where rates held relatively steady over the same time period.⁸ The data on out-of-network billing for nonemergency services during this time period are limited.

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A key component of the law—the IDR process—has been increasingly used by consumers. In 2015, the first year the legislation was enacted, there were 207 emergency service surprise bills and 36 other nonemergency surprise bills that went through the IDR process; by 2017, these numbers had grown to 645 and 451, respectively.⁹

⁷ Cooper, Z.; Morton, F. S.; and Shekita, N. (2017). Surprise! Out-of-Network Billing for Emergency Care in the United States. *National Bureau of Economic Research*, doi:10.3386/w23623.

⁸ Cooper, Z.; Morton, F. S.; and Shekita, N. (2017). Surprise! Out-of-Network Billing for Emergency Care in the United States. *National Bureau of Economic Research*. doi:10.3386/w23623.

⁹ New York State Division of Financial Services, "New York Consumer Guide to Health Insurance Companies," 2018, https://www.dfs.ny.gov/consumer/health/cg_health_2018.pdf, accessed February 2019.



Opportunities to Enhance NY's Surprise Bill Law

New York State has made significant progress in protecting patients from surprise bills.

This section highlights opportunities for the State to build upon these early successes to further enhance its law.

NETWORK ADEQUACY STANDARDS AND ENFORCEMENT

If there is not an acceptable in-network provider, patients may still face out-of-network bills when they go to an out-of-network provider—as long as they have been informed that the provider is out-of-network. Following the passage of the surprise bill law, DFS sought to address the issue of network adequacy by releasing additional regulations that required insurance plans to take into account time and distance standards when crafting their networks.¹⁰ New York State could craft more expansive standards and regulations for in-network plans. In addition, it could institute penalties for those that do not comply with these standards.

Another issue related to network adequacy arises when in-network physicians refer patients to out-of-state providers in their network, where the New York State surprise bill law is not applicable. As with any state's surprise bill law, it only applies to providers in that state, regardless of certain physician networks that may cross over into neighboring states. Patients living in counties bordering other states may receive a referral to an in-network provider that is out of state, leaving the consumer without the protections of the New York State law. Creating a protection for this scenario has the potential to safeguard New Yorkers who work or whose closest provider is located in a neighboring state.

NETWORK DISCLOSURE REQUIREMENTS

New York State's legislation requires hospitals and other health care provider facilities to post information about their providers and the insurance plans that they accept. In addition, health plans must post the listing of participating providers on their websites and update their website within 15 days of the addition or termination of a provider from its network or a change in a physician's hospital affiliation.¹¹ Although New York State's network disclosure requirements are strong, they could be made more robust by requiring plans and providers to proactively inform patients of changes in provider coverage status and by using a variety of

¹⁰ New York State Division of Financial Services, "Network Adequacy Standards and Guidance," https://www.dfs.ny.gov/insurance/health/Network_Adeq_standards_guidance_Instructions_9.15_Final.pdf, accessed February 2019.

¹¹ New York State Division of Financial Services, "Out-of-Network Law (OON) Guidance (Part H of Chapter 60 of the Laws of 2014)," https://www.dfs.ny.gov/insurance/health/OON_guidance.pdf, accessed February 2019.



Opportunities to Enhance NY's Surprise Bill Law (continued)

communication methods, such as mailing information to beneficiaries, as is the case in New Jersey, where patients receive prompt notice of network provider changes.¹²

PROVIDER BILLING

Under New York State's law, there is no limit on what a provider can charge for medical services, so long as the patient is ultimately held not responsible after the arbitration process. However, patients may still get a bill with the full charge amount from providers. The law requires providers to include documentation to assist patients in disputing surprise bill charges; however, it may still fall on the patient to start the arbitration process. By contrast, New Jersey includes a provision in its recently passed surprise bill legislation that prohibits facilities from billing insured patients in excess of the deductible, copayment, or coinsurance applicable under their insurance plans. New York could consider a similar approach to better ensure that a patient does not inadvertently pay more than needed for a surprise bill.

APPLICABILITY TO PRIVATE COMPANIES

New York's legislation applies to hospitals and many other health care facilities. However, as with many other states with surprise bill laws, New York's legislation does not necessarily apply to private companies that are not part of any insurer network, such as the rapidly growing private air and ground ambulance or medical evacuation industries. Freestanding emergency departments or privately owned emergency-only medical facilities are also not subject to New York State's surprise bill law, leaving patients responsible for full out-of-network charges for emergency care.

New York could explore how some other states are taking legislative action to address these issues. Colorado¹³ mandates that, after stabilizing the patient, freestanding emergency departments must inform patients if their facility is out-of-network for the patients' insurer before providing additional care. Georgia¹⁴ and New Mexico¹⁵ recently passed comprehensive surprise billing consumer protection legislation that include ground ambulance services in

¹² Epstein Becker Green, "New Jersey's Surprise Medical Bill Law: Implications and National Trends," <https://www.ebglaw.com/news/new-jerseys-surprise-medical-bill-law-implications-and-national-trends/>, accessed February 2019.

¹³ Freestanding Emergency Departments Required Consumer Notices, SB18-146, Colorado General Assembly, 2018 Regular Session, <https://leg.colorado.gov/bills/sb18-146>, accessed February 2019.

¹⁴ Surprise Billing and Consumer Protection Act, SB 8, Georgia General Assembly, 2017-2018 Regular Session, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/SB/8>, accessed February 2019.

¹⁵ Surprise Billing Protection Act, HB 313, New Mexico Legislature, 2017 Regular Session, <https://www.nmlegis.gov/Legislation/Legislation?chamber=H&legtype=B&legno=313&year=17>, accessed February 2019.



Opportunities to Enhance NY's Surprise Bill Law (continued)

the emergency services category under which out-of-network charges would not apply. Montana¹⁶ does not hold consumers responsible for air ambulance balance billing, and establishes an IDR process for payers and air ambulance providers. North Dakota¹⁷ requires hospitals to notify patients in nonemergency situations which air ambulance providers are in their insurance networks, when air ambulances are being used to transport the patient between two hospitals.

SELF-FUNDED HEALTH PLANS

All state-level surprise bill laws, including New York's, are limited by the fact that self-funded health plans (plans in which an employer provides health benefits to employees using the company's own funds) are not covered by these laws. Self-funded plans are governed by federal law—the Employee Retirement Income Security Act (ERISA)—which pre-empts state law. Changes to ERISA would be needed to extend surprise bill protections for people covered by self-funded plans, which in New York State account for 56% of the employer-sponsored insurance population. Absent changes in federal regulation, New York State could adopt an approach similar to New Jersey by creating an option for self-funded groups to opt in, which would allow for the protections of the surprise bill law to extend to those consumers. For self-funded groups in New Jersey to opt in, they must provide an annual notice to the New Jersey Department of Banking and Insurance which attests to being bound by the applicable provisions of New Jersey's law, and then incorporate terms into their benefit plans via an amendment. To date, however, no self-funded plans have chosen to opt in.

¹⁶ Provide Process to Hold Patients Harmless from Balance Billing by Air Ambulance, SB 44, Montana Legislature, 2017 Regular Session, http://laws.leg.mt.gov/legprd/LAW0210WSBSIV.ActionQuery?P_BILL_NO1=44&P_BLTP_BILL_TYP_CD=SB&Z_ACTION=Find&P_SESS=20171, accessed February 2019.

¹⁷ SB 2231, North Dakota Legislative Branch, 2017 Regular Session, <https://www.legis.nd.gov/assembly/65-2017/bill-actions/ba2231.html>, accessed February 2019.



Conclusion

New York State's surprise bill legislation has successfully protected many consumers from the financial responsibilities of unavoidable out-of-network medical services. When crafting federal legislation, lawmakers can look to New York, as well as a small number of other states with comprehensive consumer protections, for structure and guidance. Although the various proposed federal surprise bill laws will not give New York consumers additional benefits, they will extend similar protections to patients in other states that are without current laws as consumer-focused as New York's policy.

New York can build upon its successful efforts to protect consumers by enhancing elements related to network adequacy standards and enforcement, network disclosure requirements, provider billing, and extension of the law to private companies. Although federal action would be needed to apply surprise bill protections to individuals covered by self-insured plans, New York can consider opt-in approaches for these plans. In addition to these enhancements, a robust marketing campaign would educate New Yorkers about the comprehensive protections provided under the State's law surprise and could help increase the number of consumers benefiting from it.

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New York State led the charge with the first-ever surprise bill law in the nation. By exploring the proposed enhancements, New York can continue its groundbreaking work to empower consumers, help them take a more active role in their health care and the bills they receive, and ensure that policymakers and providers are supporting a patient experience that is free of unwanted surprises.



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