Safe Harbor Issued for Reporting Health Care Prices Under Transparency Rules

In July, group health plans must begin reporting prices on covered items and services

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New guidance issued jointly by three federal departments clarifies requirements for group health plans to disclose the costs of covered health care items and services beginning in July, and provides a safe harbor for satisfying the reporting requirements where reimbursement arrangements do not permit the plans to know specific dollar amounts in advance.

On April 19, the U.S. Department of Health and Human Services, Department of the Treasury, and Department of Labor published the guidance in a new series of frequently asked questions (https://www.cms.gov/sites/default/files/2022-04/FAQ-Affordable-Care-Act-Implementation-Part-53.pdf) (FAQs) related to group health plan price transparency requirements that begin to take effect in July 2022.

The departments' 2020 Transparency in Coverage (TiC) final rule (https://www.cms.gov/newsroom/fact-sheets/transparency-coverage-final-rule-fact-sheet-cms-9915-f) requires employer-sponsored health plans (except those grandfathered under the Affordable Care Act) to disclose on a public website, in three separate machine-readable files:

1. **In-network rates** for covered items and services.

2. **Out-of-network allowed amounts and billed charges** for covered items and services; and negotiated rates.

3. **Prescription drug historical net prices** for covered medications.

While many of the price transparency disclosures were originally set to take effect at the start of 2022, the departments delayed enforcement (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/agencies-delay-health-plan-price-transparency-disclosures.aspx) until later in the year.

New Safe Harbor

Attorneys at Chicago-based law firm McDermott Will & Emery wrote (https://www.mwe.com/insights/agencies-provide-guidance-on-impending-transparency-in-coverage-rule-implementation/) that "the departments reiterated that the enforcement of the requirements related to machine-readable files disclosing in-network and out-of-network data will begin July 1, 2022 (enforcement of this part of the rule related to prescription drugs has been [further] delayed)," and that the guidance addresses "confusion regarding reporting for certain alternative reimbursement arrangements."

In the FAQs, the departments provide an enforcement safe harbor for arrangements where a specific dollar amount cannot be determined, preventing plans from satisfying the reporting requirement. The safe harbor, which will take effect simultaneously with the enforcement of the disclosure requirements on July 1, 2022, applies in these situations:

- **For plans that have contracts with providers on a "percentage of billed charges" basis** where the ultimate negotiated dollar payment amounts are based on the specific gross charges for each item or service rendered—preventing accurate dollar amounts for contracted items and services from being known prior to the delivery of care—the plan may report a percentage number, in lieu of a dollar amount. The departments provided specific language to use for percentage-of-billed-charges arrangements (https://github.com/CMSgov/price-transparency-guide/tree/master/schemas/in-network-rates#negotiated-price-object.).
- **For plans that have other "alternative reimbursement arrangements"** that are not supported by the reporting format provided in the departments' technical implementation guidance (https://github.com/CMSgov/price-transparency-guide), there will be an opportunity to describe the "formula, variables, methodology or other information necessary to understand the arrangement" in an open text field in the file, in lieu of providing the actual dollar amounts. The departments provided additional guidance on specific language to use (https://github.com/CMSgov/price-transparency-guide/tree/master/schemas/in-network-rates#negotiated-price-object.) in the open text field.

"These two changes will help payers to comply with the TiC final rules and will result in more complete reporting," wrote (https://www.milliman.com/en/insight/transparency-in-coverage-final-rules-what-are-the-implications-for-health-plans#3) consulting actuaries at Seattle-based Milliman, a professional services and actuarial firm. "In our experience, most payers will have at least some portion of their contractual arrangements with providers on a percent of billed charges basis or alternative reimbursement models. Contractual arrangements as a percent of billed charges are one of the more common reimbursement structures, and alternative reimbursement models represent a growing proportion of arrangements."

They added, "while these changes will make it easier for payers to comply with the TiC final rules and lead to more complete reporting, they will also make the data much more difficult for consumers and other stakeholders to use for decision-making and analysis."

The safe harbor will not apply if the departments determine that the arrangement at issue can sufficiently disclose a dollar amount, according to a legal alert (https://www.ballardspahr.com/Insights/Alerts-and-Articles/2022/04/Technical-Guidance-Issued-on-Transparency-in-Coverage-Regulations) by attorneys at Philadelphia-based law firm Ballard Spahr, and the departments "may revisit these safe harbors in the future, especially when access to underlying fee schedules become more widely available" as required by the Consolidated Appropriations Act, 2021.

Plans Are Ultimately Responsible

While much of the "heavy lifting" for the new disclosures will be done by health insurance carriers for fully insured plans, third-party administrators for self-funded plans and pharmacy benefit managers for carved-out prescription drug benefits, employers are ultimately responsible for ensuring that this information is ready and available.

"Push your vendors to say that they're going to take care of this," advised (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/prepare-for-health-care-price-transparency-rules-taking-effect-soon.aspx) Jay Kirschbaum, benefits compliance director and senior vice president at World Insurance Associates in Washington, D.C.