

§ 149.410 Balance billing in cases of emergency services.

(a) *In general.* In the case of a participant, beneficiary, or enrollee with benefits under a group health plan or group or individual health insurance coverage offered by a health insurance issuer and who is furnished emergency services (for which benefits are provided under the plan or coverage) with respect to an emergency medical condition with respect to a visit at an emergency department of a hospital or an independent freestanding emergency department—

(1) A nonparticipating emergency facility must not bill, and must not hold liable, the participant, beneficiary, or enrollee for a payment amount for such emergency services (as defined in 26 CFR 54.9816-4T(c)(2), 29 CFR 2590.716-4(c)(2), and § 149.110(c)(2), as applicable) that exceeds the cost-sharing requirement for such services (as determined in accordance with 26 CFR 54.9816-4T(b)(3)(ii) and (iii), 29 CFR 2590.716-4(b)(3)(ii) and (iii), and § 149.110(b)(3)(ii) and (iii), as applicable).

(2) A nonparticipating provider must not bill, and must not hold liable, the participant, beneficiary, or enrollee for a payment amount for an emergency service (as defined in 26 CFR 54.9816-4T(c)(2), 29 CFR 2590.716-4(c)(2), and § 149.110(c)(2), as applicable) furnished to such individual by such provider with respect to such emergency medical condition and visit for which the individual receives emergency services at the hospital or independent freestanding emergency department that exceeds the cost-sharing requirement for such service (as determined in accordance with 26 CFR 54.9816-4T(b)(3)(ii) and (iii), 29 CFR 2590.716-4(b)(3)(ii) and (iii), and § 149.110(b)(3)(ii) and (iii), as applicable).

(b) *Notice and consent to be treated by a nonparticipating provider or nonparticipating emergency facility.* The requirements in paragraph (a) of this section do not apply with respect to items and services described in 26 CFR, 54.9816-4T(c)(2)(ii)(A), 29 CFR 2590.716-4(c)(2)(ii)(A), § 149.110(c)(2)(ii)(A), as applicable, and are not included as emergency services if all of the following conditions are met:

(1) The attending emergency physician or treating provider determines that the participant, beneficiary, or enrollee is able to travel using nonmedical transportation or nonemergency medical transportation to an available participating provider or facility located within a reasonable travel distance, taking into account the individual's medical condition. The attending emergency physician's or treating provider's determination is binding on the facility for purposes of this requirement.

(2) The provider or facility furnishing such additional items and services satisfies the notice and consent criteria of § 149.420(c) through (g) with respect to such items and services, provided that the written notice additionally satisfies paragraphs (b)(2)(i) and (ii) of this section, as applicable. In applying this paragraph (b)(2), a reference in § 149.420 to a nonparticipating provider is deemed to include a nonparticipating emergency facility.

(i) In the case of a participating emergency facility and a nonparticipating provider, the written notice must also include a list of any participating providers at the facility who are able to furnish

such items and services involved and notification that the participant, beneficiary, or enrollee may be referred, at their option, to such a participating provider.

(ii) In the case of a nonparticipating emergency facility, the written notice must include the good faith estimated amount that the participant, beneficiary, or enrollee may be charged for items or services furnished by the nonparticipating emergency facility or by nonparticipating providers with respect to the visit at such facility (including any item or service that is reasonably expected to be furnished by the nonparticipating emergency facility or nonparticipating providers in conjunction with such items or services).

(3) The participant, beneficiary, or enrollee (or an authorized representative of such individual) is in a condition to receive the information described in § 149.420, as determined by the attending emergency physician or treating provider using appropriate medical judgment, and to provide informed consent under such section, in accordance with applicable State law. For purposes of this section and § 149.420, an authorized representative is an individual authorized under State law to provide consent on behalf of the participant, beneficiary, or enrollee, provided that the individual is not a provider affiliated with the facility or an employee of the facility, unless such provider or employee is a family member of the participant, beneficiary, or enrollee.

(4) The provider or facility satisfies any additional requirements or prohibitions as may be imposed under State law.

(c) *Inapplicability of notice and consent exception to certain items and services.* A nonparticipating provider or nonparticipating facility specified in paragraph (a) of this section will always be subject to the prohibitions in paragraph (a) of this section, with respect to items or services furnished as a result of unforeseen, urgent medical needs that arise at the time an item or service is furnished, regardless of whether the nonparticipating provider or nonparticipating emergency facility satisfied the notice and consent criteria in § 149.420(c) through (g).

(d) *Retention of certain documents.* A nonparticipating emergency facility (with respect to such facility or any nonparticipating provider at such facility) that obtains from a participant, beneficiary, or enrollee of a group health plan or group or individual health insurance coverage (or an authorized representative of such an individual) a written consent in accordance with § 149.420(e), with respect to furnishing an item or service to such an individual, must retain the written notice and consent for at least a 7-year period after the date on which the item or service is so furnished. If a nonparticipating provider obtains a signed consent from a participant, beneficiary, or enrollee, or such individual's authorized representative, the provider may either coordinate with the facility to retain the written notice and consent for a 7-year period, or the provider must retain the written notice and consent for a 7-year period.

(e) *Notification to plan or issuer.* In the case of a participant, beneficiary, or enrollee who is stabilized and furnished additional items and services described in § 149.110(c)(2)(ii), a nonparticipating provider or nonparticipating emergency facility must notify the plan or issuer, respectively, when transmitting the bill for such items and services, either on the bill or in a separate document, as to whether all of the conditions described in paragraph (b) of this section are met with respect to each of the items and services for which the bill is submitted, and if

applicable, provide to the plan or issuer a copy of the signed written notice and consent document described in paragraph (b)(2) of this section.

(f) *Applicability date.* The provisions of this section are applicable with respect to emergency services furnished during a plan year (in the individual market, policy year) beginning on or after January 1, 2022.