



# Issue Brief:

## Balance Billing Prohibitions and the No Surprises Act

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## OVERVIEW

At the request of the California State Legislature, the California Health Benefits Review Program (CHBRP) provides prompt, independent, and rigorous evidence-based analyses of proposed benefit mandate laws that would impact Californians enrolled in health plans regulated by the California Department of Managed Care (DMHC) and health policies regulated by the California Department of Insurance (CDI). These are enrollees whose benefits are subject to state regulation and can be influenced by state-level legislation.

This issue brief discusses laws and regulations that prohibit out-of-network (OON) providers from issuing surprise bills to enrollees in plans or policies regulated by DMHC or CDI. CHBRP monitors the presence or absence of OON surprise billing prohibitions because CHBRP is sometimes requested to analyze proposed legislation for which such a prohibition may be relevant.<sup>1</sup> Benefit mandate laws place requirements on plans and insurers<sup>2</sup> and CHBRP maintains a list of such laws applicable to the health insurance of enrollees in plans and policies regulated by DMHC or CDI.<sup>3</sup> This issue brief separately addresses the No Surprises Act and other OON surprise billing prohibitions, all of which place restrictions on providers.

Key terms used in this issue brief:

- Although “balance bills” and “surprise bills” are often used interchangeably, to align with the No Surprises Act, this brief uses “OON surprise bills” and “OON surprise billing.”
  - Surprise billing occurs when an OON provider bills an enrollee for the difference between the billed charge and the amount reimbursed by the health plan or insurer, less any amount paid by the enrollee as cost sharing.
- “Provider” refers to health professionals and/or facilities.
  - “Professionals” include physicians and other health care workers - but does not include dental or vision care professionals (for whom the No Surprises Act and other OON surprise billing prohibitions are not generally applicable)
  - “Facilities,” for the No Surprises Act, includes hospitals and ambulatory surgical centers.<sup>4</sup> However, it is unclear whether, for the No Surprises Act, the term includes urgent care centers, laboratories, radiology/imaging centers, or other outpatient settings.

Several OON surprise billing prohibitions exist for Californians with health insurance, but not all such prohibitions are applicable for all enrollees. The federal No Surprises Act<sup>5</sup> overlaps with existing prohibitions for some enrollees and establishes such prohibitions for others. The following sections of this brief discuss the concept of OON surprise billing, the No Surprises Act, and the other OON surprise billing prohibitions applicable for California enrollees.

### Out-of-Network Surprise Billing

At the time a service is provided, providers are either in-network (INN) or out-of-network (OON), depending on whether the provider has a contract with the enrollee’s health plan or insurer. Contracts for INN providers determine reimbursement rates for providing services. In contrast, OON providers could be fully reimbursed, partially reimbursed, or not reimbursed at all by an enrollee’s plan or insurer after

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<sup>1</sup> Recent examples include analyses of SB 510 (2021) and AB 651 (2019) both available at [http://chbrp.com/completed\\_analyses/index.php](http://chbrp.com/completed_analyses/index.php).

<sup>2</sup> The definition of “benefit mandate law” as per CHBRP’s authorizing statute, available at [https://chbrp.org/about\\_chbrp/faqs/index.php](https://chbrp.org/about_chbrp/faqs/index.php)

<sup>3</sup> See CHBRP’s resource *Health Insurance Benefit Mandates in California State and Federal Law*, available at [https://chbrp.org/other\\_publications/index.php#revize\\_document\\_center\\_rz44](https://chbrp.org/other_publications/index.php#revize_document_center_rz44)

<sup>4</sup> 45 CFR § 149.30, 86 FR 36882

<sup>5</sup> Consolidated Appropriations Act. H.R. 133; Division BB – Private Health Insurance and Public Health Provisions. (2021).

providing a service. In the absence of an applicable law, regulation, or court decision that prohibits OON surprise billing, an OON provider can bill an enrollee for the difference between the billed charge and the amount reimbursed by the health plan or insurer, less any amount paid by the enrollee as cost sharing. A bill from an OON provider that was not expected by the enrollee or that came from an OON provider not chosen by the patient is called an OON surprise bill.<sup>6</sup>

OON surprise billing can occur for both emergency and non-emergency care. The following examples illustrate two situations in which OON surprise billing can occur.

- Emergency care: in an emergency, an enrollee typically goes to a nearby emergency department, which, for that enrollee, may be an INN or OON. Even if the enrollee goes to an INN facility for emergency care, the enrollee may receive care from an OON professional working at the INN facility. For example, some emergency departments are staffed with independent health professionals or health professionals from outside companies who manage their own insurance contracts, which are separate from the facility's insurance contracts.
- Non-emergency care: an enrollee may choose an INN facility but not know that one of the professionals involved in the enrollee's care (such as an anesthesiologist or radiologist) is OON.

Cost sharing is a provision of a plan or policy that requires an enrollee to pay a portion of medical expenses (e.g. coinsurance, copays, deductibles). As previously noted, cost sharing may be involved in the use of a covered benefit that results in an OON surprise bill. However, an OON surprise bill is not itself, a form of cost sharing.<sup>7</sup> Therefore, prohibitions on cost sharing, such as those that exist for the coverage of preventive services,<sup>8</sup> do not prohibit OON surprise billing.

## The No Surprises Act

The No Surprises Act, a part of the federal Consolidated Appropriations Act of 2021 is applicable for enrollees in plans and policies regulated by DMHC or CDI, as well as to the health insurance of many other Americans. As of January 1, 2022, the No Surprises Act prohibits OON surprise billing of most enrollees when accessing particular covered benefits (Kolber et al., 2021). The covered benefits include:

- Non-emergency services provided by OON professionals at INN facilities
- Air ambulance services
- Emergency services at OON facilities
- Post-stabilization services resulting from an emergency visit

In considering the list above, two definitions and one absence should be noted.

- As previously mentioned, the term "facilities," for the No Surprises Act, does include hospitals and ambulatory surgical centers but may not include urgent care centers, laboratories, radiology/imaging centers, or other outpatient settings. Whether surprise billing associated with these entities is prohibited by the No Surprises Act is unclear.
- The term "stabilization" is defined for the No Surprises Act through reference to the Emergency Medical Treatment and Labor Act (EMTALA). EMTALA definitions may result in unexpected application of the No Surprises Act. For example, as EMTALA defines a woman who gives birth on an emergency basis as stabilized upon delivery (and does not clarify when a newborn is stabilized), the No Surprises Act OON prohibition may not be applicable for services provided after an emergency delivery during a post-delivery stay in the OON facility.
- Ground ambulance services are addressed by the No Surprises Act, but it does not currently prohibit OON surprise billing for them. Ground ambulance services ownership is fragmented, with

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<sup>6</sup> Personal Management Office, Internal Revenue Service, Employee Benefits Security Administration, Health and Human Services Department. (2021). Requirements related to surprise billing; Part I. Interim Final Rule. *Federal Register*. 86 FR 36872.

<sup>7</sup> No Surprises Act. Consolidated Appropriations Act. H.R. 133; Division BB – Private Health Insurance and Public Health Provisions, 116<sup>th</sup> Congress (2021).

<sup>8</sup> For more on this cost sharing prohibition, see CHBRP's resource, *Federal Preventive Services Mandate and California Mandates*, available here [https://chbrp.org/other\\_publications/index.php](https://chbrp.org/other_publications/index.php).

almost half of ground ambulance organizations run by local governments, often by police or fire departments, and so partly funded by taxpayers (Centers for Medicare & Medicaid Services, 2019). The remainder are owned by for-profit or not-for-profit companies (Rosato, 2021). The No Surprises Act requires the Federal Departments of Housing and Human Services, Labor, and Treasury to form an advisory committee regarding ground ambulance service providers and OON surprise bills, but does include a related prohibition.

Although the definitions and the absence discussed above suggest cautious interpretation in some circumstances, as further discussed in the next sections, the No Surprises Act interacts with other OON surprise billing prohibitions for some enrollees and establishes such prohibitions for others.

## Other OON Surprise Billing Prohibitions

When accessing particular covered benefits, a number of OON surprise billing prohibitions are already applicable for enrollees in plans and policies regulated by DMHC or CDI. Such prohibitions, which may overlap with the No Surprises Act (see also Appendix A) include:

- For Medi-Cal beneficiaries enrolled in plans regulated by DMHC (as well as for all other Medi-Cal beneficiaries), OON surprise billing is prohibited for all covered benefits.<sup>9</sup>
- For commercial enrollees and enrollees associated with the California Public Employees' Retirement System (CalPERS), OON surprise billing is prohibited for the following:
  - Non-emergency services provided by an OON health professional at an INN health facility.<sup>10</sup>
    - Note: the California law's definition of "facility" may be broader than that included in the No Surprises Act (see earlier discussion).
  - Air (but not ground) ambulance services.<sup>11</sup>
    - Note: although California law prohibits such OON surprise billing for enrollees in plans and policies regulated by DMHC or CDI,<sup>12</sup> an existing Federal Law, the Airline Deregulation Act of 1978, prohibits much state regulation related to air transport.<sup>13</sup> Court rulings in other states have found that the Airline Deregulation Act preempts state law.<sup>14</sup> Part I of the interim final rules to implement the No Surprises Act aligns with these court decisions.<sup>15</sup>
  - For the duration of the federally declared public health emergency, which began on January 31, 2020, COVID-19 vaccinations and tests.<sup>16</sup>
  - For the duration of the public health emergency declared by the California governor on which began on March 20, 2020, COVID-19 diagnostic and screening testing.<sup>17</sup>
  - Emergency services at OON health facilities.

<sup>9</sup> California Welfare and Institutions Code 14019.3 and 14019.3, as well as Title 42 Code of Federal Regulations Section 447.15. Additionally, the California Department of Health Care Services considers "charging a Medi-Cal beneficiary for the difference between the Medi-Cal reimbursement rate and the customary charge for the service" to be fraud (California Department of Health Care Services, 2021).

<sup>10</sup> California Health & Safety Code: 1371.30, 1371.31, & 1371.9. California Insurance Code 10112.8, 10112.81, & 10112.82

<sup>11</sup> California Health & Safety Code 1371.55. California Insurance Code 10126.65

<sup>12</sup> California Health & Safety Code 1371.55 and California Insurance Code 10126.65

<sup>13</sup> Airline Deregulation Act. S.2493, 95<sup>th</sup> Congress (1978).

<sup>14</sup> *Air Evac EMS, Inc. v. Cheatham; EagleMed LLC v. Cox; Guardian Flight, LLC v. Godfread; Bailey v. Rocky Mountain Holdings, LLC*

<sup>15</sup> Personal Management Office, Internal Revenue Service, Employee Benefits Security Administration, Health and Human Services Department. (2021). Requirements related to surprise billing; Part I. Interim Final Rule. *Federal Register*. 86 FR 36872.

<sup>16</sup> Families First Coronavirus Response Act. H.R.6201, 116<sup>th</sup> Congress. (2020); CARES Act. H.R.748, 116<sup>th</sup> Congress. (2020)

<sup>17</sup> California Health and Safety Code 1342.2, California Insurance Code 10110.7.

- Note: this prohibition previously existed for enrollees in DMHC-regulated plans only,<sup>18</sup> but the No Surprises Act establishes the prohibition for enrollees in CDI-regulated policies.<sup>19</sup>

Although there are some areas of overlap that may need clarification, such as the definitions of “facilities” and “stabilization,” and although there is one notable exception among the prohibitions (ground ambulance services), the combination of federal law and other applicable prohibitions do broadly prohibit OON providers from surprise billing enrollees in plans and policies regulated by DMHC or CDI.

## Other Californians

Although the proposed benefit mandates analyzed by CHBRP are not generally applicable to other Californians - Californians enrolled in health insurance that is not regulated by DMHC or CDI - it is worth noting that, when accessing particular covered benefits, the No Surprises Act and some other OON prohibitions, may also be applicable for other Californians accessing particular covered benefits.

Examples include:

- For all Medi-Cal beneficiaries (including those enrolled in a DMHC-regulated plan), OON surprise billing is prohibited for all covered benefits.<sup>20</sup>
- For Medicare beneficiaries, OON surprise billing is prohibited when receiving services from participating providers and non-participating providers who accept assignment.<sup>21</sup>
- For enrollees in self-insured plans
  - Covered services specified in the No Surprises Act.
  - COVID-19 vaccinations and tests for the duration of the federally declared public health emergency, which began on January 31, 2020.<sup>22</sup>

Although there is variation among the groups, the No Surprises Act and/or other OON surprise billing prohibitions are frequently applicable for other Californians accessing covered benefits.

## Provider Reimbursement

The previous sections have focused on how the No Surprises Act and other OON surprise billing prohibitions may prohibit OON providers from issuing surprise bills to enrollees. It is worth noting, however, that the No Surprises Act specifies a means of determining the amounts health plans and insurers should reimburse OON providers. Other OON surprise billing prohibitions may also specify a means of determining such reimbursements. In such cases, the No Surprises Act may defer to the other prohibitions (Kolber et al., 2021). For example, the No Surprises Act will likely defer the determination of reimbursement to California’s surprise billing laws regarding non-emergency services provided by OON professionals at INN facilities.<sup>23</sup>

<sup>18</sup> California Code of Regulations title 28 § 1300.71.39. Upheld by *Prospect Medical Group Inc v. Northridge Emergency Medical Group*.

<sup>19</sup> Sec. 102, No Surprises Act. Consolidated Appropriations Act. H.R. 133; Division BB – Private Health Insurance and Public Health Provisions, 116<sup>th</sup> Congress (2021).

<sup>20</sup> California Welfare and Institutions Code 14019.3 and 14019.3, as well as Title 42 Code of Federal Regulations Section 447.15. Additionally, the California Department of Health Care Services considers “charging a Medi-Cal beneficiary for the difference between the Medi-Cal reimbursement rate and the customary charge for the service” to be fraud (California Department of Health Care Services, 2021).

<sup>21</sup> Congress created Medicare’s Participating Provider program with Deficit Reduction Act. H.R.4170, 98<sup>th</sup> Congress. (1984). Congress instituted limits on surprise billing and implemented the Medicare physician fee schedule with the Omnibus Budget Reconciliation Act. H.R.3299, 101<sup>st</sup> Congress, (1989).

<sup>22</sup> Families First Coronavirus Response Act. H.R.6201, 116<sup>th</sup> Congress. (2020).<sup>23</sup> California Health & Safety Code 1371.30, 1371.31, and 1371.9 and California Insurance Code 10112.8, 10112.81, and 10112.82

<sup>23</sup> California Health & Safety Code 1371.30, 1371.31, and 1371.9 and California Insurance Code 10112.8, 10112.81, and 10112.82

## Conclusion

In the absence of OON surprise billing prohibitions, an OON provider can bill an enrollee for the difference between the billed charge and the amount reimbursed by the health plan or insurer, less any amount paid by the enrollee as cost sharing. The No Surprises Act and the other OON surprise billing prohibitions discussed in this issue brief prohibit OON surprise billing for some or all covered benefits for many enrollees in many circumstances. Ground ambulance services are a notable exception to such prohibitions.

## APPENDIX A

For enrollees with plans or policies regulated by DMHC or CDI, Table 1 summarizes out-of-network (OON) surprise billing prohibitions.

**Table 1. Out-of-Network Surprise Billing Prohibitions**

#	Service:	Other OON Surprise Billing Prohibitions	No Surprises Act
<b>Enrollees with DMHC-regulated plans or CDI-regulated policies (a)</b>			
1	Non-emergency services provided by OON professionals at INN facilities	CA HSC 1371.30, 1371.31, & 1371.9 CA INS 10112.8, 10112.81, & 10112.82	Sec. 102
2	Air ambulance services	CA HSC 1371.55 CA INS 10126.65 (b)	Sec. 105
3	COVID-19 Vaccinations and Tests	H.R.6201 – Families First Coronavirus Response Act H.R.748 CARES Act CA HSC 1342.2, CA INS 10110.7.	None identified
4	Post-stabilization services resulting from an emergency visit	None identified	Sec. 102
<b>Enrollees with DMHC-regulated plans (a)</b>			
5	Emergency services at OON health facilities (ground ambulance services excluded)	CA Code Regs. tit. 28 § 1300.71.39 (c)	Sec. 102
<b>Enrollees with CDI-regulated policies</b>			
6	Emergency services at OON health facilities (ground ambulance services excluded)	None identified	Sec. 102
<b>All Medi-Cal Beneficiaries - including those Enrolled in DMHC-regulated plans</b>			
7	All services	WIC 14019.3 and 14019.3, as well as Title 42 Code of Federal Regulations Section 447.15 (d)	None identified

Source: California Health Benefits Review Program, 2021.

Notes: (a) See Row 7 for prohibitions applicable to Medi-Cal beneficiaries enrolled in DMHC-regulated plans. (b) Although California law (California Health & Safety Code 1371.55 and California Insurance Code 10126.65) prohibits OON surprise billing for enrollees in DMHC-regulated plans and enrollees CDI-regulated policies in cases of air ambulance services, an existing Federal Law, the Airline Deregulation Act of 1978, prohibits much state regulation related to air transport. In addition, changes to Medi-Cal rates may require federal approval. In previous analysis, CHBRP has assumed that federal law would not preempt this bill's prohibition on balance billing. The California Association of Air Medical Services supported the law. However, court rulings in other states have found that the Airline Deregulation Act preempts state law. Part I of the interim final rules to implement the No Surprises Act states that the Airline Deregulation Act “broadly preempts state laws that relate to air ambulance providers, and the Departments are unaware of any instances in which an All-Payer Model Agreement or specified state law might apply. This statement means that the No Surprises Act will likely not defer the OON surprise billing prohibition of air ambulance services to California law. (c) Upheld by *Prospect Medical Group Inc v. Northridge Emergency Medical Group California Supreme Court Decision*. (d) The California Department of Health Care Services considers “charging a Medi-Cal beneficiary for the difference between the Medi-Cal reimbursement rate and the customary charge for the service” to be fraud (California Department of Health Care Services, 2021).

Key: CA Code Regs. tit. = California Code of Regulations, Title; CA HSC = California Health and Safety Code; CA INS = California Insurance Code; CDI = California Department of Insurance; DMHC = Department of Managed Health Care; H.R. = House Resolution; NSA = No Surprises Act; Sec = Section; OON = out-of-network

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## ABOUT CHBRP

The California Health Benefits Review Program (CHBRP) was established in 2002. As per its authorizing statute, CHBRP provides the California Legislature with independent analysis of the medical, financial, and public health impacts of proposed health insurance benefit-related legislation. The state funds CHBRP through an annual assessment on health plans and insurers in California.

Detailed information on CHBRP's analysis methodology, authorizing statute, as well as all CHBRP analyses and other publications are available at <http://www.chbrp.org/>.

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