OFFICE of the INSURANCE COMMISSIONER
WASHINGTON STATE

E2SHB 1688 (Chap. 263, Laws of 2022) – Aligning the No Surprises Act & the Balance Billing Protection Act

April 1, 2022

Issue	Washington Balance Billing Protection Act (BBPA)	E2SHB 1688 as passed Legislature
Applicable plans		
Coverage of emergency services	Emergency services provided in a hospital up to point of stabilization must be covered without prior authorization regardless of the network status of the hospital or provider. RCW 48.43.093	Sec. 2, amending RCW 48.43.003 and Sec. 3, amending RCW 48.43.093 Emergency services must be covered regardless of the network status of a hospital or provider and without prior authorization. Emergency services encompass screening, stabilization, and post-stabilization, including observation or an inpatient and outpatient stay with respect to the visit during which screening and stabilization services were provided. Behavioral health emergency services providers include, in addition to a hospital emergency department, mobile crisis response teams, crisis triage and stabilization facilities, evaluation and treatment facilities, agencies certified by the state to provide outpatient crisis services and medical withdrawal management services.

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Issue	Washington Balance Billing Protection Act (BBPA)	E2SHB 1688 as passed Legislature
		Carrier can require notification of a person's stabilization or admission by in-network facilities. Carrier can require a hospital or behavioral health emergency services provider to notify them within 48 hours of stabilization if a person needs to be stabilized, or by the end of the business day following the day the stabilization occurs, whichever is later.
Scope of balance billing protections	Emergency medical services and non-emergency "surgical and ancillary services" at in-network facilities.	Sec. 7, amending RCW 48.49.020 Includes: • Emergency services. Other applicable provisions of the BBPA are amended to reference "behavioral health emergency services providers" so that balance billing protections and other related consumer protections apply to these services as well. • Non-emergency health care services performed by nonparticipating providers at certain participating facilities includes covered items or services other than emergency services with respect to a visit at a participating health care facility, as provided in the No Surprises Act (NSA). Sec. 21: Directs OIC, in collaboration with the Health Care Authority and the Department of Health, and with input from interested groups, to submit a report and any recommendations to the legislature by October 1, 2023 as to how balance billing for ground ambulance services can be prevented and whether ground ambulance services should be added to the BBPA.
Consumer cost-sharing	Same as if services had been received from an in-network provider.	Sec. 7, amending RCW 48.49.020 & Sec. 8, amending RCW 48.49.030: Same as if services had been received from an in-network provider. Uses NSA method for calculating consumer cost-sharing (aka "qualified payment amount").

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		Consumer cost sharing for services subject to balance billing protections under the NSA and for behavioral health emergency services will be calculated as provided in the NSA, using the "qualifying payment amount".
Consumer notice of rights	State template for notice. Per OIC rulemaking, must be provided to consumers when scheduling services and directly following receipt of emergency services.	Sec. 13, amending RCW 48.49.060 OIC must develop a template for a notice of consumer rights that applies to both the OIC determines through rulemaking when and how the notice must be provided to
Waiver of rights	Consumers cannot be asked to waive their balance billing protections.	Sec. 10(2) & Sec. 7(2)(b) Consumers cannot be asked to waive their balance billing protections.
Out of network claim payment standard	Payment is "commercially reasonable amount."	"Commercially reasonable amount" until July 1, 2023 or later date determined by the
Dispute resolution	Resolved through arbitration if no agreement on payment between the carrier and an out-of-network provider.	Sec. 11, amending RCW 48.49.040 BBPA arbitration until July 1, 2023 or later date determined by the Commissioner. At that point, transition to NSA "independent dispute resolution" (IDR) system if out-of-network provider and carrier cannot agree on a commercially reasonable payment. Upon transition to NSA independent dispute resolution system, if behavioral health emergency services payment disputes can be addressed using federal IDR system, use that system. If not possible, use the BBPA dispute resolution process. Air ambulance payment disputes use the NSA IDR system.

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		Retains "baseball arbitration" – one party's final offer is chosen.
		
		Revisions were made to BBPA arbitration provisions, some to more closely align to NSA, including:
		• Claims bundling:
		  ○ Provider groups or individual providers can bundle claims.
		  ○ The bundled claims must have the same procedural code, or a comparable code under a difference procedural code system.
		  ○ Bundled claims must occur within 30 days of each other.
		• Arbitrators must have experience in matters related to medical or health care services.
		• If parties agree on an out-of-network payment rate at any point before the arbitrator has made their decision, the agreed upon amount is the out-of-network payment rate for the service.
		• The arbitrator's decision must include an explanation of the elements relied upon to make their decision and why those elements were relevant to their decision.
		• The Commissioner may establish arbitrator fee ranges by rule.
		• Arbitrator fees must be paid by the parties to the arbitrator within 30 days following issuance of the arbitrator's decision.
		• The arbitrator's decision is final and binding on the parties.
		• If a federal IDR decisionmaker finds that it does not have jurisdiction over a dispute, timeframes related to good faith negotiations and notice for BBPA arbitration are modified.
		
		Section 18 provides for use of the BBPA arbitration process in limited circumstances for services that are subject to balance billing protections when a carrier and out-of-network provider or facility cannot reach agreement on a contract and an amended

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		alternate access delivery request (AADR) has been approved by the Commissioner (see Network Adequacy/Sec. 18 below). In these circumstances: • The issue before the arbitrator is the commercially reasonable payment for services addressed in the AADR. • The arbitrator chooses the final offer amount of the carrier or the out-of-network provider or facility. • The arbitrator's decision is final and binding on the parties, and effective for the period from the effective date of the amended AADR to the expiration date of the AADR or the date the parties enter into a contract, whichever occurs first. • From the effective date of the amended AADR to the date the arbitrator issues their decision, the carrier pays a commercially reasonable amount to the provider for the services addressed in the AADR. • For these disputes, the BBPA arbitration process will continue to be used, rather than transitioning to the federal IDR system.
Network adequacy	proposed provider network includes a emergency & surgical or ancillary services providers at in-network hospitals or ambulatory surgical	Sec. 18, amending RCW 48.49.150 (as recodified by this act) When determining the adequacy of a carrier's provider network, the Commissioner facility-based providers at the carrier's in-network hospitals and ambulatory surgical The Commissioner may allow carriers to submit an alternate access delivery request (AADR) to address a gap in their provider network if the carrier can show that: • Consumers won't pay more than in-network costs, or other arrangements

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		• The carrier has provided evidence of good faith efforts to contract • There is not an available provider for the carrier to contract with for the services, and • For services subject to the balance billing prohibition, the carrier has notified out-of-network providers or facilities that deliver the services referenced in the AADR within 5 days of submitting the AADR request to the Commissioner. For services subject to the balance billing prohibition, a carrier cannot treat their payment of out-of-network providers or facilities under the BBPA or NSA as a means to satisfy OIC's network access standards. However, if an AADR has been granted and a carrier meets the following requirements, the Commissioner will allow a carrier to amend its AADR to allow use of the BBPA dispute resolution process to determine the amount that will be paid to out-of-network providers or facilities for the services referenced in the AADR: • The carrier's request to amend the AADR is made at least 3 months after the effective date of the AADR at issue; and • During that 3 month period, the carrier has demonstrated substantial good faith efforts on its part to contract with out-of-network providers or facilities to deliver the services referenced in the AADR. Once a carrier has notified an out-of-network provider or facility that delivers the services referenced in an AADR, a carrier is not responsible for reimbursing a provider's or facility's charges in excess of the amount charged by the provider or facility for the same or similar service at the time the notification was provided. The provider or facility must accept this reimbursement as payment in full. When determining the adequacy of a carrier's proposed provider network or the ongoing adequacy of a current provider network, beginning January 1, 2023, the

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		commissioner must require that the carrier's proposed provider network or in-force provider network include a sufficient number of contracted behavioral health emergency services providers.
Consumer appeals to Independent Review Organization (IRO)	No similar provision.	Sec. 4, amending RCW 48.43.535 Adds NSA provision giving consumers an opportunity to appeal a carrier's adverse decision related to its obligations under the NSA.
Enforcement	Washington State Office of the Insurance Commissioner (carriers) Washington State Department of Health	New Secs. 5 & 19 OIC will enforce all BBPA and NSA requirements on carriers, with added authority to assess civil monetary penalties for violations, consistent with federal law. DOH will enforce BBPA and NSA requirements on health care providers, and defers enforcement of requirements applicable to health care facilities and air ambulance providers to the federal gov't (CMS) (Per OIC/DOH/CMS enforcement agreement).
Surprise billing dataset and study on impact of BBPA	OIC must develop a dataset from APCD claims on median in-network allowed amount, median out-of-network allowed amount and median billed charges for services subject to the BBPA.	Sec. 1, amending 43.371.100 Surprise billing data set will be updated to align with the scope of services protected from balance billing in RCW 48.49.020, as amended by E2SHB 1688. Directs OIC to conduct biennial analysis, beginning in 2022, of the impact of the BBPA and NSA on payments for in-network and out-of-network services and the volume of out-of-network health care services in Washington state.
Effective date	January 1, 2020	Sec. 25: Emergency clause