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By Email: surprisebilling@insurance.ohio.gov

Ms. Judith French
Director
Ohio Department of Insurance
50 West Street, Suite 300
Columbus, Ohio 43214

Re: Proposed Rule 3901-8-17 Reimbursement for Unanticipated Out-of-Network Care

Dear Ms. French:

The following comments are submitted on behalf of the College of American Pathologists (CAP) and the Ohio Society of Pathologists (OSP) in response to the Ohio Department of Insurance's (the Department's) proposed rule 3901-8-17 Reimbursement for Unanticipated Out-of-Network Care (the Proposed Rule). The Proposed Rule seeks to implement the surprise billing provisions enacted in House Bill 388 of the 133rd General Assembly.

As the world's largest organization of board-certified pathologists and the leading provider of laboratory accreditation and proficiency testing programs, the CAP serves patients, pathologists, and the public by fostering and advocating excellence in the practice of pathology and laboratory medicine worldwide. The OSP is dedicated to promoting the field of pathology in the State of Ohio. Pathologists are physicians whose diagnoses drive care decisions made by patients, primary care and specialist physicians, and surgeons. When other physicians need more information about a patient's disease, they often turn to pathologists, who provide specific diagnoses for each patient. The pathologist's diagnosis and value are recognized throughout the care continuum and affect many patient encounters.

The CAP and OSP desire to minimize disruption to the provision of laboratory tests to patients. Based on our review of the Proposed Rule, however, the CAP and OSP are concerned that the Proposed Rule purports to re-interpret the plain language of the statute, Ohio Rev. Code Sections 3902.50–3902.54, and impose certain additional requirements on out-of-network clinical laboratory services providers. In particular, the Proposed Rule seeks to improperly expand the purview of the statute to all out-of-network clinical laboratory services ordered by in-network providers, which distorts the plain language of the statute, and purports to create a clinical laboratory notification requirement not contemplated by the statute. These inexplicable deviations from the statutory text, if implemented, risk creating undue administrative burden for clinical laboratories and, ultimately, hindering timely provision of patient care.

I. The Proposed Rule as Applied to Clinical Laboratory Services is Inconsistent with the Statute

The Proposed Rule extends beyond what the text of Sections 3902.50–3902.51 authorizes. Specifically, Ohio Rev. Code Section 3902.51(A)(1)(a) states as follows:

> A health plan issuer shall reimburse an out-of-network provider for unanticipated out-of-network care when both of the following apply:
>
> (i) The services are provided to a covered person at an in-network facility.
>
> (ii) The services would be covered if provided by an in-network provider.

This section of the statute applies to out-of-network clinical laboratory services, but division (A)(2) further specifies that:

> In the case of clinical laboratory services *provided in connection with care described in division (A)(1) of this section*, a health plan issuer shall reimburse any out-of-network provider and any out-of-network facility that provided the clinical laboratory services.[1]

Notably, the statutory text governs reimbursement to out-of-network providers of clinical laboratory services in connection with unanticipated out-of-network care only when the care is provided at an in-network facility and when a health plan would cover the services if provided by an in-network provider. That is, according to the plain language of the statute, health plan issuers must reimburse out-of-network providers and out-of-network facilities providing clinical laboratory services so long as those clinical laboratory services were provided in connection with care provided to a covered person at an in-network facility and when the services would be covered if provided by an in-network provider.

The Proposed Rule, however, seeks to expand applicability of the statute to clinical laboratory services beyond the clearly-delineated circumstances in the statutory text by redefining the term "unanticipated out-of-network care." Specifically, Section 3902.50(G) of the statute defines unanticipated out-of-network care to mean:

> Health care services, including clinical laboratory services, that are covered under a health benefit plan and that are provided by an out-of-network provider when either of the following conditions applies: (1) The covered person did not have the ability to request such services from an in-network provider. (2) The services provided were emergency services.

[1] Emphasis added. Similarly, division (C)(4) of the statute states that "In the case of clinical laboratory services provided in this state in connection with care described in division (A)(1) of this section, no out-of-network provider or out-of-network facility shall bill a covered person for the difference between the health plan issuer's reimbursement and the provider's or facility's charge for the clinical laboratory services." The CAP and OSP do not separately address this provision in these comments, as the analysis is the same.

However, the Proposed Rule seeks to modify the statutory requirements as they apply to clinical laboratory services by redefining a statutory term. Specifically, Section 3901-8-17 (E)(7) of the Proposed Rule seeks to define "unanticipated out-of-network care" in the same manner as the statute, but, inexplicably includes additional requirements for clinical laboratory services:

> "Unanticipated out-of-network care" means health care services, including clinical laboratory services, that are covered under a health benefit plan and that are provided by an out-of- network provider when either of the following conditions applies:
>
> > (a) The covered person did not have the ability to request such services from an in-network provider.
> >
> > Clinical laboratory services provided by an out-of-network provider, *but that are ordered by an in-network provider*, shall be considered to have met the condition prescribed in paragraph (E)(7)(a) of this rule *unless the provider rendering the laboratory services discloses its network status in writing to the covered person before the services are provided.*[2]
> >
> > (b) The services provided were emergency services.

This Proposed Rule definition impermissibly expands the scope of the statute. Indeed, nowhere does the statute require that out-of-network clinical laboratory services be *ordered by* an *in-network* provider. Rather, as noted, the statute simply requires that such services be provided by an out-of-network provider to a covered person at an in-network facility and that the services would be covered if provided by an in-network provider.

Nor does the statute grant the Department discretion to interpret whether disclosure by an out-of-network clinical laboratory service provider of its network status to the covered person before providing services has any effect on the covered person's ability to request such services from an in-network provider. Rather, the statute provides that out-of-network care is "unanticipated" if the "covered person did not have the ability to request such services from an in-network provider" or the "services provided were emergency services." Accordingly, there is no statutory basis for linking a covered person's ability to request clinical laboratory services to a laboratory services provider's disclosure of its network status in writing to the covered person prior to providing services.

While the Proposed Rule's language is inconsistent with the plain language of the statute, the CAP and OSP note further that their interpretation of the statute is supported by the Department's own Business Impact Analysis submitted on August 5, 2021 in connection with the Proposed Rule. Specifically, the Analysis states that:

> This rule impacts health insurers, and healthcare providers, when insured individuals receive healthcare services under two conditions,

[2] Emphasis added.

1. Receive emergency care at an out of network provider or at an out of network facility,

2. Receive unanticipated out of network care at an in network care facility, but services are rendered by an out-of-network provider.

Under these two conditions, the health provider is prohibited from balance billing the consumer for the out of network costs.

Like the statute, the Business Impact Analysis does not require that out-of-network clinical laboratory services be ordered by an in-network provider, nor does the Analysis require that out-of-network clinical laboratory providers disclose their network status in writing to patients before rendering services. Rather, the Analysis further supports our view that the statute applies only to unanticipated out-of-network clinical laboratory services provided at in-network facilities.

Finally, we note that the Department's purported notification requirement, if implemented, could also create undue administrative burden for clinical laboratories and, ultimately, hinder patient care. Specifically, under the Proposed Rule, out-of-network clinical laboratories receiving specimens from in-network facilities would be required to hold specimens in abeyance pending confirmation of whether the patient was notified in writing of the laboratory's network status.

II. Proposed Revisions to the Regulatory Language

The CAP and OSP believe that the language of the Proposed Rule should be revised to expressly limit its applicability to out-of-network clinical laboratory services provided at in-network facilities when the patient did not have the ability to request services from an in-network provider. Specifically, we recommend the following revisions be implemented in Section (E)(7)(a) of the Proposed Rule before it is finalized:

> Clinical laboratory services provided by an out-of-network provider~~, but that are ordered by an in-network provider,~~ to a covered person at an in-network facility, that would be covered by a health plan issuer if provided by an in-network provider, shall be considered to have met the condition prescribed in paragraph (E)(7)(a), ~~of this rule unless the provider rendering the laboratory services discloses its network status in writing to the covered person before the services are~~ provided the covered person did not have the ability to request such services from an in-network clinical laboratory services provider at such facility.

These proposed revisions would ensure that the final rule conforms to the statutory text and, as a practical matter, would eliminate the risk of undue administrative burden and detrimental impacts on patient care that could accompany clinical laboratories' delaying testing pending patient notifications and responses.

* * *

The College of American Pathologists and the Ohio Society of Pathologists appreciate the opportunity to comment on the Proposed Rule and appreciate the Department's consideration of these issues. Should you have any questions or wish to discuss these issues further, please do not hesitate to contact me or the following CAP and OSP representatives:

- Barry R. Ziman, Director, Legislation and Political Action, College of American Pathologists, bziman@cap.org
- Sean M. Kirby, MD, FCAP, President, Ohio Society of Pathologists, smkirby@mercy.com

Sincerely,

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Partner, Sidley Austin LLP
On behalf of the College of American Pathologists and the Ohio Society of Pathologists

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