

## Benefits Bulletin: Health & Welfare Plans

DECEMBER 22, 2021

### Will There Be More Surprises for the No Surprises Act (NSA)?

Lobbyists for the American Hospital Association and American Medical Association became the latest to file a **lawsuit in the DC federal district court challenging the Biden administration's interim final rule implementing the NSA, which protects patients against surprise medical billing**. The lawsuit relates to how arbitrators determine the amount insurers will pay toward out-of-network bills. **The rule instructs arbitrators to select the amount closest to the "median in-network rate,"** but plaintiffs allege that focusing on median in-network rates does not reflect Congress' intent that "no particular weight or presumption for any one factor" be considered by arbitrators.

**Winston Takeaway:** The NSA effective date is January 1, 2022. Plan sponsors should continue to monitor developments to determine whether the lawsuit will have any effect on implementation of the rule or result in any changes to the final rule.

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### Delays Announced Regarding the WA Cares Fund

Washington State created the WA Cares Fund to provide affordable long-term care options for employees in Washington state, except for those employees who opted out. Employers were to begin collecting premiums from employees on January 1, 2022. Last Friday, the Washington State governor and legislature announced a delay in the **WA Cares Fund Premium Assessment** to make adjustments to the Fund during the 2022 legislative session. The delay was partially in response to a class action lawsuit filed in the U.S. District Court of Washington challenging the law on ERISA preemption and other grounds. Under the delay, employers will not be subject to penalties and interest for failure to withhold premiums from employees' wages until these changes are made at a future date.

**Winston Takeaway:** We recommend that employers with employees in Washington state notify affected employees of the delay in premium payments to the WA Cares Fund until the state provides additional clarification and guidance. Employers should also continue to monitor legal challenges to the fund.

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# How Will Expansion of Free At-Home COVID-19 Testing Affect Group Health Plans and Insurers?

Under President Biden's ***New Actions to Protect Americans Against the Delta and Omicron Variants***, guidance is to be issued **by January 15th** clarifying that individuals who purchase **over-the counter** COVID-19 diagnostic tests **during the public health emergency** will be able to be reimbursed by their group health plan or health insurance issuer. This new policy change will likely not be retroactive but will have a short timeline for implementation.

**Winston Takeaway** - It remains unclear as to whether this will be treated as an eligible medical expense under Internal Revenue Code Section 213(d), and if not, the tax implications for such a reimbursement.

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## Increase in the ACA PCORI Fee

The Affordable Care Act's (ACA's) fee to help fund the Patient-Centered Outcomes Research Institute (PCORI) has been increased to \$2.79 per enrollee for plan years beginning October 1, 2021, through October 1, 2022. This is an increase in the \$2.66 per enrollee fee assessed during the plan years beginning October 1, 2020 through October 1, 2021. See [Notice 2022-4](#) for more details.

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