There has been some question regarding APA's interpretation of the No Surprises Act. Please see below for more information from APA's outside counsel. Please know that PPA is taking a conservative approach here as well—as someone noted on the listserv, it is far easier to ease restrictions than to tighten them after the fact. While we would love to announce that the law does not apply to psychologists in private practice, we believe it is more important for everyone to be prepared to apply the law until we know more. We fully appreciate the apprehension and frustration folks are feeling; however, there is limited new information available at this time. AS SOON AS WE HAVE NEW, VALID INFORMATION, IT WILL BE DISTRIBUTED TO PPA MEMBERSHIP.

There has also been a lot of speculation on the PPA listserv about the implications of the law. Currently, the important aspects to know are that uninsured patients and patients who are choosing not to use their insurance need to be provided with an estimate of projected costs. There are several templates available directly from CMS (CMS-10791 | CMS). This law can rightfully be viewed as another piece of informed consent with patients/potential patients. Here is new additional information from the Department of Health and Human Services regarding the Act HHS PPDR Individuals Guidance (cms.gov)

The following information comes from APA Practice's outside attorneys, Epstein Becker & Green:

Note: APA and APA Services, Inc. attorneys and outside counsel do not provide legal advice or legal opinions to SPTAs and members. Those seeking legal advice should consult with an attorney with appropriate experience.

I have double checked the language in the statute and regulations, as well as recent guidance that CMS has put out regarding the requirement for providers and facilities to provide a good faith estimate. My reading of the statutory and regulatory language, and the recent guidance, is that the good faith estimate requirement applies to all providers who schedule services in advance, and it does not apply only to providers who furnish services in a facility.

Specifically, the balance billing prohibitions at Sec. 2799B-1 apply to emergency services furnished in an emergency department of a hospital or an independent freestanding emergency department. The balance billing prohibitions at Sec. 2799B-2 apply to non-emergency services performed by nonparticipating providers at a participating health care facility. Accordingly, both of these provisions apply to services that are furnished in a facility setting. However, the good faith estimate requirements at Sec. 2799B-6 apply to "each health care provider and health care facility". There is no language in the statute that limits the requirement to only those providers who furnish services in a health care facility (unlike in Secs. 2799B-1 and 2799B-2, which are clearly limited to services furnished in an applicable facility setting). *See* https://www.govinfo.gov/content/pkg/COMPS-8798/pdf/COMPS-8798.pdf.

Further, the regulatory language included in the Second Interim Final Rule related to the provision of the good faith estimate (e.g., at 45 C.F.R. §149.610) states that the requirement applies to "health care providers and health care facilities" … "upon request or upon scheduling an item or service." Throughout this section of the regulations, the language refers to a provider ***or*** facility, but there is no language stating that the good faith estimate requirement only applies when the provider furnishes the service in a facility. *See* https://www.govinfo.gov/content/pkg/FR-2021-10-07/pdf/2021-21441.pdf.

CMS issued an FAQ document on Dec. 22 that mainly addresses the IDR process, but it also includes one question that discusses the good faith estimate requirements. Specifically, this FAQ distinguishes

between providers who are subject to the balance billing protections (i.e., physicians who furnish services in connection with a visit to a health care facility or emergency facility) vs. all providers who are required to comply with the good faith estimate requirements. The FAQ reads as follows:

> Q: Which physician types do the No Surprises Act rules apply to?
>
> A. Any physician or other health care provider who is acting within the scope of practice of that provider's license or certification under applicable State law may be subject to the rules, depending upon the rule. For example, a provider who never furnishes services in connection with a visit to a health care facility or emergency facility would generally not furnish items or services that fall within the balance billing protections. However, that same provider may need to provide a good faith estimate of expected charges to uninsured or self-pay individuals. If you have further questions, please email provider_enforcement@cms.hhs.gov.

See https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Guidance-IDR-NC-FAQ.pdf.

CMS issued another FAQ document within the past few days that specifically addresses questions related to the good faith estimate requirements. There is an FAQ that discusses which providers are subject to the requirement. The FAQ reads as follows:

> Q: Which providers and facilities are required to provide GFEs to uninsured (or self-pay) individuals?
>
> A: Generally, all providers and facilities that schedule items or services for an uninsured (or self-pay) individual or receive a request for a GFE from an uninsured (or self-pay) individual must provide such individual with a GFE. No specific specialties, facility types, or sites of service are exempt from this requirement.
>
> The terms "health care provider (provider)" and "health care facility (facility)" are defined in regulations for purposes of the GFE requirements for uninsured (or self-pay) individuals as:
>
> - "Health care provider (provider)" means a physician or other health care provider who is acting within the scope of practice of that provider's license or certification under applicable State law, including a provider of air ambulance services;
>
> - "Health care facility (facility)" means an institution (such as a hospital or hospital outpatient department, critical access hospital, ambulatory surgical center, rural health center, federally qualified health center, laboratory, or imaging center) in any State in which State or applicable local law provides for the licensing of such an institution pursuant to such law or is approved by the agency of such State or locality responsible for licensing such institution as meeting the standards established for such licensing.
>
> There may be variations in practice patterns, such as whether a specific provider or facility furnishes services to uninsured (or self-pay) individuals, along with the types of items or services provided. There are some items or services that may not be included in a GFE because they are not typically scheduled in advance and not typically the subject of a requested GFE (such as urgent, emergent trauma, or emergency items or services); however, to the extent that such

> care is scheduled at least 3 days in advance, a provider or facility would be required to provide a GFE.
>
> For example, individuals will likely not be able to obtain GFEs for emergency air ambulance services, as these are not generally scheduled in advance. However, making these requirements applicable to providers of air ambulance services helps to ensure that individuals can obtain a GFE upon request or at the time of scheduling non-emergency air ambulance services, for which coverage is often not provided by a plan or issuer and thus even individuals with coverage must self-pay.

See https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Guidance-Good-Faith-Estimates-FAQ.pdf.

Accordingly, CMS has clarified that the good faith estimate requirement is not limited to providers who furnish services in a facility, but rather, the requirement applies to all providers if services are scheduled in advance.

If it is helpful, HHS and CMS have both issued additional guidance regarding the good faith estimate requirements. HHS recently issued two guidance documents – one for patients and one for providers – on the good faith estimate and patient-provider dispute resolution process. These documents are available here:

> https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Good-Faith-Estimate-Patient-Provider-Dispute-Resolution-Process-for-Uninsured-or-Self-Pay-Individuals.pdf
>
> https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Guidance-Good-Faith-Estimate-Patient-Provider-Dispute-Resolution-Process-for-Providers-Facilities-CMS-9908-IFC.pdf

Additionally, CMS has issued a number of model forms related, a few of which provide information on the good faith estimate requirements. The forms are available here: https://www.cms.gov/files/zip/cms-10791.zip. The good faith estimate forms of interest include:

- HHS PRA Supporting Statement
- 1. Right to Receive a Good Faith Estimate of Expected Charges Notice
- 2. Good Faith Estimate Template
- 11. HHS – Appendix Good Faith Estimate Data Elements