The Honorable Xavier Becerra
Secretary
Department of Health and Human Services
200 Independent Avenue, SW
Washington, DC 20201

The Honorable Martin J. Walsh
Secretary
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Janet Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

March 10, 2022

Dear Secretaries Becerra, Walsh, and Yellen:

The undersigned organizations represent large and mid-sized employer plan sponsors who collectively provide healthcare coverage to half of the US population. Late last month, a Federal District Court in Tyler, TX vacated certain sections of your interim final rule (CMS-2021-01560) implementing the *No Surprises Act*.[1] While the prohibition on surprise bills remains intact, if this decision remains in place, it will badly harm the same families the law seeks to protect. **As representatives of the nation's leading employers, we write today to provide our perspective of the likely impact of the *Texas Medical Association* decision on employers, purchasers, and families and to provide our recommendations on how to proceed with any future rulemaking.**

In the immediate term, we expect **the decision will lead to wide variation, and lack of predictability, in arbitration outcomes**. Your rule provided detailed and specific guidance to arbitrators on how to weigh various factors in resolving payment disputes. That guidance sought both to generally anchor arbitration decisions around the statutorily defined median contracted rate – effectively, the market rate – for services, unless extenuating circumstances dictate otherwise, and to provide all parties with predictability, minimizing variation in arbitration outcomes. With that section of the rule vacated, each individual arbitrator must exercise their own judgment in weighing factors as disparate as the market payment rate, training and experience of the clinician, teaching status of the facility and whether the participants engaged in good faith efforts in resolving a payment dispute, among others.

Over time, the lack of predictability in arbitration decisions will likely **lead to a greater use of arbitration** by providers as parties seek to identify which arbitrators are likely to rule in their favor and which factors most impact arbitration decisions. **The proliferation of arbitration will increase administrative costs for all parties, most of which will be directly or indirectly passed onto employers, purchasers, and families**. The opposite would be true if a more predictable IDR process remained in place. While it is reasonable to expect some initial testing

[1] Texas Medical Association v. Department of Health and Human Services (Case No. 6:21-cv-425-JDK)

of arbitration by providers, once a pattern of decisions emerges under a more predictable IDR process, the incentive for both parties will be to settle payment disputes before arbitration rather than go forward with a costly and burdensome arbitration process or for plans to pay amounts that avoid payment disputes altogether. Unfortunately, the decision erodes these incentives and will to lead to more arbitration, not less.

As you know, nearly half the states in the country implemented surprise billing protections before enactment of the federal *No Surprises Act*. **State-level experience shows the importance of the instructions provided to arbitrators and how those decisions impact long-term cost growth.** Laws enacted in New Jersey, New York, and Texas direct arbitrators to consider the offer submitted by the party closest to the 80th percentile of billed charges (already a highly inflated figure). Not surprisingly, early data indicate that arbitration is leading to very high payments to out-of-network providers. In New Jersey, median arbitration decisions are more than five times the market rate for services in the state.[2] In Texas, where state law was implemented more recently and data is less available, the Texas Medical Association reports that the use of arbitration was significantly higher in 2021 than in 2020, a likely indication that providers are finding that going to arbitration results in higher profits than settling payment disputes before arbitration, or going in-network.[3]

An arbitration system that fails to sufficiently emphasize the market rate will likely lead to more decisions being made in favor of providers with offers well above the market rate, and those decisions will lead to substantially enhanced leverage for providers in contract negotiations. To cope with this dysfunctional system, self-insured employers will be forced to increase their own in-network payment rates for specialties capable of surprise billing, driving up costs and ultimately harming employees and their families. **Ultimately, the court decision creates a disincentive for providers to join carrier networks, perpetuating the market distortions Congress intended to correct and eliminating the savings the Congressional Budget Office forecast for the legislation.**

We are deeply disappointed that the federal district court in Tyler, TX chose to legislate from the bench, rather than provide appropriate discretion to rule makers seeking to implement a complicated new law. Nevertheless, while the decision in Tyler has nationwide immediate effect, there are five other cases currently pending in other district courts dealing with the same issues raised by the Texas Medical Association. Indeed, the district court in Washington, DC, will be hearing oral arguments on a similar case later this month. **We believe that the IFR's rules establishing the market rate as a starting point for arbitration decisions are not only legal, but are absolutely vital to rectifying a distorted market and avoiding the inflationary scenario described above. We understand that you are working to finalize the regulations at issue in these cases and we urge you to ensure the final rules retain strong**

[2] https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/20/laws-to-curb-surprise-medical-bills-might-be-inflating-health-care-costs
[3] https://www.texmed.org/Template.aspx?id=57449

provisions providing a predictable, clear arbitration process in which the local market rate is a prominent consideration.

Thank you for your consideration of the needs of America's employers, purchasers, and the millions of families for which we have the privilege of providing health care coverage.

Sincerely,

American Benefits Council
American Health Policy Institute
Auto Care Association
Business Group on Health
HR Policy Association
National Alliance of Healthcare Purchaser Coalitions
National Association of Health Underwriters
National Retail Federation
Partnership for Employer-Sponsored Coverage
Purchaser Business Group on Health