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The Converging Forces of Healthcare Price Transparency:
Self-Insured Employers Will Lead the Way to Cost Reductions

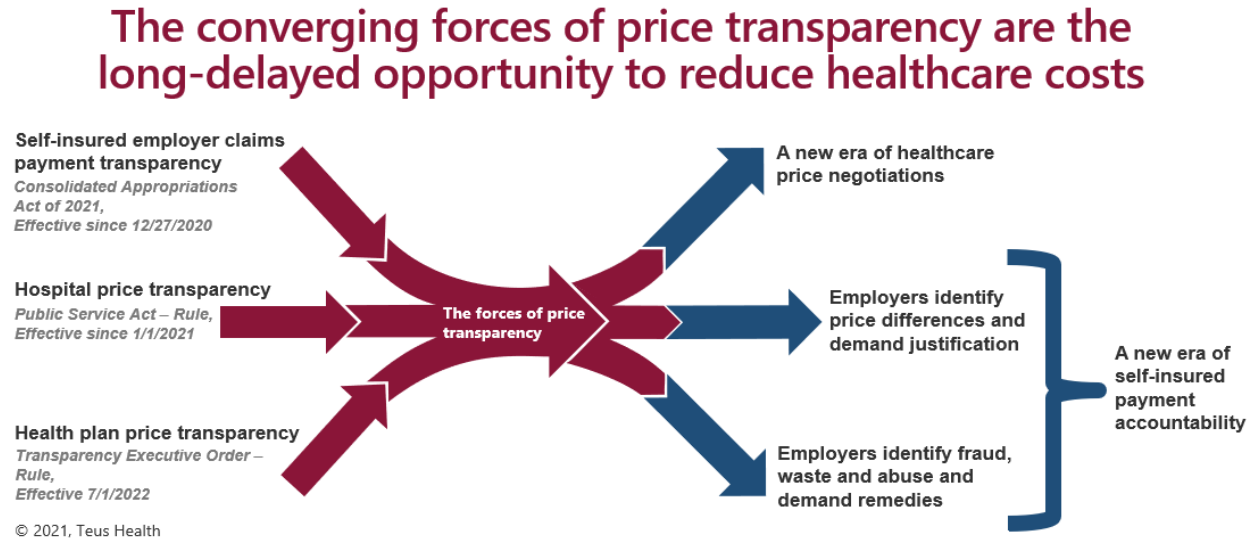
Overview

For decades the negotiated prices between healthcare providers, insurance carriers, and networks have been tightly-guarded trade secrets. Carriers and networks included "gag clauses" in their contracts with providers, prohibiting any party from disclosing the contracted prices and other financial terms to anyone. Only the carrier/network was aware of how much prices varied from one provider to another. Self-insured employers, who contract with carriers and networks to pay for two-thirds of employer-sponsored healthcare costs, were not permitted to know provider-level prices—even as their money paid the providers.

Self-insured employers who asked for payment details were told "*You can have provider-identity or you can have prices, but you cannot have both*." The secrecy led to today's widely variable prices. Within the same network, prices can vary several-fold from provider to provider, often with no relationship with quality.[1] Self-insured employers, who pay more than $22,000 per year per employee,[2] had to blindly trust that their carrier or network was charging them reasonable prices and protecting them from fraud, waste, and abuse.

Today, self-insured employers can do better than trust their carrier/network. Healthcare price transparency is the bipartisan-supported law and can deliver employers long-awaited healthcare cost reductions. Gag clauses have been banned, and, by law, medical care prices[3] should be fully transparent by July 2022. While entrenched interests are doing their best to stall transparency, unless the laws change, transparency is going to happen and will rock the health insurance market. And, since self-insured employers have the most to gain and least to lose from transparency, they will lead the change.

Figure 1



Transparency Laws

Transparency is progressing under three forces: hospital price transparency (a rule), self-insured employer claims payment transparency (a law), and health plan price transparency (a rule).

Hospital price transparency. Hospital price transparency has received the most press. Under the "Price Transparency Requirements for Hospitals to Make Standard Charges Public" Final Rule of the Public Health Service (PHS) Act, released November 2019, hospitals were required to publicly post a machine-readable file that lists all of their negotiated prices with payers at the service line-level and also in-total for common bundles of services, by January 1, 2021 and annually thereafter. They also have to provide a consumer-friendly online pricing tool.[4,5] The rule covers inpatient and outpatient facility services and the services of hospital-employed physicians and non-physician practitioners. Negotiated prices include the contractual prices for commercial coverage, Medicare Advantage, and Managed Medicaid.[6] In 2021 a supermajority of hospitals have posted insufficient data, unusable data, or none at all.[7] As a consequence, CMS has greatly increased the 2022 penalty for non-compliance.[8]

Self-insured employer transparency. The "Increasing Transparency by Removing Gag Clauses on Price and Quality Information" provisions of the Consolidated Appropriations Act of 2021 (CAA), signed into law December 27, 2020, prohibits gag clauses and other contractual provisions that restrict self-insured employer access to comprehensive health insurance claims data. Carriers and networks holding plan data must share it with the employer. Employers are furthermore allowed to share the data, consistent with applicable patient privacy regulations.[9] The gag prohibition extends to all employer-sponsored plans including Medicare Advantage employer group waiver plans (EGWPs). Self-insured employer transparency is the least discussed of the three transparency forces. This may be because the provisions have been overlooked within the massive appropriations act or because people are mistakenly waiting for rules. The Department of Labor confirmed in August 2021 that the provisions were effectively immediately and are to be implemented based on a good faith interpretation rather than rules.[10]

Health plan transparency. Under deferred enforcement of the "Transparency in Coverage" (TiC) Final Rule on President Trump's "Improving Price and Quality Transparency in American Healthcare to Put Patients First" Executive Order, by July 1, 2022 all health plans must prepare and publicly post a machine-readable file that lists all of their negotiated prices with all contracted providers (hospital and otherwise), at the service line-level and also in-total for common bundles of services. They soon thereafter will also have to provide a consumer-friendly online pricing tool.[11,12] These obligations extend to all non-ACA-grandfathered plans with negotiated prices: individual, fully insured group, self-insured group, Medicare Advantage, and managed Medicaid. Fulfilling the obligations is the legal responsibility of the plan sponsor, which in the case of self-insured plans is the employer and not the carrier or network to which the employer may delegate the fulfillment tasks.

Transparency is threatening

Transparency will initially be rocky. Negotiators, after decades of price secrecy, have neither the necessary analytic capabilities nor experience to negotiate in an era of transparency. Past negotiations relied on limited data and simple trends. In contrast, everyone at the negotiating table will soon have the ability to know what every provider, locally and nationally, is being paid and by whom.

While there will be both winners and losers, most providers, carriers, and networks are much more concerned with the possibility of losing (including a disruption to business as usual) than the potential for winning. And, some prominent providers, that had "named their prices" in the era of secrecy, will definitely lose. Most providers, carriers, benefits consultants, and networks will likely engage in some form of active or passive resistance – if only to stretch their time to full compliance and avoid a perceived first-mover disadvantage.

Self-insured employers will win

Self-insured employers, however, only win with transparency. For the first time ever, they can see the irrationality in the prices paid to providers.[13] For example, they can question why there is a 3x spread in the prices paid to similar providers, a difference that can seldom be justified by quality differences. They can require that carriers and networks negotiate new prices or remove high-price providers from their preferred network. And, if self-insured employers are unhappy with their carrier's or network's response, they will be able to issue a request for proposal (RFP) for a bid from new carriers/networks, provide the bidders with historical claims data for repricing, and ask for price guarantees.

Claims data will also allow self-insured employers to follow-the-money to payment fraud, waste, and abuse (FWA) and the specific providers perpetuating the FWA. Addressing fraud, waste, and abuse has never been a priority of carriers and networks and, as a result, perhaps 10% of employers' spend is FWA.[14] See "The Dawn of Self-Insured Transparency: Shining Light onto Fraud, Waste, Abuse, and Overpricing" for more on FWA and overpricing.

More claims are better. To be even more effective, employers can pool their claims data, which will give them the power of bigger data. Pooled data is particularly useful for identifying patterns of FWA and the providers perpetuating FWA. While the pooled data has to protect patient identity, it does not need to protect provider identity.

Self-insured employers must lead

Transparency allows self-insured employers to be good stewards of their plan's healthcare spend – stewardship that is required under the employer's federal ERISA fiduciary responsibilities.[15,16] Now that price transparency is law, it is incumbent upon plan stewards to demand price-transparent data from providers, carriers, and networks and use the data to reduce FWA and overpricing.

Employers will need Teus Health and other analytic partners, who have the tools and deep expertise necessary to identify FWA and overpricing. It's not work for novices, nor should employers rely exclusively on their old vendors' "new solutions", even those that reportedly rely upon "new and improved" "artificial intelligence." Novices and machines don't understand the imperfections and nuances of the data, ignore larger contextual issues, and wrongly identify FWA and overpricing.

Conclusion

Self-insured employers were disappointed that implementation of the Affordable Care Act (ACA) did little to address healthcare cost. Today, years later, price transparency provides a meaningful cost-reduction opportunity. Like any change that reduces cost and redistributes revenue, transparency is resisted by entrenched interests. It is up to self-insured employers, with the most to gain from price transparency and fiduciary obligations to fulfill, to push past the resistance, assure that the nascent transparency laws are sustained and enforced, and use the newly-available data to reduce healthcare costs. The work will pay off.

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[1] Health Cost Institute, "The Price-Quality Paradox in Health Care", April 2016.
[2] Kaiser Family Foundation, "2021 Employer Health Benefits Survey", November 2021.
[3] Prescription drug price transparency will take a bit longer and will be discussed in a future essay.
[4] Federal Register, "Price Transparency Requirements for Hospitals To Make Standard Charges Public Final Rule", November 27, 2019.
[5] CMS, "Compliance with Hospital Price Transparency Final Rule: 8 Steps to a Machine-Readable File", August 2021.
[6] CMS, "Hospital Price Transparency Frequently Asked Questions (FAQs)", January 15, 2021.
[7] Healthcare Executive Intelligence, "Hospitals Fall Short of Price Transparency Rule Compliance", July 22, 2021.
[8] CMS, "CMS OPPS/ASC Final Rule Increases Price Transparency, Patient Safety and Access to Quality Care", November 2, 2021.
[9] US Congress, "Consolidated Appropriations Act, 2021", December 27, 2020, page 1711.

[10] Department of Labor, "FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021, Implementation Part 49", August 21, 2021, page 7.
[11] CMS, Fact Sheet: Transparency in Coverage Final Rule Fact Sheet (CMS-9915-F), October 29, 2020.
[12] Department of Labor, "FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021, Implementation Part 49", August 21, 2021.
[13] New York Times, "Hospitals and Insurers Didn't Want You to See These Prices. Here's Why", August 22, 2021.
[14] MHK, "Health-Care FWA May Be Much Higher Than Suspected in the United States", December 3, 2019.
[15] Department of Labor, "Understanding Your Fiduciary Responsibilities Under a Group Health Plan", September 2019.
[16] SHRM, "Legal & Regulatory: What is a fiduciary, and what are 'fiduciary responsibilities' under an ERISA-covered group health plan?", October 6, 2016.