Federal District Court Upholds CMS Hospital Price Transparency Rule, Reporting to Begin January 1, 2021

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Hospitals are urging CMS to delay implementation of the reporting requirements until the issue of the rule's legality is settled by appeal in the courts. In the meantime, hospitals should prepare for the scheduled effective date of the reporting requirements on January 1, 2021.

Summary of Reporting Requirements

CMS promulgated the hospital price transparency rules as part of the administration’s efforts to provide information to patients on the cost of health care services and lower health care costs. The rule followed an Executive Order signed by the President on June 24, 2019, directing the Department of Health and Human Services (HHS) to propose a regulation to require hospitals to publicly post standard charge information.

The final rule applies to all Medicare and non-Medicare hospitals, except those that are federally owned, and includes all entities and locations operated under the same state license, as well as services provided through their employed physicians and non-physician practitioners. It imposes two requirements on hospitals: 1) establish, update, and make public a list of all standard charges for all items and services; and 2) make public a consumer-friendly list of standard charges for a limited set of “shoppable services.”

Public List of Standard Charges
CMS outlined the following five types of standard charges that hospitals must report for each item or service provided by the hospital, whether in the inpatient or outpatient department setting:

1. Gross charge
2. Payer-specific negotiated charge
3. De-identified minimum negotiated charge
4. De-identified maximum negotiated charge
5. Discounted cash price

Hospitals must also include a description of each item or service provided by the hospital and any code used by the hospital for accounting or billing purposes related to the item or service, such as a CPT code, HCPCS code, DRG, NDC, or other common payer identifier.
The information must be in a single digital file, in a machine-readable format, posted in a publicly available internet location, displayed prominently and clearly identify the hospital location associated with the charge information. Updated postings are required at least once annually.

**Consumer-Friendly List of Standard Charges for Shoppable Services**

Hospitals must make public standard charges for "shoppable services," including as many of the 70 shoppable services specified by CMS that are provided by the hospital and as many additional shoppable services selected by the hospital, for a combined total of at least 300 shoppable services. CMS defines a "shoppable service" as a service that can be scheduled by a health care consumer in advance.

The 70 CMS-specified shoppable services are divided into four broad categories: E&M Services, Laboratory and Pathology Services, Radiology Services, and Medicine and Surgery Services. CMS provides guidance in the preamble to the final rule on how hospitals should select additional shoppable services.

Hospitals are required to include a description of each shoppable service, an indication if the hospital does not provide the service, and standard charge information including the payer-specific negotiated charge, discounted cash price, de-identified minimum negotiated charge, and de-identified maximum negotiated charge. Hospitals must also identify the location where the shoppable service is provided, including whether each type of standard charge applies at that location with regard to the inpatient setting, outpatient setting, or both. Hospitals must identify any primary code used for accounting or billing purposes for the shoppable service.

Charge information must be included for each "ancillary service" associated with the shoppable service, which CMS defines as an item or service a hospital customarily provides as part of or in conjunction with a shoppable primary service. Hospitals should present the charge for the primary shoppable service along with charges for ancillary services in a grouping of related services.

Ancillary items and services may include laboratory, radiology, drugs, delivery room, operating room, therapy services, hospital fees, room and board charges, and charges for employed professional services. Hospitals are not required to post professional fees for non-employed providers, although CMS encourages hospitals to do so to improve transparency for consumers.

Hospitals may use a format of their choosing to make the shoppable service information public online, so long as it is easily accessible through a publicly available internet location, is displayed prominently, and identifies the hospital location with which the information is associated. Hospitals must update the standard charge information at least once annually.

CMS will deem a hospital to meet the requirement if the hospital maintains an internet-based price estimator tool that meets certain criteria.

**Monitoring and Penalties**

CMS will monitor compliance and is authorized to take a number of actions related to non-compliance, including:

- Provide a written warning notice;
- Request a corrective action plan for material violations; and
- If a hospital fails to respond to a request for a corrective action plan or fails to comply with the terms of a corrective action plan, impose civil monetary penalties of up to $300 per day and publicize the penalty on the CMS website.
Summary of Court Decision

The American Hospital Association, Association of American Medical Colleges, Federation of American Hospitals and National Association of Children’s Hospitals, along with several health systems and state hospital associations, filed suit on December 4, 2019, against the Secretary of Health and Human Services in the U.S. District Court for the District of Columbia, arguing that the 2019 price transparency final rule exceeds CMS's authority, violates the First Amendment public speech rights, and is arbitrary and capricious under the Administrative Procedure Act.

The agency's regulations were created to implement the statutory provisions that require each hospital to "establish...and make public (in accordance with the guidelines developed by the Secretary) a list of the hospital's standard charges for items and services provided by the hospital." 42 U.S.C. § 300gg-18(e). The court rejected the plaintiffs’ arguments that the statute limits the disclosure of "standard charges" to a hospital's chargemaster charges and that "standard charges" cannot reasonably be read to include payer-negotiated charges. The court further rejected the plaintiffs’ position that the mandates of the regulation compel speech in violation of the First Amendment. The court determined that to the extent the publication of charges qualifies as a form of expression, it is a regulation of commercial speech which is reasonably related to the agency's interests and does not chill any protected speech. The court concluded that the final rule was not arbitrary or capricious. The plaintiffs appealed the decision to the D.C. Circuit Court of Appeals on June 24, 2020. No. 20-5193, D.C. Cir.

Next Steps and Hospital Considerations

In addition to the appeal of the court determination, four hospital groups wrote to HHS on June 29, 2020, urging the agency not to implement the final rule on January 1, 2021, largely due to the challenges faced by hospitals due to the COVID-19 pandemic. The groups asked HHS to delay implementation until the courts have resolved the legality of the final rule, given the financial and operational challenges hospitals will face creating systems to implement the reporting requirements while the pandemic is straining hospital resources. A group of 34 state hospital associations sent a similar letter to HHS on July 2, 2020.

At the same time, Republicans in the U.S. Senate have introduced legislation to codify both the hospital price transparency rule as well as a separately proposed rule issued by CMS, similar to the hospital price transparency rule, that would require insurance companies to publish rate information.

Although hospitals are asking for a delay in implementation, the requirements of the current hospital price transparency final rule cannot be implemented overnight so hospitals should begin now to establish procedures to ensure full implementation by January 1, 2021.

For more information or any question regarding these issues, please contact Leslie Goldsmith, Jeff Davis, or any member of Baker Donelson’s Reimbursement team.

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