

COURT RULES THAT HOSPITAL PRICE TRANSPARENCY REQUIREMENTS CAN TAKE EFFECT

The Department of Health and Human Services ("HHS") received a victory this week in the litigation challenging the agency's final rule that requires hospitals to publicly disclose the prices they charge, as well as their specific reimbursement rates with third-party payers ("Price Transparency Rule"). The Price Transparency Rule is scheduled to go into effect on January 1, 2021.

The court's decision comes amid calls from across the industry to delay the Price Transparency Rule's effective date to allow hospitals, already burdened by COVID-19, more time to prepare for the arduous publication requirements. With the effective date only a few months away, however, this court victory, combined with indications HHS appears committed to the current timeframe, means hospitals must continue preparing to meet the requirements included in the Price Transparency Rule.

PRICE TRANSPARENCY BACKGROUND

Under the Affordable Care Act, Congress authorized HHS to develop guidelines for hospitals to publish lists of "standard charges" for items and services provided by the hospital. Pursuant to that authority, and further prompted by an executive order from the President last summer, CMS promulgated the Price Transparency Rule in November of 2019.^[1] The Price Transparency Rule requires that nearly all licensed hospitals post "standard charges" (defined to include the rates that the hospital has negotiated with each third-party payer) on their websites for each item and service they provide, beginning on January 1, 2021.

LEGAL CHALLENGE UPDATE - *AMERICAN HOSPITAL ASSOCIATION ET AL. V. AZAR*

Following the publication of the final Price Transparency Rule, the American Hospital Association and others promptly sued HHS to challenge the rule. The plaintiffs alleged that the Price Transparency Rule exceeds statutory authority granted to HHS to require hospitals to publish their standard charges, unlawfully compels speech in violation of the First Amendment and subverts the Administrative Procedure Act's rulemaking requirements.

On June 23, 2020, a federal judge for the U.S. District Court for the District of Columbia ruled in favor of the federal government and dismissed the plaintiffs' claims on a motion for summary judgment.^[2] The district court noted that it was "a close call whether the Agency reasonably interpreted 'standard charges' to include rates negotiated with third-party payers" but ultimately concluded that the CMS's definition of "standard charges" was a "reasonable construction that accounted for the peculiar dynamic of the health care industry" and is consistent with the statutory goal of "bringing down the cost of health care coverage."

Additionally, the plaintiffs contended that the publication of payer-specific negotiated rates would "chill negotiations between hospitals and insurers" and confuse, or even deter, patients from seeking care. The court found that such possibilities were "too attenuated from the compelled disclosure" of negotiated rates to unlawfully infringe commercial speech protected under the First Amendment. Moreover, the court concluded that the Price Transparency Rule is sufficiently related to CMS's goal of improving patients' decision-making and that it does not impose a disproportionately large burden on hospitals.

On June 25, 2020, the plaintiffs filed their notice of appeal of the district court's decision to the D.C. Court of Appeals. With the requirements of the Price Transparency Rule set to be effective in just five months, however, it is unlikely that an appellate ruling would occur prior to that date. The American Hospital Association may seek to have the Price Transparency Rule stayed pending the appeal, but in the meantime hospitals should continue to prepare to comply with the Price Transparency Rule's publication requirements as of January 1, 2021.

NO DELAY TO ACCOUNT FOR COVID-19

Some health systems and industry associations had hoped that HHS would delay the effective date of the Price Transparency Rule or announce an enforcement waiver as a result of the current COVID-19 Public Health Emergency. HHS has not yet issued any guidance delaying the effective date or enforcement of the Price Transparency Rule. In contrast, HHS appears to have doubled-down on its efforts in the recently published Inpatient Prospective Payment System Proposed Rule for fiscal year 2021 ("Proposed Rule"). CMS proposed to adopt a major overhaul to the Medicare cost report submission process that builds on the Price Transparency Rule's standard charge publication

requirements.^[3]

Although the Proposed Rule did not specifically address whether CMS would delay the price transparency requirements due to COVID-19, the agency indicated that it believes the new reporting requirement will not be burdensome because hospitals will already be publishing this information by January 1, 2021, as required by the Price Transparency Rule. This initiative suggests that CMS has no intention of moving away from the Price Transparency Rule's previously announced January 1, 2021 effective date.

PRACTICAL TAKEAWAY

Hospitals should continue to prepare to meet the requirements included in the Price Transparency Rule before the January 1, 2021 effective date. In addition, hospitals should monitor the ongoing litigation challenging the rule, as well as any possible announcement from CMS, either of which could still ultimately affect the requirements for hospitals' disclosure under the Price Transparency Rule.

If you have questions or would like additional information about this topic, please contact:

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^[1] For more on the Price Transparency Rule, see our summary available [here](#).

^[2] See American Hospital Association et al. v. Azar, (1:19-cv-03619), available [here](#).

^[3] For more information on these particular reporting requirements, see our summary available [here](#).