

Area Wage Index Litigation: What You Need to Know November 2022

Background

On Aug. 2, 2019, the Centers for Medicare & Medicaid Services (CMS) adopted its federal fiscal year (FFY) 2020 inpatient prospective payment system (IPPS) final rule, which included several changes to how the area wage index (AWI) is determined. The AWI is a factor used by CMS in adjusting payments for geographic differences in labor costs for IPPS hospitals. The AWI changes [outlined in the FFY 2020 IPPS final rule](#) included two key issues: a reduction to the standardized IPPS payment amount for all hospitals to fund an AWI increase for hospitals in the lowest quartile, and the exclusion of hospitals located in urban areas that have reclassified as rural hospitals from the determination of the rural wage index and the related rural floor.

CHA strongly opposed CMS' "rob Peter to pay Paul" approach, which sets a dangerous precedent: that CMS can choose to increase payments to one group of hospitals by decreasing payments to another group. To remedy this situation, CHA's Executive Committee directed CHA to coordinate, organize, and fund challenges to these policies on behalf of affected member hospitals for FFY 2020, FFY 2021, and FFY 2022.

CHA's legal challenge to the policies for FFYs 2020, 2021, and 2022 are ongoing. CHA's Executive Committee recently authorized CHA to coordinate, organize, and fund a legal challenge for FFY 2023. However, action is required by each hospital to challenge the policies carried forward into FFY 2023.

To that end, CHA has engaged Hooper, Lundy & Bookman, P.C. (HLB) to lead the legal challenges to the AWI policies. HLB is working with Toyon Associates, Inc. to assist with organizing and filing the necessary administrative appeals for the AWI litigation.

CHA, not its members, will be responsible for the fees incurred in the AWI Provider Reimbursement Review Board (PRRB) process and subsequent litigation (collectively, "AWI litigation"). Because these issues are important to the overall welfare of all California hospitals, decisions about the AWI litigation will continue to be made by CHA's Executive Committee.

Update on Ongoing AWI Legal Challenge

CHA's ongoing litigation challenges two issues, outlined below. Both Issue #1 and Issue #2 are challenged for FFY 2020; only Issue #1 is challenged for FFYs 2021 and 2022.

- **Issue #1:** A reduction to the standardized IPPS payment amount for all hospitals in the nation to fund an increase only for hospitals with an AWI in the lowest quartile (none of California's hospitals are in the lowest quartile). This reduction affects all California general acute care IPPS hospitals and resulted in an approximate \$22 million loss in FFY 2020, a \$25 million loss in FFY 2021, and a \$24.6 million loss in FFY 2022.
- **Issue #2:** The exclusion of hospitals located in urban areas that reclassified as rural hospitals from the determination of the rural wage index and the related rural floor. For FFY 2020, this policy resulted in an estimated cut to about half of California's IPPS hospitals totaling \$123 million. However, for FFY 2021, the policy had a positive impact — increasing payments to California's hospitals by approximately \$81 million — and for FFY 2022, the policy had a neutral impact. As such, CHA did not pursue a legal challenge for FFY 2021 or FFY 2022 and modified

legal arguments for the FFY 2020 challenge to reduce the risk of adversely affecting urban hospitals in years beyond 2020.

HLB entered into separate engagement agreements with California hospitals and health systems that chose to participate in the litigation. For FFY 2020, the hospitals and health systems could choose to participate in the litigation for either Issue #1 or Issue #2 (if applicable), or both. HLB filed appeals with the PRRB for each independent hospital or health system that chose to participate in the litigation, separately for each issue. Expedited judicial review was subsequently granted by the PRRB for the lead case for each issue, and complaints have been filed in the U.S. District Court for the Central District of California. For FFY 2021 and FFY 2022, HLB again entered into separate engagement agreements with California hospitals and health systems and filed appeals with the PRRB on Issue #1 for each independent hospital or health system that elected to participate in the litigation. These appeals are pending at the PRRB.

The complaint for Issue #1, *Kaweah Delta Health Care District, et al. v. Azar* Case No. 2:20-cv-06564 CMB (SPx), was filed on July 23, 2020. A hearing took place on Sept. 20, 2022, and CHA awaits a decision. Notably, a separate but similar legal challenge — *Bridgeport Hospital v. Becerra* — was filed in the U.S. District Court for the District of Columbia and received a favorable ruling that found the CMS policy violates the Medicare Act. This case has been appealed to the D.C. Circuit.

The complaint for Issue #2, *Enloe Medical Center, et al. v. Azar* Case No. 2:20-cv-09278 CBM (SPx), was filed on Oct. 8, 2020. A hearing has not been scheduled. However, on April 8, 2022, the U.S. District Court for the District of Columbia (*Citrus HMA vs. Becerra*) found that the Health and Human Services secretary did not have authority under section 4410(a) of the Balanced Budget Act of 1997 to establish a rural floor lower than the rural wage index for hospitals in that same state. This case is separate from, but similar to, CHA's sponsored challenge to the FFY 2020 policy. Following this decision, **CMS rescinded its policy of excluding the wage data of urban to rural reclassified hospitals from the rural floor calculations for FFY 2023 and subsequent years.** CMS also voluntarily withdrew its D.C. Circuit appeal in the *Citrus HMA* case; withdrawal was granted by the D.C. Circuit on Sept. 16, 2022. CMS will now either settle with the *Citrus HMA* plaintiffs or will attempt to fashion a remedy consistent with the D.C. District Court decision.

FFY 2023 AWI Legal Challenge

CHA's current litigation applies only to the policies finalized for FFY 2020, FFY 2021, and FFY 2022. As indicated in the FFY 2020 IPPS final rule, CMS plans to implement its redistributive policy that reduces the standardized amount for all hospitals to fund an increase to the wage index for hospitals in the lowest quartile for four years. On Aug. 1, 2022, CMS issued its FFY 2023 IPPS [final rule](#). Despite a critically important ruling by the D.C. District Court in *Bridgeport Hospital vs. Becerra* as described above, CMS finalized its low-wage index hospital policy (Issue #1) for FFY 2023.

CHA estimates the policy will result in a reduction in payment to California hospitals of approximately \$23 million in FFY 2023.

Hospitals must once again appeal this payment reduction to the PRRB, even if the FFY 2020, FFY 2021, and FFY 2022 appeals prove successful. This is because remedies are only available to hospitals that appeal the issue for the applicable FFY, except in extraordinary circumstances. If California hospitals forgo an appeal of the issue in FFY 2023, they could lose the opportunity to recover the estimated \$23

million that would be lost under the policy in FFY 2023. **On Oct. 21, 2022, CHA's Executive Committee authorized CHA to sponsor a legal challenge to Issue #1 for FFY 2023.**

Next Steps for FFY 2023 Legal Challenge

CHA member hospitals and health systems that are participating in the FFY 2020, FFY 2021, and FFY 2022 legal challenges to Issue #1 will be contacted by HLB to execute a new engagement letter for legal services from HLB related to the FFY 2023 challenge. This letter must be returned to David Vernon at dvernon@health-law.com no later than Dec. 12, 2022. Your engagement of HLB for the FFY 2023 AWI litigation will be effective only when HLB signs the engagement agreement and returns it to you.

Please note that HLB will evaluate whether it has a conflict of interest in representing your organization after receiving a signed engagement agreement. If there is a conflict, HLB will represent your organization in the AWI litigation only if the conflict may be waived and both your organization and any other applicable party agree, in writing, to waive the conflict. HLB will work with you to obtain any necessary waivers.

As previously noted, pursuing this challenge to the FFY 2023 IPPS final rule requires appeals by hospitals and health systems to the Medicare PRRB and subsequent litigation in federal court. Toyon Associates will work with HLB to assist hospitals in filing those PRRB appeals. HLB will reach out to secure an engagement letter for legal services from HLB, and a provider representative letter to authorize PRRB appeal services from Toyon.

HLB and Toyon's services will be paid for by CHA as part of its funding of this FFY 2023 Issue #1 legal challenge.

In summary, CHA members interested in participating in the AWI litigation for FFY 2023 are asked to:

1. Carefully review the engagement letter and provider representative letter that will be sent to you by HLB
2. Enter the name of your organization where indicated in the engagement letter, which will be:
 - a. An individual hospital, in the case of a hospital that is not a member of a health system or is the only member of the system that is participating; or
 - b. A health system's parent organization, in the case of a health system that participates with at least two hospitals
3. Enter the name and title of the individual signing the engagement letter on behalf of your organization
4. Have an authorized individual sign the engagement agreement
5. Print the provider representative letter on hospital/health system letterhead and have an authorized individual sign the provider representative letter
6. In your email returning the signed agreement and provider representative letter, include the name, phone number, and email of the current contact individual for your organization on this matter
7. Return the signed agreement, signed provider representative letter, and key contact information to David Vernon at dvernon@health-law.com by Dec. 12, 2022

Due to the complexity of the PRRB process and the rules of litigation, we understand that health systems — particularly those with hospitals located outside of California — must consider a number of factors

before proceeding. **CHA welcomes the opportunity to answer any questions or concerns in one-on-one calls with hospital or health system teams. To schedule a conversation, please contact Megan Howard, CHA vice president, federal policy, at mhoward@calhospital.org.**

If your hospital/health system DOES NOT WISH TO PARTICIPATE in the FFY 2023 litigation, please notify Megan Howard at mhoward@calhospital.org.

Additional information about the next steps will be available on the CHA [website](#).

Key Contacts

With general questions about CHA's next steps, contact:

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California Hospital Association
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With questions related to the HLB engagement letter, contact:

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With questions related to the financial impact on your facility, contact:

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