

Area Wage Index Litigation: What You Need to Know

September 2019

Background

On August 2, 2019, the Centers for Medicare & Medicaid Services (CMS) adopted its federal fiscal year (FFY) 2020 inpatient prospective payment system (IPPS) final rule, which includes 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](#) include two key issues:

- (1) A reduction to the standardized IPPS payment amount to fund an increase in the AWI for hospitals with an AWI in the lowest quartile. This change represents a dangerous precedent: that CMS can choose to increase payments to one group of hospitals by decreasing payments to another group. **This reduction affects all California general acute care IPPS hospitals and will result in an approximate \$22 million loss in FFY 2020.** CMS intends to continue this policy for at least four years, representing an estimated \$100 million reduction in Medicare fee-for-service inpatient payments to California hospitals.
- (2) 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. The IPPS rates of hospitals that are located in an urban area with an AWI that is lower than the state's rural floor are computed using the rural floor rather than the AWI for the urban area. **As a result of this policy, IPPS payments to about one-half of California's IPPS hospitals will be reduced by an estimated \$123 million in FFY 2020.**

CHA's Role

CHA strongly opposed CMS' "rob Peter to pay Paul" approach and urged CMS to withdraw its policy. Although CMS modified the policy since its initial proposal, we remain concerned about this dangerous precedent. CHA's Executive Committee recently directed CHA to coordinate, organize, and finance challenges to these policies on behalf of impacted member hospitals. To that end, CHA has engaged Hooper, Lundy & Bookman, P.C. (HLB) to lead the legal challenges to the AWI policies. HLB has engaged Toyon Associates, Inc. (Toyon) to further assist with organizing and filing the necessary administrative appeals in 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 be made by CHA's Executive Committee.

Process for Challenge with Respect to the IPPS

Once an engagement letter is signed by the hospitals and health systems wishing to participate in the legal challenge, we anticipate the following process to unfold as we challenge the AWI policies finalized in the FFY 2020 IPPS rule:

- To avoid the significant risk that a case would be dismissed for failing to "exhaust administrative remedies," hospitals should first appeal to the Medicare PRRB. All appeals are due within 180 days of issuance of the final rule, which is January 29, 2020. Subsequent appeals must be filed annually to preserve appeals rights for each year the policy is in place. CMS has noted its intent to keep the reduction in the standardized amount in effect for a minimum of four years (FFYs 2020-23); the rural floor policy is final.

- HLB will promptly request expedited judicial review (EJR) for one or more hospital groups. PRRB must grant or deny that request within 30 days.
- HLB will file a case in a federal district court in California after EJR is granted.

As with any litigation, a number of circumstances could necessitate a change in this strategy. CHA will keep members informed throughout the process.

Next Steps

CHA member hospitals and health systems that wish to participate in the AWI litigation must execute the [engagement letter](#) for legal services from HLB no later than Friday, September 27, and return it to David Vernon at dvernon@health-law.com. Your engagement of HLB for the 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.

CHA members interested in participating in the AWI litigation are asked to:

1. Review the [agreement](#) carefully.
2. Enter the name of your organization where indicated, which will be:
 - a. an individual hospital, in the case of a hospital that is not a member of a hospital system or is the only member of the system that is participating; or
 - b. a hospital system's parent organization, in the case of a hospital system that participates with at least two hospitals.
3. Indicate the issue or issues you wish to appeal.
4. Enter the name and title of the individual signing on behalf of your organization.
5. Have an authorized individual sign the engagement agreement.
6. In your email with the signed agreement, include the name, phone number, and email of the contact individual for your organization on this matter.
7. Return the signed agreement and key contact information to David Vernon at dvernon@health-law.com.

As noted above, hospitals and health systems should indicate whether they will appeal one or both of the AWI issues identified above. All California hospitals are impacted by CMS' action to reduce the standardized amount to adjust the AWI, and 152 are impacted by the change in the rural floor policy. To determine whether you are impacted by both issues, please see the list of hospitals posted to the CHA [website](#). If you require additional information about the financial impact on your hospital or health system, please contact Ryan Sader, senior manager of wage index services at Toyon, at ryan.sader@toyonassociates.com.

As previously noted, pursuing this challenge to the FFY 2020 IPPS final rule requires appeals by hospitals and hospitals systems of either or both AWI issues to the Medicare PRRB and subsequent litigation in federal court. **Toyon Associates will be working with Hooper, Lundy & Bookman in assisting hospitals in filing those PRRB appeals. Karen Kim, vice president of appeals services at Toyon, will reach out directly to hospital contacts provided once an engagement agreement is executed.** Toyon's services will be paid for by CHA as part of its funding of this legal challenge.

In summary:

- All appeals must be filed with the PRRB no later than **January 29, 2020**.
- Groups of related hospitals that wish to participate in this AWI litigation will be required to file a single group appeal with the PRRB for each issue outlined above. Such groups may include affected affiliated hospitals that are not located in California. Member health systems with hospitals outside of California are eligible to participate in the AWI litigation so long as at least one hospital in the commonly controlled or owned health system group is located in California. Please let us know if you are part of a health system that includes hospitals outside of California. These systems can participate in the litigation, but there are special considerations that we would like to discuss directly with these organizations.

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 discuss these issues in one-on-one calls with health system teams. To schedule those conversations, please contact Alyssa Keefe, CHA vice president, federal regulatory affairs, at akeefe@calhospital.org.**

If your hospital/health system does not wish to participate in the litigation, please notify Alyssa Keefe at akeefe@calhospital.org.

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

Key Contacts

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

Alyssa Keefe
Vice President, Federal Regulatory Affairs
California Hospital Association
(202) 488-4688
akeefe@calhospital.org

With questions related to the HLB engagement letter, contact:

David Vernon
Hooper, Lundy and Bookman
(202) 580-7713
dvernon@health-law.com

With questions related to the provider representative letters, contact:

Karen Kim
Vice President, Appeals Services
Toyon Associates
(888) 514-9312
karen.kim@toyonassociates.com

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

Ryan Sader
Senior Manager, Wage Index Services
Toyon Associates
(888) 514-9312
ryan.sader@toyonassociates.com