

## Area Wage Index Litigation: What You Need to Know November 2021

### 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 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](#) include two key issues: a reduction to the standardized IPPS payment amount 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. CMS has since carried forward these policies into its FFY 2021 and FFY 2022 IPPS final rules.

CHA strongly opposed CMS' "rob Peter to pay Paul" approach, which represents 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 finance challenges to these policies on behalf of impacted member hospitals for FFY 2020 and FFY 2021. **CHA's legal challenge to the FFY 2020 and 2021 policies are ongoing; however, action is required to challenge the policies carried forward into FFY 2022.**

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 continue to be made by CHA's Executive Committee.**

### Update on FFYs 2020 and 2021 AWI Legal Challenge

CHA's ongoing litigation challenges are 1) Issue #1 and Issue #2 below pertaining to FFY 2020, and 2) only Issue #1 below for FFY 2021.

- **Issue #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 reduction affects all California general acute care IPPS hospitals and resulted in an approximate \$22 million loss in FFY 2020 and \$25 million loss in FFY 2021.
- **Issue #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. For FFY 2020, this policy resulted in an estimated cut to about one-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. As such, CHA did not pursue a legal challenge and modified legal arguments for the FFY 2020 challenge to reduce the risk of adversely impacting urban hospitals in years beyond 2020.

HLB entered into separate engagement agreements with California hospitals and hospital systems that chose to participate in the litigation. For FFY 2020, the hospitals and hospital 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 hospital system that elected 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 United States District Court for the Central District of California.

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 is scheduled for November 16, 2021. The complaint for Issue 2, *Enloe Medical Center, et al. v. Azar* Case No. 2:20-cv-09278 CBM (SPx), was filed on October 8, 2020. A hearing is scheduled for December 7, 2021.

For FFY 2021, 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 hospital system that elected to participate in the litigation. These appeals are pending at the PRRB.

### **FFY 2022 AWI Legal Challenge**

In the FFY 2022 IPPS [final rule](#), CMS carried forward its AWI policies. As stated in the FFY 2020 final rule, CMS intends to keep the reduction in the standardized amount in effect for a minimum of four years (FFYs 2020-23); CMS also permanently finalized the rural floor policy. To preserve appeal rights for each year that the policy is in place, subsequent appeals must be filed with the PRRB. **For FFY 2022, all appeals are due within 180 days of issuance of the final rule, meaning that the deadline is January 28, 2022.**

**For Issue 1, CHA estimates the policy will result in a payment reduction to California hospitals of approximately \$24.6 million in FFY 2022. Hospitals must once again appeal this payment reduction to the PRRB, even if the FFY 2020 and FFY 2021 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 forego an appeal of the issue in FFY 2022, they could lose the opportunity to recover the \$24.6 million lost under the policy in FFY 2022. **CHA continues to strongly oppose this “rob Peter to pay Paul” approach, and CHA’s Executive Committee has approved CHA sponsorship of an appeal to the continuation of this policy in FFY 2022.**

However, for Issue 2, due to changes in reclassification by certain hospitals, California’s rural floor was not impacted by the reclassified rural hospitals for FFY 2022. As a result, CHA will not sponsor a challenge to this policy in 2022. CHA continues its challenge to the FFY 2020 policy under a more limited legal argument.

### **Next Steps for FFY 2022 Legal Challenge**

**CHA member hospitals and health systems that are participating in the FFY 2020 and FFY 2021 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 2022 challenge. This letter must be returned to David Vernon at [dvernon@health-law.com](mailto:dvernon@health-law.com) no later than December 10, 2021. Your engagement of HLB for the FFY 2022 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 2022 IPPS final rule requires appeals by hospitals and hospital 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’s and Toyon’s services will be paid for by CHA as part of its funding of this FFY 2022 Issue 1 legal challenge.**

In summary, CHA members interested in participating in the AWI litigation for FFY 2022 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 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. 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](mailto:dvernon@health-law.com) by December 10, 2021.

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 any questions or concerns in one-on-one calls with health system teams. To schedule those conversations, please contact Megan Howard, CHA vice president, federal policy, at [mhoward@calhospital.org](mailto:mhoward@calhospital.org).**

**If your hospital/health system does not wish to participate in the FFY 2022 litigation, please notify Megan Howard at [mhoward@calhospital.org](mailto:mhoward@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:***

Megan Howard  
 Vice President, Federal Policy  
 California Hospital Association  
 (202) 488-3742  
[mhoward@calhospital.org](mailto:mhoward@calhospital.org)

***With questions related to the HLB engagement letter, contact:***

David Vernon  
 Hooper, Lundy & Bookman  
 (202) 580-7713  
[dvernon@health-law.com](mailto:dvernon@health-law.com)

***With questions related to the provider representative letters, contact:***

Kathleen Giberti  
 Director, Appeals Services  
 Toyon Associates  
 (925) 685-9312  
[kathleen.giberti@toyonassociates.com](mailto:kathleen.giberti@toyonassociates.com)

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

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