

Hospitals Held to Task While Insurers Get Time: *An Update on CMS Transparency Rules*

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It has been one year since the Hospital Price Transparency Rule went live,^[1] and word on the street is the Centers for Medicare & Medicaid Services (CMS) is not happy with the “sub-optimal” compliance by hospitals, as evidenced by the increased penalty provisions that went into effect on January 1, 2022. Under the stiffer penalty amounts, hospitals with more than 30 beds face a \$10 per bed per day fine for noncompliance, with a maximum daily penalty of \$5,500—this math means a hospital with 550 beds or more that fails to comply in 2022 could face a penalty in excess of \$2 million, whereas under the initial penalty provisions that maximum penalty was just \$109,500. In South Carolina, at least three hospitals are that large in size, and in North Carolina as least eight hospitals fit into that category.

Despite forging ahead with the Hospital Price Transparency Rule issued under the Trump Administration (and indeed doubling down on compliance by finalizing increased penalties after issuing several hundred warning letters to hospitals since last summer), interestingly enough, a CMS spokesperson reportedly stated that the agency is holding off on issuing penalties for the time being, although still closely monitoring compliance and issuing warning letters on a rolling basis.^[2]

Separately, and formally, the Biden Administration recently delayed portions of the price transparency rules that impact insurers. The Transparency in Coverage Rule^[3] issued in late October 2020, turns the spotlight on insurers to disclose price and cost-sharing information to participants, beneficiaries, and enrollees, including publishing in-network negotiated rates and allowed amounts for out-of-network providers, as well as pricing details for prescription drugs. With disclosure and publishing obligations very similar to the pricing transparency requirements faced by hospitals for more than a year now, the coverage rule provided for certain disclosures by non-grandfathered insurers began on January 1, 2022, with phasing through 2024.

More specifically, the Transparency in Coverage Rule required group health plans and health insurance issuers subject to the rule to publish machine-readable files beginning January 1, 2022, that in this instance were to disclose identified within network negotiated rates, historical charges and payments made outside of network, and negotiated rates and net prices for covered prescription drugs. Now CMS and the Department of Treasury will delay enforcement^[4] of certain of these transparency obligations until July 1, 2022, while other components of the coverage transparency rule are delayed indefinitely. This about-face comes on the heels of litigation primarily concerned with the drug pricing components of the rule, led by pharmaceutical interest groups fearing the publication of actual pricing information will lead to increased costs and harm market participants once drug manufacturers become wise to pricing strategies of their competitors.

Such complaints stemming from the forced disclosure of confidential, commercially sensitive cost and pricing information is no different than the concerns held by hospitals not keen on sharing their charge and cost information, but opponents to the coverage rule were successful in buying more time before the comply or pay up provisions go into effect. The Hospital Price Transparency Rule had also been judicially challenged, and the American Hospital Association was obviously unsuccessful. In contrast, the recent litigation against the coverage rules led to the delay noted above, as well as indefinite delay on the drug pricing disclosures.

Overall, the push for transparency in the cost of health care continues and providers and insurers alike should ready themselves for compliance.

[1] <https://www.federalregister.gov/documents/2019/11/27/2019-24931/medicare-and-medicaid-programs-cy-2020-hospital-outpatient-pps-policy-changes-and-payment-rates-and#h-83>

[2] <https://news.bloomberglaw.com/health-law-and-business/medicare-holds-off-on-hospital-price-disclosure-fines-for-now>

[3] <https://www.cms.gov/newsroom/fact-sheets/transparency-coverage-final-rule-fact-sheet-cms-9915-f>

[4] <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-49.pdf>