



Charles N. Kahn III
President and CEO

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Via electronic submission at <http://www.regulations.gov>

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

**Re: Medicare Program; Changes to the Fiscal Year 2025 Hospital Inpatient
Prospective Payment System (IPPS) Rates Due to Court Decision; (CMS-1808-IFC)**

Dear Administrator Brooks-LaSure:

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying hospitals and health systems throughout the United States. FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC, and Puerto Rico. Our members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services. The FAH appreciates the opportunity to submit comments to the Centers for Medicare & Medicaid Services (CMS) regarding its interim final rule on *Changes to the Fiscal Year 2025 Hospital Inpatient Prospective Payment System (IPPS) Rates Due to Court Decision* published in the Federal Register (89 Fed. Reg. 80,405) on October 3, 2024.

MEDICARE WAGE INDEX: LOW WAGE INDEX POLICY

For fiscal year (FY) 2020, CMS adopted a low-wage index policy where it increased wage indexes below the 25th percentile by one-half the difference between the hospital's otherwise applicable wage index and the 25th percentile wage index value. CMS applied a budget neutrality adjustment for the low wage index policy such that increasing the wage index

for the affected hospitals did not increase Medicare spending.¹ This policy has been in place in every year since FY 2020.

The low wage index hospital policy and the related budget neutrality adjustment have been the subject of litigation, including in *Bridgeport Hospital, et al., v. Becerra (Bridgeport)*. The District Court in *Bridgeport* held that the Secretary did not have authority to adopt the low wage index hospital policy.² On July 23, 2024, D.C. Circuit Court affirmed on the merits, but held that the policy should be vacated for FY 2020 and interest awarded to the plaintiffs.³ As of the date of the original FY 2025 IPPS/LTCH rule final rule publication, the time to seek further review of the D.C. Circuit’s decision in *Bridgeport* had not expired. CMS indicated its intent to evaluate the decision and consider options for next steps. In the interim, CMS finalized its proposal to continue the low wage index policy in FY 2025.⁴ At this time, *Bridgeport* and related cases remain pending in district court.

On October 3, 2024, CMS published an interim final rule with comment (IFC) in the *Federal Register* revising its previously announced FY 2025 policies and rates for Medicare’s hospital inpatient prospective payment system (IPPS). In this IFC, CMS is recalculating the IPPS hospital wage index to remove the low wage index hospital policy for FY 2025 and is removing the low wage index budget neutrality factor from the FY 2025 standardized amounts.⁵

In the FY 2023 IPPS rule, CMS adopted a 5-percent cap on year-to-year decreases in each hospital’s wage index value regardless of the circumstances causing the decline. For FY 2025, CMS will limit the decrease in the wage index value for hospitals that will no longer benefit from the low wage index hospital policy to 5 percent consistent with the policy it adopted beginning in FY 2023. Under this “transitional exception,” CMS will not make that policy budget neutral as it does when other hospitals benefit from the 5 percent cap on decreases to the wage index using its “exceptions and adjustments” authority under section 1886(d)(5)(I)(i) of the Act. As CMS properly notes, section 1886(d)(5)(I)(i) of the Act does not require budget neutrality for these “exceptions and adjustments.” In fact, as the FAH has emphasized in past comments, CMS does not have authority under subsection (d)(5)(I)(i) or otherwise to reduce IPPS payments for purposes of budget neutrality. Regardless, as noted in the IFR, a budget neutrality adjustment for the transitional exception would be inappropriate, particularly in light of the timing of the policy change for FY 2025.

The IFC is appropriately confined to FY 2025 and does not address any prior fiscal years that are the subject of legal challenges in *Bridgeport* and related cases. To the extent that CMS is considering further action with respect to past fiscal years once court proceedings have concluded and remand is effectuated, the FAH reiterates its longstanding objection to any clawback of payments made in past fiscal years. The Medicare statute does not permit the clawback of past payments under the IPPS because the fundamental premise of the IPPS is that the payment system is *prospective* in nature. Medicare hospitals properly rely on the IPPS’s

¹ 84 FR 42325

² 589 F. Supp. 3d 1 (D.D.C. 2022)

³ 108 F.4th 882, 887–91 & n.6 (D.C. Cir. 2024)

⁴ 89 FR 68989

⁵ 89 FR 80405

predictability to effectively budget and plan their operations, and any clawback or other action that upsets the predictability and reliability of the system places hospitals at risk in a way that was neither contemplated nor authorized by Congress. In this case, any clawback would be particularly inequitable because low wage index hospitals have already properly spent and obligated payments made under the prospective payment system. In adopting the low wage index hospital policy, CMS has consistently expressed its expectation that low wage index hospitals would use payments under the policy to increase employee compensation,⁶ and therefore, it would only be reasonable to assume that any clawback would place these hospitals that heeded CMS's calls to increase wages in a materially worse position than they would have been in without the policy.

At oral argument in the D.C. Circuit, counsel for the Secretary was explicitly asked by the court whether there was a "scenario where the low budget hospitals that have gotten money would get to keep the money." Counsel did not state that a clawback is legally required. Instead, counsel answered that the secretary had not yet determined that a clawback is required and that it is "not clear why the Secretary would need to go out" and make such a clawback. Based on its regulations, we presume that CMS will adhere to the position it stated in open court. *See* 42 CFR § 412.64(k) (providing that a midyear correction to the wage index is only effective *prospectively* except in limited circumstances where CMS had agreed that the wage index should be corrected before the start of the fiscal year). Ultimately, clawbacks are incompatible with a prospective payment system, unauthorized by statute, and inconsistent with CMS's regulations. Therefore, CMS, having adopted a final rule for FY 2025 that is consistent with the *Bridgeport* decision, must not seek to reduce IPPS payments made under its policy in past years.

Thank you for the opportunity to comment on the IFC. If you have any questions, please contact me or a member of my staff at 202-624-1534.

Sincerely,



⁶ *E.g.*, 84 Fed. Reg. 42,327–28.