CMS Proposal Would Require Hospitals to Ask Emergency Patients about Their Immigration Status

Stacey A. Tovino
satovino@central.uh.edu
August 16, 2004

Section 1011 of the recently enacted Medicare Prescription Drug, Improvement and Modernization Act of 2003 (Act) appropriated $1 billion for payments to hospitals that furnish emergency health services to undocumented aliens. To implement this section of the Act, the Centers for Medicare & Medicaid Services (CMS) recently proposed that hospitals that wish to request payments under the Act must ask patients about their immigration status and document their responses. If CMS adopts its proposal, Texas and other hospitals will have to incorporate these documentation requirements into their registration processes while steering clear of activities prohibited under Title VI of the Civil Rights Act of 1964 and the federal Emergency Medical Treatment and Active Labor Act, as well as analogous state laws.

For years, state officials and hospital executives have argued that the federal government should cover the costs associated with providing health care to illegal immigrants, which weigh heavily on border states such as Texas, Arizona, and California. According to the former U.S. Immigration and Naturalization Service (INS), an estimated seven million undocumented aliens resided in the United States (and more than one million resided in Texas) in the year 2000.¹ Texas hospitals located near the U.S.-

Mexico border spend significant financial and medical resources providing emergency and other health care services to undocumented aliens.

In a May 2004 report by the United States General Accounting Office (GAO), the GAO attempted to address the impact of undocumented aliens on hospitals’ uncompensated care costs. As part of its research, the GAO surveyed 503 hospitals, interviewed Medicaid and hospital officials in ten states (including Arizona, California, Florida, Georgia, Illinois, New Jersey, New Mexico, New York, North Carolina, and Texas), and interviewed and obtained data from Homeland Security officials. However, the GAO was unable to assess the impact of undocumented aliens on hospitals’ uncompensated care costs in part because the GAO found that most hospitals do not collect information relating to their patients’ immigration status.

Historically, the federal government has made some funds available directly and indirectly to help cover the costs associated with providing health care to undocumented aliens. Under the new Act, two-thirds of the funds will be divided among all fifty states and the District of Columbia using INS data, which establishes the relative percentages of undocumented aliens in each jurisdiction. The remaining one-third of the funds will be divided among the six states with the largest number of undocumented alien apprehensions. The preliminary allocation for Texas is $47,508,379 ($24,824,647 for

\[ \text{Id.} \]
\[ \text{Id. at 2.} \]
\[ \text{Id. at 3.} \]
\[ \text{Id. at 4.} \]
\[ \text{Id. at 5.} \]
\[ \text{Id. at 6.} \]

Medicaid provides some coverage for treatment of emergency medical conditions for some aliens who are eligible for Medicaid and choose to enroll in it. See 42 U.S.C. § 1396b(v)(2)(A); 42 C.F.R. § 440.255(b)(1). In addition, Medicaid disproportionate share hospital adjustments provide supplemental payments to some hospitals that serve relatively large numbers of low-income patients, which can include undocumented aliens. GAO REPORT at 3. Moreover, the Balanced Budget Act of 1997 made $25 million available on an annual basis, from fiscal years 1998 through 2001, to select states for emergency services provided to undocumented aliens. Id.

According to 2000 INS data, approximately 14.9% (or 1,041,000) of the undocumented aliens residing in the United States live in Texas. Id.
undocumented aliens and $22,683,733 for alien apprehensions). Under the Act, the Secretary of the Department of Health and Human Services has until September 1, 2004, to establish a process for hospitals and other health care providers to request these payments.

Accordingly, on July 21, 2004, CMS published a proposed process for hospitals and other providers to request payments under the Act. In its proposal, CMS specifically stated that hospitals and other health care providers who request payments under the Act will be required to collect and maintain additional information regarding the immigration status of patients. CMS specifically proposed to adopt a “patient based documentation approach” pursuant to which providers will be required to document the patient’s citizenship status and whether the patient is a member of a group for which payment under section 1011 of the Act is possible. In documenting citizenship status, CMS explains that providers may use a Medicaid enrollment application or another existing information collection instrument that requires the applicant to make a declaration regarding citizenship or immigration status. As an alternative to using the Medicaid enrollment application process or another established information collection instrument, CMS included in its proposal a form specifically designed to obtain necessary information regarding a patient’s citizenship. CMS’s information “collection instrument” contains questions such as: (1) Are you a United States Citizen? (2) Are you a lawful permanent resident, an alien with a valid and current I-688B, or other qualified alien? (3) Are you in the United States on a non-immigrant VISA? (4) Are you a foreign

---


8 Id. at 31 (Attachment B).
citizen that has been admitted to the U.S. with a 72-hour border crossing card? (5) Have you been paroled into the United States for the purposes of receiving eligible services and do you have a Form I-94? (6) Do you have a Social Security Number or health insurance policy number? Mark B. McClellan, Administrator of CMS, believes that hospitals can ask these questions in “an unobtrusive way” that will not discourage immigrants from seeking care.9

In light of Title VI of the Civil Rights Act of 1964,10 which prohibits discrimination on the basis of race, color, or national origin in any program or activity operated by entities such as Medicare participating hospitals that receive federal funds or other federal financial assistance, most U.S. hospitals will have to determine whether they will ask all of their uninsured emergency patients these questions, even if a particular patient “looks American.” Indeed, CMS has interpreted the Title VI requirements to mean:

Thus, in operating or participating in a federally assisted program, a provider should not, on the basis of race, color or national origin, directly or indirectly differentiate among persons in the types of program services, aids or benefits it provides or the manner in which it provides them. For example, providers should treat all similarly situated individuals in the same manner, and should not single out individuals who look or sound foreign for closer scrutiny or require them to provide additional documentation of citizenship or immigration status.11

In addition, Medicare participating hospitals will also have to determine when they will ask citizenship questions and obtain the required documentation in light of the federal Emergency Medical Treatment and Active Labor Act (EMTALA), which

---

11 CMS PROPOSAL at 16.
prohibits hospitals from delaying screening examinations and stabilizing treatment to inquire about method of payment or insurance status. In its proposal, CMS advises hospitals to request information about a patient’s citizenship or immigration status “prior to discharge, but after the patient is identified as self-pay and not Medicaid eligible.” CMS further emphasizes that providers should not delay screening or treatment in order to inquire about citizenship.

Although hospitals collect a variety of demographic and clinical information from their patients, hospitals generally do not ask patients about their immigration status. CMS’ proposal is alarming to many hospital administrators, who believe that the citizenship documentation process might cost them more than they will receive in financial aid, as well as immigration advocates, who believe that the process will deter undocumented aliens from seeking emergency care when they really need it. Immigration experts further believe that the technical questions designed to determine immigration status will “befuddle” both hospital employees and immigrants. In addition, there is some speculation that undocumented aliens will fear that their answers will be used against them in deportation proceedings. Marcela G. Urrutia, an analyst at the National Council of La Reza, a Hispanic civil rights group, stated: “We are extremely concerned about this requirement. It will deter Latino communities from seeking emergency care. That could lead to serious public health problems, including the spread of communicable diseases.” Similarly, Janelle Howard, a spokeswoman for

---

12 42 U.S.C. § 1395dd(h).
13 CMS PROPOSAL at 17.
14 Id.
15 Pear, supra note 9, at A1.
16 Id.
17 Id.
Carondelet Health Network, stated: “Our emergency rooms see a lot of undocumented immigrants . . . But as a Catholic institution, we have never asked about their immigration status. It’s our mission and philosophy to treat all without distinction.”

---

18 Id.