

CMS ISSUES FINAL RULE FOR DSH MEDICARE ADVANTAGE DAYS POLICY

On June 7, CMS issued a much-anticipated **Final Rule** addressing the placement of Medicare Advantage patient days within the Medicare DSH calculation. The Final Rule adopts a retroactive policy that will place Medicare Advantage days in the Medicare Fraction of the DSH calculation for discharges before October 1, 2013. The numerator of that fraction is Medicare SSI days, and the denominator of the fraction is total Medicare days. Essentially, this Final Rule eliminates the victory hospitals received from the Supreme Court's 2019 *Allina v. Azar*, which vacated the rulemaking pertaining to CMS's first attempt at this same DSH policy for Medicare Advantage days back in 2005.

BACKGROUND

In 2019, the Supreme Court ruled in providers' favor—holding that CMS cannot issue changes to “substantive legal standard[s] governing the scope of benefits, the payment of services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under,” Medicare without adequate notice-and-comment rulemaking. The landmark ruling rejected the agency's previous attempt to include Part C days in the Medicare DSH calculation. **As Hall Render then noted**, providers' ultimate relief from the improper rulemaking faced an uncertain timeline. We now have CMS's answer.

RETROACTIVE RULEMAKING

CMS's Final Rule attempts to include Part C days into Medicare DSH calculation—but this time through retroactive rulemaking. The agency purports that it may do so for two reasons. First, it asserts the Secretary has determined retroactive application is needed to comply with statutory requirements of the DSH program. Second, the agency asserts that the Secretary has found a failure to apply the rule retroactively would be contrary to the public interest. As part of the Secretary's rationale, CMS asserts that its decision to include Medicare Advantage days in total Medicare days is bolstered by last year's Supreme Court decision in *Becerra v. Empire Health Foundation*, in which the Court articulated a bright-line rule that all patient days for individuals entitled to Medicare Part A benefits should be included in total Medicare days, even when Medicare does not cover those days (known as Medicare exhaust days). In CMS's view, patients who enroll in a Medicare Advantage plan under Part C remain entitled to various Part A benefits and therefore must also be included in the Medicare fraction.

PRACTICAL TAKEAWAYS

Litigation challenging this Final Rule is certain. There are many DSH Medicare Advantage cases pending in District Court for the District of Columbia concerning both the *Allina* decision, as well as litigation challenging the CMS Ruling released when the Proposed Rule was issued in 2020.

The Final Rule will be effective 60 days from publication in the Federal Register, which is scheduled to be **June 9, 2023**.

Hospitals should consider the impact of this rule carefully. If you have any questions or would like additional information about the Final Rule or this topic, please contact:

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