Centers for Medicare and Medicaid Services Issues Final Guidance on Reimbursing Health Care Providers for Emergency Services to Uninsured Immigrants

May 2005

The Centers for Medicare and Medicaid Services (CMS) released final guidance on May 9, 2005, implementing Section 1011 of the Medicare Prescription Drug, Modernization and Improvement Act. Section 1011 provides limited federal funding to hospitals and certain other health care providers for emergency care given to uninsured patients who are undocumented immigrants, Mexican citizens with "border crossing cards," or persons paroled into the United States to receive medical services. Reimbursement under Section 1011 is targeted to otherwise uncompensated care and is therefore not available for services provided to patients who are eligible for emergency or full-scope Medicaid or who have other insurance.[1] The CMS notice and related documents are available at www.cms.hhs.gov/providers/section1011. (See also 70 Federal Register 25578–95 (May 13, 2005).)

Under Section 1011, $250 million per year will be distributed to hospitals, ambulance services and physicians, with fixed amounts allocated to each state.[2] A state's allotment will be divided among the providers who choose to participate and who submit individual claims. Funding under Section 1011 is expected to reimburse providers for only a small fraction of their uncompensated care costs, which result not only from services to patients covered by Section 1011, but to a much broader group of immigrants and U.S. citizens who lack private or public health insurance.

Hospitals participating in Medicare remain obligated under the Emergency Medical Treatment and Labor Act (EMTALA) to screen and provide treatment to *all* persons with an emergency medical condition, regardless of whether they have insurance or can be claimed under Section 1011. The original CMS guidance allowed Section 1011 payments for services provided until a patient is discharged, but the final guidance limits reimbursement to the services necessary to "stabilize" the emergency condition. As CMS acknowledged, this restriction creates additional administrative burdens for hospitals attempting to calculate eligible costs.

Patients seeking emergency services are *not* required to provide immigration documents or to disclose any information about their immigration status in order to receive such treatment or to be claimed for Section 1011 reimbursement. However, advocates and health care providers are concerned that the ambiguous and at times conflicting directives contained within the final guidance leave many questions unresolved about how the guidance is to be properly

[1] Some undocumented immigrants have private health insurance, and others who are "categorically linked" to the Medicaid program (e.g., low-income children and families, pregnant women, persons with disabilities, seniors) may be eligible for emergency Medicaid. The uninsured patients covered by Section 1011 generally will be single adults without children or disabilities, and individuals in families earning too much to qualify for Medicaid.

[2] A state's allotment is based on a 2003 estimate of its relative percentage of undocumented immigrants, with additional amounts going to the six states with the greatest ongoing number of undocumented immigrant apprehensions. Reimbursements under Section 1011 are authorized for fiscal years 2005–08.

National Immigration Law Center
www.nilc.org

NATIONAL IMMIGRATION LAW CENTER

Los Angeles (Headquarters)
3435 Wilshire Blvd
Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

Washington, DC
1101 14th Street, NW
Suite 410
Washington, DC 20005
202 216-0261
202 216-0266 fax

Oakland, CA
405 14th Street
Suite 1400
Oakland, CA 94612
510 663-8282
510 663-2028

implemented. The procedures recommended by CMS could open the door to intrusive and potentially intimidating questioning of patients, which could deter immigrants and their family members from seeking critical care or cause unnecessary anxiety for those who do seek emergency treatment.

CMS attached a suggested form for providers to use in documenting whether a patient's services are eligible for reimbursement. The guidance does not require providers to use this particular form, but requires that the information contained on the form be collected and maintained — if the hospital is seeking reimbursement for services provided to the particular patient. The form, which is available at www.cms.hhs.gov/providers/section1011/cms-10130A.pdf, instructs providers not to ask patients if they are undocumented, but enables a provider to check a box if a patient informs the provider of his or her undocumented status. In such cases, the form states that "[t]he patient is an eligible immigrant for Section 1011 payment purposes."[3] For cases where no admission of undocumented immigrant status has been recorded, the form asks three major questions:

1. Is the patient eligible for or enrolled in Medicaid or emergency Medicaid? If not, state the reason.
2. Does the patient have a Mexican "border crossing" card or evidence that he or she was paroled into the U.S.?
3. Provide proof of foreign birth, such as a birth certificate, passport, voting card, expired visa, invalid border crossing card, foreign driver's license, consular identification card, or other foreign identification card; or, indicate that the patient submitted an invalid Social Security number (SSN); or that the patient is in federal or state custody.

CMS's optional form sends potentially confusing messages. It clarifies, for example, that providers should not ask patients whether they are undocumented but allows them to check a box (and avoid collecting documentation) if a person has made such an admission. Similarly, it does not require providers to request SSNs, and notes that the Social Security Administration cannot validate SSNs for purposes of Section 1011 payment. However, it allows providers to use any "current practices and procedures or internal documentation" for verifying SSNs. Its reminder that providers may not claim payments for certain lawfully present immigrants may lead providers to believe, mistakenly, that they must request immigration information from patients, to determine that they do not fall within one of the specific immigration categories listed. Although the names and addresses of patients do not appear on this form, this privacy protection could be undermined if the form is stored with a patient's other medical records or documents attached to the form.

The form includes an "optional" privacy message, which was reiterated in a press briefing by CMS Administrator Dr. Mark McClellan: "Patients should be aware that the Department of Homeland Security will not access or use information related to medical care to initiate enforcement of United States immigration laws unrelated to an ongoing terrorism or criminal investigation." The guidance discusses existing privacy and civil rights protections, explains that the sole purpose of the form is to determine provider payment, and admonishes providers not to single out individuals who "look or sound foreign." Patient eligibility information would not be

[3] The form, as written, appears to allow providers to determine a patient to be eligible for Section 1011 reimbursement based on a self-declaration of undocumented status, without first screening the patient's eligibility for emergency Medicaid. Such a determination would conflict with the statute, since Section 1011 reimbursement is not available for services that can be covered by emergency Medicaid or other insurance. This procedure could also be adverse to a patient's interests, since emergency Medicaid necessarily relieves the patient of payment obligation, while Section 1011 reimbursement does not.

sent routinely to CMS but would be maintained by the hospitals for auditing and compliance purposes.

Despite these assurances, advocates and health care providers have raised significant concerns about how the Section 1011 procedures will be administered and the messages that will be sent to patients and community members. NILC joined major health care providers and immigrant rights organizations in warning CMS about the deterrent effects of asking patients about their immigration status or even "proxies" for that status. In comments to an earlier CMS proposal, NILC and other groups had requested that CMS use a "global" data methodology for estimating a hospital's share of the funding, rather than individual patient questions (see NILC's comments at www.nilc.org/immspbs/health/index.htm). Responding to the concerns about negative public health consequences, CMS adopted what it describes as an "indirect patient-based documentation approach." Although this approach departs from CMS's original proposal to ask more "direct" immigration questions, the individual inquiries raise similar concerns and implementation issues. Were providers to question patients using some of the "indirect" proxies recommended by CMS — for example, an expired visa, invalid SSN, invalid border crossing card or proof of parolee status — such queries are certain to be perceived by some patients as questions regarding their immigration status.

Hospitals will need to decide whether the administrative burdens involved in a patient-specific claiming process, the costs of determining which services are eligible, the procedures for tracking third party and other offsetting reimbursements, and the potential deterrence and harm to public health caused by Section 1011's information collection efforts are worth the relatively small return. Hospitals would be required to seek payment from all other sources, including the patient, before seeking reimbursement under Section 1011. The guidance clarifies that if patients refuse or are unable to provide proof of eligibility, no claims should be submitted on their behalf. It assumes that 10 percent of eligible patients will refuse or be unable to provide the eligibility information and will grant providers an additional 10 percent of the approved costs to account for such patients.

Patients should be reminded not to make admissions about their undocumented status and to avoid providing an invalid SSN or other false information to any government agency. Unlike emergency Medicaid, Section 1011 payments do not provide insurance coverage to patients and do not guarantee that their emergency bill will be covered. On the other hand, it is in a patient's interest to apply for emergency or full-scope Medicaid, health insurance, or charity care options if the patient is eligible. Even in those cases, however, patients should know that they are not required to disclose their immigration status, SSN, or income information as a condition of receiving emergency services.

NILC is encouraged by the fact that some hospitals are considering the possibility of not participating in the Section 1011 reimbursement process. NILC and other immigrant rights organizations will need to work closely with health care providers who choose to participate to determine the least intrusive way of administering this system. And they will need to ensure that immigrant families are well informed and are not unduly deterred from seeking or securing critical and often life-saving care.

FOR MORE INFORMATION, CONTACT

Tanya Broder, NILC staff attorney | broder@nilc.org | 510.663.8282 x. 307