

LAW OFFICES

## WILLIAMS &amp; CONNOLLY LLP

725 TWELFTH STREET, N.W.

WASHINGTON, D. C. 20005-5901

(202) 434-5000

FAX (202) 434-5029

LISA S. BLATT  
(202) 434-5050  
lblatt@wc.com

EDWARD BENNETT WILLIAMS (1920-1988)  
PAUL R. CONNOLLY (1922-1978)

October 2, 2020

VIA ELECTRONIC FILING

Mr. Mark J. Langer  
Clerk of the Court  
United States Court of Appeals for the D.C. Circuit  
E. Barrett Prettyman U.S. Courthouse and  
William B. Bryant Annex  
333 Constitution Avenue, NW  
Washington, D.C. 20001

Re: *American Hospital Association et al. v. Azar*, No. 20-5193 (argument scheduled Oct. 15, 2020)

Dear Mr. Langer:

This responds to DOJ's October 1, 2020, 28(j) letter. Appellants attach: (1) guidance regarding the rule's "two requirements"; (2) HHS's frequently-asked-question responses; (3) "8 Steps to a Machine-Readable File"; and (4) "10 Steps to a Consumer-Friendly Display."

- The materials confirm that disclosure of a machine-readable file and shop-pable-services list are "two requirements" hospitals must independently satisfy, and illustrate the requirements' "differences." Attach. 8, 12. Appellants argue that this multi-list mandate exceeds HHS's authority to require "a list" of standard charges. AHA Br. 37-40.

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- The materials specify that “contracts with non-payer companies, i.e. local employers for drug screening, need to be included in the list of payer-specific negotiated rates.” Attach. 17. Appellants argue that HHS’s interpretation is implausibly capacious and could produce thousands of “standard charges” for any single item. AHA Br. 26-34.
- The materials show a mock hospital “display” of three types of rates—percentage-of-charge, per-diem, and DRG-based rates—with 6 out of 9 “N/A” entries signifying no individual, payer-specific rate. Attach. 9-10. Appellants argue that an interpretation of “standard charges” that produces charges impossible to calculate and that do not exist is unreasonable. AHA Br. 30, 52-56.
- The materials explain that negotiated “base rates” for service packages may vary based on patients’ treatment, but instruct hospitals to merely disclose the “base” rate. Attach. 9-10. The materials do not address negotiated rates for items with more variability. Appellants argue that hospitals cannot disclose variable rates as the rule requires, and thus that the rule would mislead patients. AHA Br. 50-61.
- The materials enumerate de-identified minimum and maximum negotiated rates as two of “five types of standard charges,” Attach. 6, contrary to DOJ’s assertion that the rule requires only three types of standard charges, *see* U.S. Br. 30-31; Reply 4-5.
- The materials state that the rule makes data “available for use by the public in price transparency tools.” Attach. 5. Appellants argue that consumers could not directly use HHS’s machine-readable file, and that price-transparency tools are a less-speech-restrictive, more-effective alternative. AHA Br. 50-51, 59-60.
- The materials confirm a January 1, 2021, effective date. *Cf.* U.S. Response Ltr. (Oct. 1, 2020).

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Respectfully submitted,

*/s/ Lisa S. Blatt* \_\_\_\_\_

Lisa S. Blatt

*Counsel for Appellants*

cc: Counsel of Record via ECF