

PUBLICATION

Court Affirms CMS's Adjustments to Wage Index [Ober|Kaler]

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Deferring to CMS, the United States Court of Appeals for the Sixth Circuit recently upheld the agency's treatment of hospitals' payments to employees for wage index purposes. [Atrium Medical Center v. U.S. Dept. of Health & Human Services, No. 13-3288 \(6th Cir. filed Sept. 8, 2014\)](#). The court ruled both on short-term disability and "Baylor Plan" hours.

Short-Term Disability

Although many hospitals buy short-term disability insurance or self-insure to cover this cost, hospitals in this appeal simply paid employees for their short-term disabilities out of general funds through the payroll process. The hospitals sought to have this cost treated in the same manner as would hospitals that purchased insurance or self-insured, i.e., including the cost but no related hours in their wage index data. Such treatment results in a higher average hourly wage and ultimately a higher wage index, because the calculation excludes hours. The hospitals argued that to treat the cost differently simply based on whether the cost was insured resulted in disparate treatment of similar costs, in violation of the Medicare statute's mandate that the wage index be uniform and consistent. CMS argued that it was not treating hospitals disparately because it treated all hospitals without insurance the same and treated all hospitals with insurance the same. CMS treated the cost for the hospitals at issue as paid time off, including the hours in the wage index.

The court held that the Medicare statute allows CMS to treat insurance premiums as a "wage-related cost" for which no hours are reported and a disability payment made from general funds as a "wage" for which hours must be reported. In doing so, the court applied the deference standard established in *Chevron USA Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837 (1984), finding the agency's position not "manifestly contrary" to the statute.

Baylor Plan Hours

Some hospitals encourage employees to work weekend shifts by paying employees who work two weekend shifts in a month a full-time salary plus benefits. This is referred to as the "Baylor Plan," after the hospital that first introduced the arrangement. The wage index issue involving this arrangement is whether the actual hours worked or the full-time (i.e., a full month's) hours are recorded for wage index purposes. In a similar circumstance, when a hospital pays its employees a bonus or for overtime, e.g., pays an employee for 1.5 hours when the employee works only 1 hour, CMS allows the hospital to exclude the "phantom hours," i.e., the .5 hour, for wage index purposes.

The court, once again deferring to the agency, upheld CMS's inclusion of the full-time hours in the wage index, finding such action by the agency neither arbitrary nor capricious.

Ober|Kaler's Comments

The appeals court upheld the decision of the district court, relying on deference to the agency in the implementation of the wage index calculation. In the area of wage index, there are few statutes or even

regulations. Most of the guidance is found in preambles in the Federal Register. Without much specific guidance in the form of statutes or regulations, the agency is afforded great latitude and discretion. While the hospitals in this appeal had good arguments that their interpretations were reasonable – and perhaps more reasonable than those of the agency – the standard, unfortunately, that the court must apply is whether the agency's position is unreasonable. That standard is very difficult for a hospital to overcome.