

Posting Negotiated Rates & More: Overview of CMS's New Price Transparency Rule for Hospitals

Baird Holm Health Law Webinar Series
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Learning Objectives

- Demonstrate requirements for compliance with CMS's price transparency rule
- Describe and identify "standard charges" under the final rule
- Outline elements of posting 300 "shoppable services" in consumer-friendly format
- Review lower court decision in *AHA et al. v. Azar*

Presentation Outline

- A brief-ish history of price transparency under the ACA
- Final price transparency rule (45 CFR Part 180)
 - Definitions: hospital, items and services, standard charges
 - Publicly posting standard charges in “machine-readable” format
 - Publicly posting standard charges for 300 “shoppable services” in consumer-friendly format
 - Penalties for noncompliance
- *AHA et al. v. Azar*
- Closing comments
- Questions & comments

Escalating obligations for public access to hospitals’
“standard charges”

A BRIEF HISTORY OF PRICE TRANSPARENCY UNDER THE ACA

Section 1001 of the ACA

- Section 1001 of the ACA amended by § 10101(f) of HCERA
- Created § 2718 of the Public Health Service Act (42 USC § 300gg-18)
- Subsection (e) titled "Standard hospital charges"

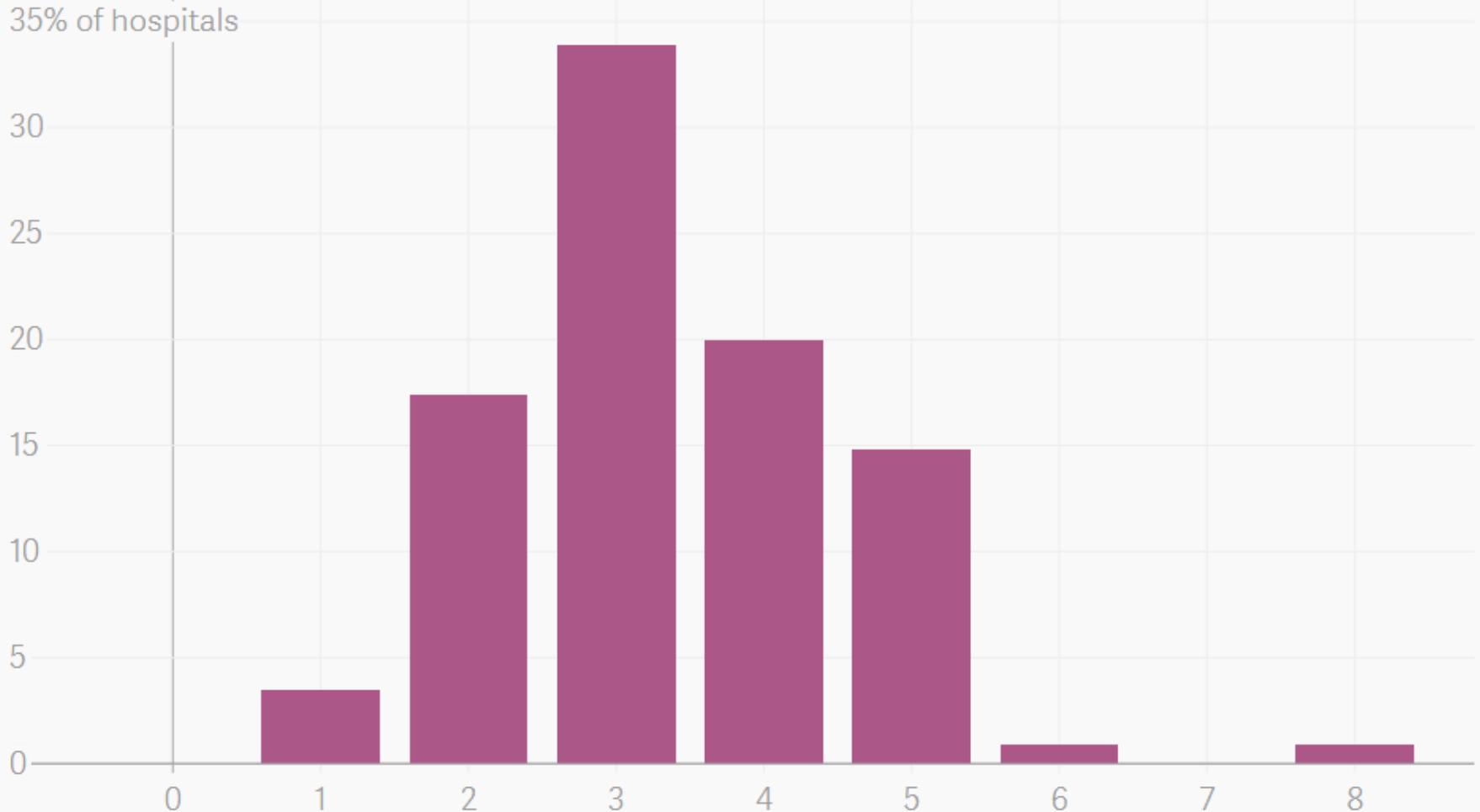
CMS Under Obama Administration

- No rules, only guidelines in 2015 IPPS proposed & final rule
- A friendly “reminder” from CMS
- Make public:
 - A list of “standard charges” (chargemaster/gross charges or in another form) or
 - Hospital policy for making list of standard charges available upon request

CMS Under Trump Administration

- Expressed concern over “reminder” in 2015 IPPS proposed & final rule
- Effective January 1, 2019 *required* hospitals to post “standard charges”
 - Machine-readable format
 - Update information annually
- CMS issued two FAQs in November & December 2018 to address confusion

Number of clicks to get from hospital home page to price-list data



Quartz, *US hospitals are now required by law to post prices online. Good luck finding them* (January 15, 2019) available at <https://qz.com/1518545/price-lists-for-the-115-biggest-us-hospitals-new-transparency-law/>

Example #1

	A	B	C	D
1				
2				
3				
4				
5				
6	Item Cd	Item Description	Item Price	Effective Date
7	63600002	TISAGENLECLEUCEL INTRAVENOUS SUSPENSION-ALL	\$ 2,375,000.00	1-Sep-19
8	63600002	AXICABTAGENE CILOLEUCEL (YESCARTA) - DLBCL INFUSION	\$ 1,865,000.00	1-Sep-19
9	63600002	TISAGENLECLEUCEL INTRAVENOUS SUSPENSION-DLBCL	\$ 1,865,000.00	1-Sep-19
10	25000005	BOTULISM IMMUNE GLOBULIN (BABYBIG) (50 MG/ML) IV (NEWBORN/PEDIATRIC)	\$ 271,800.00	1-Sep-19
11	27850001	HEARTMATE3 LVAD IMPLANT KIT	\$ 256,856.55	1-Sep-19
12	27850001	HEARTMATE3 LVAD IMPLANT KIT	\$ 256,856.55	1-Sep-19
13	27850001	HEARTMATE3 LVAD IMPLANT KIT	\$ 256,856.55	1-Sep-19
14	27850001	HEARTMATE3 LVAD IMPLANT KIT	\$ 256,856.55	1-Sep-19
15	27850001	DEVICE HEARTMATE 3 LVAS	\$ 231,875.00	1-Sep-19
16	27850001	DEVICE HEARTMATE 3 LVAS	\$ 231,875.00	1-Sep-19
17	27850001	DEVICE HEARTMATE 3 LVAS	\$ 231,875.00	1-Sep-19
18	27850001	HEARTMATE VENT PUMP CONTROL SM	\$ 231,875.00	1-Sep-19
19	27850001	HEARTMATE VENT PUMP CONTROL SM	\$ 231,875.00	1-Sep-19
20	27850001	HEARTMATE VENT PUMP CONTROL SM	\$ 231,875.00	1-Sep-19
21	27050001	HEARTMATE PUMP/POCKET CONTROL	\$ 200,737.50	1-Sep-19
22	27050001	HEARTMATE PUMP/POCKET CONTROL	\$ 200,737.50	1-Sep-19
23	27050001	HEARTMATE PUMP/POCKET CONTROL	\$ 200,737.50	1-Sep-19

Example #2

	A	B
1	As of January 2019	
2	MULTIVISCERAL ORGAN TRANSPLAN	\$266,363.00
3	SYNCARDIA HEART IMPLANT	\$244,939.00
4	HEARTWARE HVAD IMPLANT KIT	\$226,029.00
5	IMPLANT KIT HEARTMATE II VAD	\$223,769.00
6	LVAS HEARTMATEIII G140113	\$201,998.00
7	CORD BLOOD ACQUISITION CHARGE	\$168,000.00
8	ALLOGENIC BMT ACQUISITION-803	\$166,000.00
9	SMALL BOWEL	\$101,891.00
10	LIVER ACQUISITION CADAVER	\$89,592.00
11	LIVER ACQUISTN LIVNG DONOR	\$89,592.00
12	OPERATING ROOM - 24 HOURS	\$88,600.00
13	IPG NEURO 1.34CM PROCLAIM DRG	\$87,630.00
14	HEART ACQUISITION	\$86,592.00
15	SOD BENZO/SOD PHENV 10% 50MI	\$78,539.68

Example #3



Code	Description	Charge Amount
163737	SUPPLIES	\$10,507.00
600389	SUPPLIES	\$10,500.00
600141	SUPPLIES	\$10,500.00
600390	SUPPLIES	\$10,500.00
573691	SUPPLIES	\$10,489.50
603077	SUPPLIES	\$10,290.00
450093	SUPPLIES	\$10,150.00
557862	SUPPLIES	\$10,132.50
557863	SUPPLIES	\$10,132.50
591134	SUPPLIES	\$9,940.00
488563	SUPPLIES	\$9,891.00
581606	SUPPLIES	\$9,849.00
600140	SUPPLIES	\$9,800.00
590072	SUPPLIES	\$9,782.50
481358	SUPPLIES	\$9,450.00
547788	SUPPLIES	\$9,373.00
505462	SUPPLIES	\$9,373.00
567267	SUPPLIES	\$9,373.00
347571	SUPPLIES	\$8,912.04
601456	SUPPLIES	\$8,732.50



Executive Order

- Section 3 titled "Informing Patients About Actual Prices"
- Directive to HHS to draft new regulation for hospitals to post prices in a patient-friendly format
- Standard charges and negotiated rates



CMS Proposed Rule

- By January 1, 2020, all hospitals post standard charges and negotiated rates with insurers
- Negotiated rates for 300 "shoppable services"
 - 70 selected by CMS; 230 selected by provider
- Consumer-friendly format
- Publicly available website & updated annually
- Civil Monetary Penalties for noncompliance & appeals process

Industry Response

- Nearly 4,000 industry comments
- AHA, AAMC, AHIP
- AHA's 66-page letter was roadmap of its litigation strategy
 - § 2718(e) uses the term "standard charges"
 - Negotiated rates are trade secrets
 - CMS lacks authority to penalize hospitals
 - Constitutional issues
- File size & whether all information can be "user-friendly" format

Posting negotiated charges with third party payers & more
and a potential \$300 CMP per day for noncompliance

FINAL PRICE TRANSPARENCY RULE (45 CFR PART 180)

Highlights

- Effective January 1, 2021
- Creates new section 45 CFR Part 180
- “Publicly available” = published on the internet
- Section Outline
 - Definitions: hospital, items and services, standard charges
 - Publicly posting standard charges in “machine-readable” format
 - Publicly posting standard charges for 300 “shoppable services” in consumer-friendly format
 - Penalties for noncompliance

Section 2718(e)

- Each hospital operating within the United States
- Shall for each year establish (and update) and make public (in accordance with guidelines developed by the Secretary)
- A list of the hospital's standard charges for items and services provided by the hospital,
- Including for diagnosis-related groups established under section 1395ww(d)(4) of this title

Hospital, items and services, and standard charges

DEFINITIONS

“Hospital” (45 CFR § 180.20)

- Price transparency requirements apply to all “hospitals”
- Regulations defer to State law for hospital licensure
- Applies to all facilities licensed as hospitals under State law
- Also applies to entities where agency/department that licenses hospitals deems a facility to meet such standards

“Hospital” (45 CFR § 180.20)

- Applies to:
 - Critical Access Hospitals (CAHs)
 - Inpatient Psychiatric Facilities (IPFs)
 - Sole Community Hospitals (SCHs)
 - Inpatient Rehabilitation Facilities (IRFs)
- Also applies to off-campus locations operating under the same hospital license
- Does not apply to: Veterans Health Administration hospitals, Indian Health Service hospitals, and Department of Defense hospitals

“Items and Services” (45 CFR § 180.20)

- “Items and services” that could be provided to hospital inpatients or outpatients for which the hospital has established a standard charge
- Individual items and services and service packages negotiated with third-party payers

“Items and Services” (45 CFR § 180.20)

- Examples: supplies and procedures, room and board, facility fees, services of *employed* physicians and non-physician practitioners, and any other service for which hospital has established a standard charge
- If provider is an independent contractor, do not have to post his or her charges
- If there are different charges for different locations, need to post both charges

“Standard Charges” (45 CFR § 180.20)

- CMS defines “standard charges” as: “the regular rate established by the hospital for an item or service provided to a specific group of paying patients.”
- “Standard charges” includes:
 - Gross charges (i.e., chargemaster)
 - Payer-specific negotiated charge
 - De-identified minimum negotiated charge
 - De-identified maximum negotiated charge
 - Discounted cash price (if none, gross charges)
- Why so many definitions? Reflects patchwork of health insurance coverage; CMS believes this many are necessary so all patient groups are covered

Gross Charges

- The price that appears for an item or service on hospital's chargemaster
- Essentially, what hospitals are currently posting under the 2019 IPPS final rule effective January 1, 2019
- Why?
 - From preamble comments, it is clear CMS is looking for third-party developers to step in to create price transparency tools
 - Research others

Payer-Specific Negotiated Charge

- Applies to any charge that the hospital has negotiated with a third-party payer
 - Percentage of chargemaster, percentage of Medicare rates, etc.
 - Does not mean the amount hospital is ultimately paid by third party payer and patient
- Excludes Medicare and Medicaid, but includes Medicare Advantage, Medicaid MCOs and other Medicaid managed care plans

De-Identified *Minimum* and *Maximum* Negotiated Charge

- Same information for the lowest and highest payer-specific negotiated charge, but de-identified
- CMS believes it provides useful “bookends” for consumers; also believes consumers could use information to negotiate own rates
- Believes it is part of the “complete picture” for consumers to make informed decisions regarding health care

Discounted Cash Price

- The charge established by the hospital for any consumer paying out of pocket for any items or services
- Discounted cash price does not take into account charity care policies or bill forgiveness
 - If tax-exempt, not the same as “amounts generally billed” under 501(r) policies
- If no discounted cash price, gross charges would be “discounted cash price”

A list for “all items and services” and another for 300
“shoppable services”

PUBLICLY AVAILABLE

Two Distinct Requirements

- Make publicly available a list of all items and services in a machine-readable format (45 CFR § 180.50)
 - “All items and services”
- Make publicly available a list of 300 “shoppable services” in a consumer-friendly format (45 CFR § 180.60)
 - “Shoppable services”

“All Items and Services” (45 CFR § 180.50)

- Not for consumers
 - CMS refers to as spreadsheet for “further computer processing”
- Must be “machine-readable” (.XML, .JSON, .CSV are examples)
- Single digital file
- If same service has different charges based on location, must post both
- Updated at least once per year
 - Indicate in file or on page where it is uploaded the date of most recent update
- Charge information must be “digitally searchable”

“All Items and Services” (45 CFR § 180.50)

- Common data elements (45 CFR § 180.50(b))
 - Description of each item or service
 - Gross charge
 - Payer-specific negotiated charge (“must be clearly associated with the name of the third-party payer”)
 - De-identified minimum negotiated charge
 - De-identified maximum negotiated charge
 - Discounted cash price
 - Any code used by hospital for purposes of accounting or billing (e.g., CPT, HCPCS, DRG, NDC, etc.)

“All Items and Services” (45 CFR § 180.50)

- Location and accessibility requirements
 - Free of charge, no username or password, no personal identifying information (PII)
 - Standardized naming convention for file: EIN_hospitalname_standardcharges.filetype
 - 49-0123456_localcommunityhospital_standardcharges.xml

Hospital XYZ Medical Center

Prices Posted and Effective [month/day/year]
 Notes: [insert any clarifying notes]

Description	CPT/HCPCS code	NDC	OP/Default gross charge	IP/ER gross charge	ERx Charge quantity
HB IV INFUS HYDRATION 31-60 MIN	96360 .....	.....	\$1,000.13	\$1,394.45	
HB IV INFUSION HYDRATION ADDL HR	96361 .....	.....	251.13	383.97	
HB IV INFUSION THERAPY 1ST HR	96365 .....	.....	1,061.85	1,681.80	
HB ROOM CHARGE 1:5 SEMI PRIV .....	.....	.....	.....	2,534.00	
HB ROOM CHG 1:5 OB PRIV DELX .....	.....	.....	.....	2,534.00	
HB ROOM CHG 1:5 OB DELX 1 ROOM .....	.....	.....	.....	2,534.00	
HB ROOM CHG 1:5 OB DELX 2 ROOMS .....	.....	.....	.....	2,534.00	
SURG LEVEL 1 1ST HR 04	Z7506 .....	.....	.....	3,497.16	
SURG LEVEL 1 ADDL 30M 04	Z7508 .....	.....	.....	1,325.20	
SURG LEVEL 2 1ST HR 04	Z7506 .....	.....	.....	6,994.32	
PROMETHAZINE 50 MG PR SUPP	J8498	00713013212	251.13	383.97	12 Each.
PHENYLEPHRINE HCL 10% OP DROP .....	.....	17478020605	926.40	1,264.33	5 mL.
MULTIVITAMIN PO TABS .....	.....	10135011501	0.00	0.00	100 Each.
DIABETIC MGMT PROG, F/UP VISIT TO MD	S9141 .....	.....	185.00	.....
GENETIC COUNSEL 15 MINS	S0265 .....	.....	94.00	.....
DIALYSIS TRAINING/COMPLETE	90989 .....	.....	988.00	.....
ANESTH, PROCEDURE ON MOUTH	170 .....	.....	87.00	.....

“Shoppable Services” (45 CFR § 180.60)

- Consumer-facing
- “Shoppable service” is defined as a service that can be scheduled by a patient in advance
- Hospital must post 300 “shoppable services” in a consumer-friendly format
 - CMS selects 70, divided into four categories (E&M, Lab & Pathology, Radiology, and Medicine and Surgery)
 - Hospital selects the other ~230

“Shoppable Services” (45 CFR § 180.60)

- If hospital does not provide all 70 CMS-specified services, must list but note that hospital does not provide the service (e.g., “n/a”)
- If hospital does not provide 230 “shoppable services,” must post as many as possible.
- Need to hit 300 “shoppable services”
 - Example: If hospital only offers 60 of the CMS-specified services, hospital must select 240 for a total of 300

“Shoppable Services” (45 CFR § 180.60)

- How frequently do you bill for the services?
- Must post the standard charges for the “shoppable services” and any ancillary services commonly billed (e.g., facility fees and professional fees of *employed* providers)

“Shoppable Services” (45 CFR § 180.60)

- Data elements
 - Plain-language description of the service
 - If CMS-specified service is not offered by the hospital
 - All “standard charges” with the exception of “gross charges”
 - Location where shoppable service is provided
 - Accounting or billing code (CPT, HCPCS, DRG)

“Shoppable Services” (45 CFR § 180.60)

- No standard format for posting information
- CMS deems hospitals to meet this “shoppable service” requirement if hospital has internet-based price estimator tool
- Same requirements on accessibility (i.e., no password, etc.)
- Must be searchable by service description, billing code, and payer
- Information must be updated at least once annually

Hospital XYZ Medical Center	
Prices Posted and Effective [month/day/year]	
Notes: [insert any clarifying notes or disclaimers]	

Shoppable service	Primary service and ancillary services	CPT/HCPCS code	[Standard charge for Plan X]
Colonoscopy	primary diagnostic procedure	45378	\$750
	anesthesia (medication only)	[code(s)]	\$122
	physician services	Not provided by hospital (may be billed separately)	
	pathology/interpretation of results	Not provided by hospital (may be billed separately)	
Office Visit	facility fee	[code(s)]	\$500
	New patient outpatient visit, 30 min	99203	\$54
Vaginal Delivery	primary procedure	59400	[\$]
	hospital services	[code(s)]	[\$]
	physician services	Not provided by hospital (may be billed separately)	
	general anesthesia	Not provided by hospital (may be billed separately)	
	pain control	Not provided by hospital (may be billed separately)	
	two day hospital stay	[code(s)]	[\$]
	monitoring after delivery	[code(s)]	[\$]

Thoughts on Publicly Available Lists

- Resource-intensive, especially for smaller hospitals
- For “shoppable services,” series of drop-down menus
- Potential contracts with third-party developers
- State law requirements

Thoughts on Publicly Available Lists

- Nondisclosure clauses
- Consider a disclaimer in machine-readable file or “shoppable-services” on; not required by regulation, but recommended
- Strive for compliance, not perfection; expect missteps
- First step from CMS?

Written notice of noncompliance, corrective action plan,
and \$300 per day Civil Monetary Penalty

MONITORING COMPLIANCE & PENALTIES FOR NONCOMPLIANCE

Monitoring Compliance

- CMS will primarily rely on complaints from individuals **and entities**
 - CMS has setup email address for the receipt of complaints
(PriceTransparencyHospitalCharges@cms.hhs.gov)
- CMS review of reports of noncompliance
- CMS's independent review of hospital websites

Penalties for Noncompliance

- Usually (but not always) will occur in the following order:
 - Written notice or warning to hospital of specific violations
 - Request for corrective action plan (CAP) if noncompliance is a “material” violation
 - If hospital fails to submit a CAP or CAP is insufficient, CMS has authority to impose CMP of up to \$300 per day and publish noncompliance on CMS website
- Appeals process for CMPs (45 CFR § 180.100 *et seq.*)

Final rule exceeds the statutory intent under § 2718(e) of the PHS Act, it is unconstitutional, and it is arbitrary and capricious

LAWSUIT FILED BY AHA *ET AL.*

AHA et al. v. Alex M. Azar

- Alleged CMS's final rule is unlawful
 - "Standard charges" as used in the statute does not include "payer-specific negotiated charges"
 - Unconstitutionally compels speech in violation of the First Amendment
 - Arbitrary and capricious
- U.S. District Court for the District of Columbia sided with CMS
- **Note: "It is a close call whether [CMS] reasonably interpreted 'standard charges' to include rates negotiated with third party payers."**
- Lower court decision is currently on appeal; decision is not expected before January 1, 2021

Wrapping it up

FINAL THOUGHTS

Price Transparency Rule

- January 1, 2021
- Applies to all hospitals in U.S., with some exceptions (i.e., VA, IHS, DOD facilities)
- Two lists made “publicly available”:
 - All items and services (large spreadsheet for the machines)
 - “Shoppable services” (smaller spreadsheet for the humans)
- Preparation for compliance will likely take months, not weeks
- Appeal of lower court ruling may impact date of implementation, and scope of final rule
 - If not, have a plan in place to comply by January 1, 2021

Questions and Comments?

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Appendix

Evaluation & management services	2020 CPT/HCPCS primary code
Psychotherapy, 30 min	90832
Psychotherapy, 45 min	90834
Psychotherapy, 60 min	90837
Family psychotherapy, not including patient, 50 min	90846
Family psychotherapy, including patient, 50 min	90847
Group psychotherapy	90853
New patient office or other outpatient visit, typically 30 min	99203
New patient office of other outpatient visit, typically 45 min	99204
New patient office of other outpatient visit, typically 60 min	99205
Patient office consultation, typically 40 min	99243
Patient office consultation, typically 60 min	99244
Initial new patient preventive medicine evaluation (18–39 years)	99385
Initial new patient preventive medicine evaluation (40–64 years)	99386

Laboratory & pathology services	2020 CPT/HCPCS primary code
Basic metabolic panel	80048
Blood test, comprehensive group of blood chemicals	80053
Obstetric blood test panel	80055
Blood test, lipids (cholesterol and triglycerides)	80061
Kidney function panel test	80069
Liver function blood test panel	80076
Manual urinalysis test with examination using microscope	81000 or 81001
Automated urinalysis test	81002 or 81003
PSA (prostate specific antigen)	84153–84154
Blood test, thyroid stimulating hormone (TSH)	84443
Complete blood cell count, with differential white blood cells, automated	85025
Complete blood count, automated	85027
Blood test, clotting time	85610
Coagulation assessment blood test	85730

Appendix

Radiology services	2020 CPT/HCPCS primary code
CT scan, head or brain, without contrast	70450
MRI scan of brain before and after contrast	70553
X-Ray, lower back, minimum four views	72110
MRI scan of lower spinal canal	72148
CT scan, pelvis, with contrast	72193
MRI scan of leg joint	73721
CT scan of abdomen and pelvis with contrast	74177
Ultrasound of abdomen	76700
Abdominal ultrasound of pregnant uterus (greater or equal to 14 weeks 0 days) single or first fetus	76805
Ultrasound pelvis through vagina	76830
Mammography of one breast	77065
Mammography of both breasts	77066
Mammography, screening, bilateral	77067

Appendix

Medicine and surgery services	2020 CPT/HCPCS primary code
Cardiac valve and other major cardiothoracic procedures with cardiac catheterization with major complications or comorbidities	216
Spinal fusion except cervical without major comorbid conditions or complications (MCC)	460
Major joint replacement or reattachment of lower extremity without major comorbid conditions or complications (MCC)	470
Cervical spinal fusion without comorbid conditions (CC) or major comorbid conditions or complications (MCC)	473
Uterine and adnexa procedures for non-malignancy without comorbid conditions (CC) or major comorbid conditions or complications (MCC)	743
Removal of 1 or more breast growth, open procedure	19120
Shaving of shoulder bone using an endoscope	29826
Removal of one knee cartilage using an endoscope	29881
Removal of tonsils and adenoid glands patient younger than age 12	42820
Diagnostic examination of esophagus, stomach, and/or upper small bowel using an endoscope	43235
Biopsy of the esophagus, stomach, and/or upper small bowel using an endoscope	43239
Diagnostic examination of large bowel using an endoscope	45378
Biopsy of large bowel using an endoscope	45380
Removal of polyps or growths of large bowel using an endoscope	45385
Ultrasound examination of lower large bowel using an endoscope	45391
Removal of gallbladder using an endoscope	47562
Repair of groin hernia patient age 5 years or older	49505
Biopsy of prostate gland	55700
Surgical removal of prostate and surrounding lymph nodes using an endoscope	55866
Routine obstetric care for vaginal delivery, including pre-and post-delivery care	59400
Routine obstetric care for cesarean delivery, including pre-and post-delivery care	59510
Routine obstetric care for vaginal delivery after prior cesarean delivery including pre-and post-delivery care	59610
Injection of substance into spinal canal of lower back or sacrum using imaging guidance	62322–62323
Injections of anesthetic and/or steroid drug into lower or sacral spine nerve root using imaging guidance	64483
Removal of recurring cataract in lens capsule using laser	66821
Removal of cataract with insertion of lens	66984
Electrocardiogram, routine, with interpretation and report	93000
Insertion of catheter into left heart for diagnosis	93452
Sleep study	95810
Physical therapy, therapeutic exercise	97110