

Does Medicare Have the Constitutional Authority to Conscript Physicians?

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Medicare Enrollment

Most physicians who treat Medicare beneficiaries “enroll” in Medicare. Most enrolled physicians also sign a participation agreement and accept assignment on all claims because then Medicare will send payments to them, not to their patients. Otherwise, some patients pocket Medicare’s checks and forget to pay their doctors.

In order to enroll, a physician completes the Centers for Medicare and Medicaid Services (CMS) form 855i, which may be downloaded at <http://www.cms.gov/Medicare/CMSForms/CMSForms/downloads/cms855i.pdf>.

This form requires a physician to prove that he is qualified (i.e. is licensed to practice medicine) and is eligible to receive money from Medicare (e.g. is not prohibited from receiving federal funds because of a crime such as tax fraud).

An enrolled physician accepts both benefits (payments) and obligations as defined by Medicare. An enrolled physician is bound to a host of regulations including fee schedules, the form and content of medical records, and bureaucratic billing requirements—all enforced by potential draconian civil and criminal penalties. An enrolled physician further agrees to give the government broad access to confidential medical records.

An enrolled physician has one of three relationships with Medicare: participating, nonparticipating, or opted-out.

A participating physician must bill Medicare, and Medicare pays the physician a price fixed by Congress. A nonparticipating physician also must bill Medicare and also is paid a price fixed by Congress (which is a little more than a participating physician’s fee), but may choose to have Medicare send the check either to the patient or to the physician. In other words, a nonparticipating physician may collect a fee mandated by Congress directly from the patient, who is then reimbursed by Medicare.

An opted-out physician cannot bill Medicare, but is still bound by Medicare’s regulations. Opting out is similar to enlisting in the military and then taking a two-year leave of absence. Medicare’s rules still apply, but the opted-out physician forfeits Medicare’s money. An opted-out physician may require patients to pay their own bills. However, a patient treated by an opted-out physician forfeits any Medicare reimbursement—which often leaves the patient uninsured with respect to the opted-out physician’s services. (Medicare might still pay for other related services such as surgicenter fees.)

A nonenrolled physician is not “enlisted” in Medicare. Some physicians never enroll in Medicare. Other physicians have disenrolled by completing form CMS-855i; they have checked a box in Section 1A that reads “you are **voluntarily terminating** your Medicare enrollment” and have signed Sections 13 and 15.

When a patient receives medical care from a nonenrolled physician, the patient pays the physician a mutually agreeable fee. Contrary to the situation that arises when a patient receives medical care from an enrolled physician who has “opted out” of Medicare, a patient who is treated by a nonenrolled physician may seek reimbursement directly from Medicare for the physician’s services by submitting form CMS-1490S. Download this form at <http://www.cms.gov/Medicare/CMS-Forms/CMSForms/downloads/cms1490s-english.pdf>. Medicare typically does reimburse the patient. The patient may seek additional reimbursement from any supplemental insurer.

There are many reasons that physicians who treat Medicare beneficiaries might not be enrolled in Medicare. For example, many Americans receive medical care from nonenrolled physicians when they visit other countries or are on board a ship. Understanding that Medicare enrollment exposes patients to inspection of their medical records by government agents, many physicians—including many psychiatrists—elect not to enroll in Medicare for reasons pertaining to patient confidentiality.

Medicare’s Policy: a Physician Can Be Forced to Furnish Medical Care without Charge

Medicare laws allow beneficiaries free choice of physicians—including physicians who are not enrolled in Medicare. See Social Security Act Section 1802 [42 U.S.C. 1395a] FREE CHOICE BY PATIENT that says:

Any individual entitled to insurance benefits under this subchapter may obtain health services from any...person qualified to participate under this subchapter if such...person undertakes to provide him such services.

The government would likely face legal challenges and a vocal political backlash if it tried to restrict access to care by denying Medicare recipients their insurance benefits for medical care provided by nonenrolled physicians.

Social Security Act Section 1802 [42 U.S.C. 1395a] prohibits any federal officer or employee from exercising any supervision or control over the practice of medicine or the manner in which medical services are provided.

Despite such constraints, Medicare tries to coerce physicians to enroll. Medicare’s current interpretation of Social Security Act (SSA) Section 1848¹ is that a nonenrolled physician must provide medical care free of charge.

In November 2011, the American Medical Association published an unsigned email from a federal employee that made this position crystal clear: “... [A] physician who treats a Medicare beneficiary...must either...enroll in Medicare...or...**furnish the Medicare-covered services for free**” [emphasis added].²

The relevant Federal Regulation Section 424.505³ used by federal employees to interpret the intent of Section 1848 subjects a violating physician to stiff civil penalties. Therefore, if a patient submits a claim for reimbursement to Medicare, a nonenrolled physician should be prepared to receive a threatening letter:

[CMS]...monitors compliance with the mandatory claim filing requirement. Failure to follow this requirement may result in sanctions being imposed, as outlined in section 1848(g)(4) of the Act. Violators of the requirement may be subject to a civil monetary penalty of up to \$2,000 for each violation and/or Medicare program exclusion.... Sincerely, C51

Some nonenrolled physicians throw these letters from "C51" away because they believe that Medicare's onerous regulations, threatening letters, and comments are hollow.

In early 2012, an individual sent a Freedom of Information Act (FOIA) request to Medicare seeking the names of the top 50 California "violators" of the claims submission requirement of Section 1848, a list that must be maintained according to the Medicare Claims Manual.⁴ Medicare has not produced a single name of any such physician. Furthermore, a review of the public list of physicians excluded from Medicare since the late 1980s does not appear to contain a single physician "violation" of Section 1848.

If the federal government carried through on its threats or tried to litigate its assertion that the U.S. Constitution grants the government plenary authority to conscript a physician, the federal government, which would bear the burden of proof in such a lawsuit, arguably might have great difficulty in prevailing.

The Policy of Organized Medicine

The Association of American Physicians and Surgeons first educated physicians regarding the option to not enroll in Medicare and has published many important related articles,^{5,9} which are available free on line at http://www.aapsonline.org/index.php/article/medicare_payment_options_the_basics/.

Following the lead of AAPS, the California Medical Association (CMA) Solo Small Group Practice Forum doggedly pursued an understanding of Medicare nonenrollment, culminating in CMA's adoption of this policy from its October 2012 House of Delegates:

RESOLVED: That CMA support every physician's ability to choose not to enroll in Medicare; and be it further RESOLVED: That CMA seek the right of patients to collect from Medicare for covered services provided by unenrolled or disenrolled physicians; and be it further RESOLVED: That this be referred for national action.

CMA's Delegation to the American Medical Association (AMA) offered the following resolution, which was adopted by the November 2012 AMA House of Delegates:

RESOLVED: That our American Medical Association support every physician's ability to choose not to enroll in Medicare (New HOD Policy); and be it further RESOLVED: That our AMA seek the right of patients to collect from Medicare for covered services provided by unenrolled or disenrolled physicians. (Directive to Take Action)

Some physicians in private practice are now waiting for organized medicine to advocate on behalf of physicians in order to put an end to physician coercion by Medicare officials. Please note, *new legislation is not necessary*. The problem is overreaching regulations under existing law.

Current Status

Is physician enrollment in Medicare a voluntary activity akin to enlisting in the military, or does Medicare have U.S. Constitutional authority to conscript physicians? The Thirteenth Amendment, Section 1 says:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . .

The Fourteenth Amendment Section 1 prevents states from passing "Jim Crow" laws that undercut the intent of the Thirteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Is it necessary or proper for the government to *require* a physician to serve it? The current regulatory interpretation of Section 1848 asserting that the federal government has the power to force a physician to enroll in Medicare grants unprecedented governmental control over the private businesses of physicians who provide medical care to elderly or disabled Americans.

Many erudite readers believe that Federal Regulation 424.505 is unconstitutional. Instead of reasonably requiring every *enrolled* physician to submit a claim to Medicare, this regulation purports that the federal government has the authority to require every physician who treats a Medicare beneficiary *to enroll* in Medicare—even a physician who does not want to receive any payment from Medicare. Here is the overreaching 42 C.F.R. § 424.505:

To receive payment for covered Medicare items or services **from** either Medicare (in the case of an assigned claim) or **a Medicare beneficiary** (in the case of an unassigned claim), **a provider or supplier must be enrolled in the Medicare program**. Once enrolled, the provider or supplier receives billing privileges and is issued a valid billing number effective for the date a claim was submitted for an item that was furnished or a service that was rendered [emphasis added].

The straightforward conditional intent of the applicable law, Social Security Act Section 1848, is: *if a physician wants to be paid by Medicare, then he or she must enroll in the Medicare program*. If a physician does not enroll in Medicare, then he or she is not eligible to be paid by Medicare ("under this part"). Here is Social Security Act Section 1848(g)(1)(A)¹⁰ with insertions of the words that clarify its plain implied meaning, which is sound law:

Physician submission of claims.—In general— . . . within 1 year after the date of providing a service **for which payment is made [by Medicare] under this part** on a reasonable charge or fee schedule basis, **a[n enrolled] physician...shall complete and submit a claim** for such service on a standard claim form specified by the Secretary to the carrier on behalf of a beneficiary [emphasis added]. . . .

To be clear, only a physician who is enrolled in Medicare may submit a claim to Medicare for payment.¹¹

Next Steps

A physician together with a patient must be able to create a personal service contract. The liberty that enables a doctor and patient to choose an intimate and private relationship defines the very soul of our free society and is founded on centuries of precedent, both in common law and in statute.

Recognizing the regulatory dispute, some physicians who wish to treat Medicare beneficiaries without being bound by onerous federal rules may want to consider nonenrollment. Before disenrolling, a physician should consider legal advice.

In addition to inordinate fines, a nonenrolled physician risks exclusion from the Medicare program, which might affect hospital privileges and eligibility for participation in some private insurance plans. Medicare has promulgated a regulation whereby hospitals are directed not to grant medical staff privileges to any physician who is excluded from a government program (e.g. Medicare or Medicaid). Exclusion from these programs is reportable to the National Practitioner Data Bank (NPDB).¹² This type of Adverse Action Report in the NPDB could ruin a physician. A hospital would also be legally obligated to report a physician who was not granted privileges to the state medical board within 15 days. Liability insurers may decline to provide insurance to a sanctioned physician.

A final positive note: facilitating Medicare nonenrollment is a partial solution to the trillion-dollar federal deficit. It also would help mitigate patients' increasing lack of access to services. More patients would be able to see a nonenrolled physician if Medicare reimbursed part of the fee; patients of opted-out physicians can collect nothing from Medicare.

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