

Chapman Client Alert

March 30, 2020

Current Issues Relevant to Our Clients

The CARES Act – Notable Provisions for Health Care Businesses

The [Coronavirus Aid, Relief, and Economic Security Act](#) (CARES Act or the Act), a bill designed to provide financial support and resources to individuals and businesses affected by COVID-19 pandemic, was signed into law on March 27, 2020.¹ The \$2 trillion stimulus bill is the largest stimulus bill in U.S. history and Congress' third major piece of legislation to address the COVID-19 crisis.² This Alert summarizes notable CARES Act provisions for health care businesses, including hospitals and physician practices. Please note that this summary is not exhaustive and there may be additional health care provisions in the Act of interest to your business. Additionally, the CARES Act may not be the last word from Congress on COVID-19 relief for the industry, as there is already talk of a fourth phase of legislation once Congress reconvenes at the end of April.

For additional Chapman Insights addressing legal and regulatory developments related to the COVID-19 crisis, please visit our [COVID-19 Legal and Regulatory Developments](#) webpage.

[\\$100B Fund for Eligible Health Care Providers](#)

The CARES Act adds \$100B to the “Public Health and Social Services Emergency Fund” to reimburse “eligible health care providers” for “health care related expenses or lost revenues that are attributable to coronavirus.” The fund will remain available until expended.

The single paragraph of the CARES Act that establishes the \$100B fund is quite vague, leaving the Department of Health and Human Services (HHS) Secretary Alex Azar (Secretary) with a major role to play in distribution decisions. Some things we do know from the text:

- **Eligible Providers:** The funds are available to “eligible health care providers” which means “public entities, Medicare or Medicaid enrolled suppliers and providers, and such for-profit entities and not-for-profit entities ... as the Secretary may specify ... that provide diagnoses, testing, or care for individuals with possible or actual cases of COVID-19.” This would cover a large variety of health care providers including hospitals, physician practices, long-term care providers and FQHCs.
- **Application:** Eligible health care providers must submit an application to the Secretary that includes their tax ID number and “a statement justifying the need of the provider for the payment.” Applications will be reviewed by the Secretary on a rolling basis. There is no further instruction as to how to apply.

- **Reports and Documentation:** Recipients will be required to “submit reports and maintain documentation as the Secretary determines are needed to ensure compliance with condition that are imposed.”
- **Fund Distribution:** The Act does not indicate how or when the money will be disbursed, except that it will be “through grants or other mechanisms”, that payment includes “pre-payment, prospective payment, or retrospective payment, as determined appropriate by the Secretary,” and that it will be through “the most efficient payment systems practicable to provide emergency payment.”
- **Expenses or Lost Revenues.** Provider expenses that may be reimbursed include expenses relating to “building or construction of temporary structures, leasing of properties, medical supplies and equipment including personal protective equipment and testing supplies, increased workforce and trainings, emergency operation centers, retrofitting facilities, and surge capacity.” The Act does not explain how the Secretary will view “lost revenues”.

[\\$349B Small Business Loan Program](#)

The CARES Act establishes a \$349B “Paycheck Protection Program” (PPP) for small businesses financially suffering from the COVID-19 crisis. In the health care sector, the PPP may be particularly helpful for smaller physician practices and dental practices.

The PPP covers the period from February 15, 2020 through June 30, 2020 and allows qualifying businesses to borrow money for a variety of qualified costs related to employee compensation and benefits. The legislation greatly expands the number of businesses (including non-profits and physician practices) that are eligible for loans through the Small Business Administration's (SBA) 7(a) loan program and increases the maximum amount for such loans. Approved 7(a) lenders can issue the covered loans if they determine a business was operating with salaried employees or paid contractors as of February 15, 2020. Some additional key terms of the PPP set forth in the Act are summarized below:

- **Eligibility:** Companies with 500 or fewer employees, as well as sole proprietors, independent contractors and other self-employed individuals, may be eligible. The term "employee" includes individuals employed on a full-time, part-time, or other basis. (Section 1102)
- **Amount, Interest Rate and Collateral:** The maximum loan amount is 2.5 x the borrower's average total monthly payroll costs, or up to \$10M. The interest rate during the covered period may not exceed 4%. No personal guarantee or collateral is required. (Section 1102)
- **Allowable Uses:** Allowable uses of the loan include covering costs related to employee compensation and benefits, including: (i) payroll costs, (ii) costs related to the continuation of health care benefits during periods of paid sick, medical or family leave and insurance premiums, (iii) employee compensation (up to \$100K per employee as prorated during the covered period), (iv) mortgage interest obligations, (v) rent, (vi) utilities and (vii) interest on debt incurred before the covered period. Payroll costs do not include sick leave wages or family leave wages, for which a tax credit is allowed under the Families First Coronavirus Response Act (FFCRA). (Section 1102)
- **Borrower Certification:** Eligible recipients must make a good faith certification that (i) that the uncertainty of current economic conditions necessitates the loan to support the recipient's ongoing operations, (ii) that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; (iii) that the eligible recipient does not have another PPP application pending; and (iv) that the eligible recipient has not received PPP amounts for the same purpose or other duplicative amounts for the February 15, 2020 to December 31, 2020 period. (Section 1102)
- **Loan Forgiveness:** PPP loans are eligible for forgiveness through a process that incentivizes companies to retain employees. Specifically, PPP borrowers are eligible for loan forgiveness equal to the amount spent by the

borrower during an 8-week period after the origination date on (i) rent, (ii) eligible payroll costs, (iii) interest on a mortgage, and (iv) utility payments. The amount forgiven may not exceed the principal of the loan. The PPP incentivizes companies to retain employees by reducing the amount forgiven proportionally by any reduction in employees retained compared to the prior year. To encourage employers to rehire any employees who have already been laid off due to the COVID-19 crisis, the Act provides that borrowers that re-hire workers previously laid off will not be penalized for having a reduced payroll at the beginning of the period. (Section 1106)

Medicare and Medicaid Reimbursement Boosts and Flexibility

The CARES Act attempts to alleviate some of the financial strain on hospitals, physicians, and other health care providers through a series of new Medicare policies that temporarily boost Medicare and Medicaid reimbursement and allow for added flexibility:

Suspension of 2% Medicare sequester through the end of the year. The annual 2% cut, or "sequester," in Medicare payments to hospitals, physicians, and other providers is cancelled for the rest of calendar year 2020. In order to offset the added expense of the 2020 cancellation, the CARES Act extends the sequester by one year, through 2030. (Section 3709)

20% Medicare IPPS add-on payment for COVID-19 patients. The Act increases hospitals' Inpatient Prospective Payment System (IPPS) payment by 20% for treating a COVID-19 patient. Specifically, the Act provides that the Secretary will increase the weighting factor that would otherwise apply to the diagnosis-related group (DRG) to which the COVID-19 patient discharge is assigned by 20%. The weighting factor is used by the Secretary of HHS to account for relative hospital resources used with respect to certain DRGs versus others. The add-on payment will be available for duration of the COVID-19 emergency period. (Section 3710)

Delay of Medicaid Disproportionate Share Hospital payment cuts. The Act delays scheduled reductions in Medicaid disproportionate share hospital (DSH) payments. Specifically, the Act eliminates the \$4B in Medicaid DSH cuts in FY 2020 and reduces the DSH cut for FY 2021 to \$4B from \$8B. (Section 3813).

Delay of Medicare Clinical Laboratory Test Payment Reduction and DME Payment Reduction. The Act prevents scheduled reductions in Medicare payments for clinical

diagnostic laboratory tests furnished to Medicare beneficiaries in 2021. (Section 3718)

The Act also suspends price reductions to the durable medical equipment (DME) payment methodology for the duration of the emergency period for areas other than those that are rural and noncontiguous. (Section 3712)

Expansion of Medicare Accelerated Payments Program. In certain circumstances, when a hospital is experiencing financial difficulty due to delays in receiving payment for Medicare services provided, it may be eligible for an accelerated or advance payment pursuant to the Medicare accelerated payment program. In an attempt to get payments to hospitals more quickly, the Act revises the Medicare accelerated payment program to:

- Increase the prepayment amount from 70% to 100% (125% for critical access hospitals) of expected Medicare payments.
- Increase the length of time accelerated payments may cover from 3 to 6 months.
- Delay the start of recoupment of any overpayments from 90 to 120 days.
- Extend the due date for any outstanding balances from 90 days to one year.

The Act also expands the Medicare accelerated payment program for the duration of the COVID-19 emergency period to children's hospitals, cancer hospitals, and critical access hospitals. (Section 3719). A step-by-step guide on how to request accelerated payment may be found on [CMS's fact sheet](#).

Increasing Medicare Access to Post-Acute Care. The Act provides acute care hospitals flexibility, during the COVID-19 emergency period, to transfer patients out of their facilities and into alternative care settings in order to prioritize resources needed to treat COVID-19 cases. Specifically, the Act waives the Inpatient Rehabilitation Facility (IRF) "3-hour rule," which requires that a beneficiary receive at least 3 hours of intensive rehabilitation for at least 5 days per week.

In order to allow Long Term Care Hospitals (LTCHs) to care for patients who require less intensive care during the emergency period without risking their LTCH designation under the Medicare program, the Act allows a LTCH to maintain its designation even if more than 50% of its patient cases are less intensive. It also temporarily pauses the current LTCH site-neutral payment policy, which uses an IPPS-level payment rate for lower acuity patients. (Section 3711)

Providing State Access to Enhanced Medicaid FMAP. The Act amends a section of the Families First Coronavirus Response Act of 2020 to ensure that states are able to receive the Medicaid 6.2% Federal Medical Assistance Percentage (FMAP) increase. (Section 3720)

Coverage of Diagnostic Testing for COVID-19 and Preventive Services

The Act requires health plans to provide coverage, without cost sharing (including deductibles, copayments or coinsurance) or prior authorization, for all diagnostic tests for SARS-CoV-2 or COVID-19, provided that: (i) the test has been approved, cleared or authorized by the FDA; (ii) the test developer intends or has requested FDA authorization for emergency use; (iii) a state has authorized it and notified HHS; or (iv) HHS has otherwise deemed it appropriate. Health plans/insurers are required to reimburse at either (i) the negotiated rate set forth in a contract with the provider or (ii) if the health plan/insurer does not have a negotiated rate for such service with the provider, at the price listed by the provider. Diagnostic test providers are required to list tests prices on a public website. Failure to do so can result in civil fines of \$300 per day.

In addition, health plans are required to cover qualifying COVID-19 preventive services such as an item, service or immunization recommended by the US Preventive Services Task Force or CDC's Advisory Committee on Immunization Practices. (Sections 3201-3203)

Telehealth Flexibilities

Because telehealth offers flexibility for patients to access COVID-19 screening or care while avoiding exposure to others, the CARES Act includes a number of temporary policy changes relating to telehealth services in order to increase access to care during the COVID-19 crisis. Among others, these include:

Increasing Medicare Telehealth Flexibility. The Act eliminates the requirement in Coronavirus Preparedness and Response Supplemental Appropriations Act that a professional must have treated a Medicare beneficiary in the last three years in order to provide them with Medicare telehealth services during the COVID-19 emergency. This will enable Medicare beneficiaries to access telehealth, including in their home, from a broader range of providers. (Section 3703)

Enhanced Medicare Telehealth Services for FQHCs and Rural Health Clinics. During the emergency period, FQHCs and Rural Health Clinics will be able to serve as distant sites to provide telehealth services to patients in their homes and other eligible locations. The Act allows FQHCs and Rural Health

Clinics to be reimbursed at a rate that is similar to payment for comparable telehealth services under the physician fee schedule. (Section 3704)

Liability Limitations for Volunteer Health Care Providers and Respiratory Protective Device Suppliers

The Public Service Health Act provides liability immunity to manufacturers and sellers of certain essential medical devices during a public health crisis.³ The CARES Act extends that liability immunity to entities who manufacture, test, distribute prescribe or administer “respiratory protective devices” during the relevant public health crisis period. (Section 3103)

The CARES Act also limits liability for volunteer health care professionals during the COVID-19 emergency response for health care provided within the scope of the volunteer’s licensure and made in good faith. Certain exceptions to this liability limitation exist, including for harm that was caused due gross negligence and reckless misconduct. (Section 3215)

For More Information

If you would like further information concerning the matters discussed in this article, please the Chapman attorney with whom you regularly work.

-
- 1 The H.R. 748.
 - 2 The first and second phases of legislation, respectively, are: (1) the Corona Virus Preparedness and Response Supplemental Appropriations Act which was signed into law on March 6, 2020, and (2) the Families First Coronavirus Response Act, which was signed into law on March 18, 2020.
 - 3 42 U.S.C. 247d–6d(i)(1).

Chapman and Cutler LLP

Attorneys at Law · Focused on Finance®

This document has been prepared by Chapman and Cutler LLP attorneys for informational purposes only. It is general in nature and based on authorities that are subject to change. It is not intended as legal advice. Accordingly, readers should consult with, and seek the advice of, their own counsel with respect to any individual situation that involves the material contained in this document, the application of such material to their specific circumstances, or any questions relating to their own affairs that may be raised by such material.

To the extent that any part of this summary is interpreted to provide tax advice, (i) no taxpayer may rely upon this summary for the purposes of avoiding penalties, (ii) this summary may be interpreted for tax purposes as being prepared in connection with the promotion of the transactions described, and (iii) taxpayers should consult independent tax advisors.

© 2020 Chapman and Cutler LLP. All rights reserved. Attorney Advertising Material.