



Fox Rothschild LLP
ATTORNEYS AT LAW

A Physician Practice's Survival Guide for Challenging Times

Financial Focus: Revenue & Relief Options

April 21, 2020

Presenters:

Robert N. Amkraut

Margaret J. Davino

Susan McNear Fradenburg

Allen J. Guon

CARES Act Public Health and Social Services Emergency Fund

- \$100 billion available to eligible health care providers
- Details regarding \$30 billion distribution on April 10, 2020
 - Terms and conditions
 - Guidance and discussion from CMS
- Attestation requirements



CARES ACT, Signed March 27, 2020

- Coronavirus Aid, Relief and Economic Security Act (CARES Act)
- Division B – Emergency Appropriations for Coronavirus Health Response and Agency Operations (Relief Funds)
 - \$100 billion to prevent, prepare for and respond to coronavirus, for necessary expenses to reimburse, through grants or other mechanisms, eligible health care providers for health care-related expenses or lost revenues attributable to the coronavirus



Eligible Health Care Providers

- Originally heralded as relief for hospitals
- Actually much broader
- Eligible health care providers include:
 - Public entities, Medicare or Medicaid enrolled suppliers and providers, and such for-profit entities and not-for-profit entities deemed eligible by the Secretary of HHS that provide diagnoses, testing or care for individuals with possible or actual cases of COVID–19



Example of Relief Fund Use

- Building or construction of temporary structures
- Leasing of properties
- Medical supplies and equipment including PPE and testing supplies
- Increased workforce and trainings
- Emergency operation centers
- Retrofitting facilities
- Surge capacity



First \$30 Billion Distribution

- April 10, 2020: First \$30 billion distributed to eligible health care providers
- Funds were distributed to
 - Large organizations and health systems based on billing tax ID #s
 - Group practices based on their billing organization
 - Individual physicians in the group practice will not receive separate or additional payments
 - Solo practitioners who bill Medicare received payment under their tax ID # used to bill Medicare



How Is Payment Received?

- The automatic payments come to providers via Optum Bank with "HHSPAYMENT" as the payment description
- Providers who normally receive a paper check for reimbursement from CMS will receive a paper check in the mail within the next few weeks



Distribution

- Payment amount
 - Based solely on Medicare Fee For Service Payment in 2019
 - Represent roughly 6% of 2019 Medicare FFS reimbursement
- Automatic payment not application required
- Money received is a grant, not a loan
- If you can abide by the stated terms and conditions, the funds do not need to be returned



Terms and Conditions

- Eligibility:
 - Billed Medicare in 2019
 - Not currently terminated from participation in Medicare
 - Not excluded from participation in federal health care programs
 - Medicare billing privileges are not currently revoked
 - Provides, or provided after January 31, 2020, diagnoses, testing or care for individuals with possible or actual cases of COVID-19



Provides, or Provided After January 31, 2020 . . .

- HHS Guidance states that:
 - If you ceased operation as a result of the COVID-19 pandemic, you are still eligible to receive funds so long as you provided diagnoses, testing or care for individuals with possible or actual cases of COVID-19
 - Care does **not** have to be specific to treating COVID-19
 - HHS broadly views **every** patient as a possible case of COVID-19



Additional Terms and Condition

- The provider will use the payment only to prevent, prepare for and respond to coronavirus and to reimburse the provider for health care-related expenses or lost revenues attributable to coronavirus
 - HHS has noted that the PHSS Relief Funds can be used for “those providers who are struggling to keep their doors open due to healthy patients delaying care and cancelled elective services”
 - This HHS language indicates a very broad interpretation of activities deemed to be responding to or attributable to coronavirus



Limitation on Use of Funds

- Cannot use the payment
 - To reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse
 - To pay an individual staff member salary equivalent of over \$197,300
 - For unpaid federal tax liabilities
 - Lobbying
 - Other specifically enumerated purposes involving items such as abortion, legalization of controlled substance, needle exchange programs



Terms and Conditions – Out of Network Charges

- For all care for a possible or actual case of COVID-19, the provider will not seek to collect from the patient out-of-pocket expenses in an amount greater than what a patient would have otherwise been required to pay if provider were in network for that patient



Terms and Condition – Reporting Requirements – Over \$150,000

- A provider must submit a report not later than 10 days after the end of each calendar quarter if it received more than \$150,000 in total funds from any federal appropriations related to the coronavirus response and associated activities, such as
 - CARES Act
 - The Coronavirus Preparedness and Response Supplemental Appropriations Act, and
 - The Families First Coronavirus Response Act



Reporting Requirements

- This report shall contain:
 - The total amount of funds received from HHS under the COVID-19 Acts
 - The amount of received funds actually expended or obligated for projects or activities
 - A detailed list of all projects or activities for which large amounts of covered funds were expended or obligated
 - Detailed information on any level of subcontracts or sub-grants awarded by the covered recipient or its subcontractors or sub-grantees



Documenting Expenses

- Providers should track expenses associated with
 - Addressing treatment of patients with possible COVID-19
 - Staying in operation despite significantly reduced patient visit or procedure volumes due to the pandemic
 - Some suggested items to track:
 - Decreased revenues due to government orders to cease non-essential services and stay at home
 - Increased supply costs
 - Salaries for staff when not able to see patients
 - Increased write-offs of patient co-pays to comply with requirement that you do not charge out of network co-pays



Tracking and Documentation

- Providers may be audited
- Should maintain documentation of expenses and use of relief funds in the event of an audit or future compliance requirements



Attestation Language

- Within 30 days of receipt of the funds providers must complete an electronic attestation
- Link located on www.hhs.gov/provider relief page.
- Attestation requires:
 - Acknowledgement of receipt of Relief Fund
 - Acceptance of the Terms & Conditions
 - Compliance with “any other relevant statutes and regulations”
 - Acknowledgment that non-compliance with any term or condition is grounds for the Secretary to recoup some or all of the payment made from the Relief Fund



Attestation

- Acknowledgement that you may be asked to submit to the review process established by the HHS, to determine your eligibility for this payment
- Provision of any and all information related to the disposition or use of the funds received under the Relief Fund for auditing and/or reporting purposes



Attestation

- Signer has the legal authority to act on behalf of the provider group that has received payment under the Relief Fund
- Acknowledgement that for Electronic Funds Transfer / ACH Payments, HHS or its contractor may make adjustments to the payment whenever a correction or change is required



What If You Need To Return the Funds?

- Go to www.hhs.gov/providerrelief
- Click on attestation link
- Complete attestation noting you are not eligible and funds should be remitted



Remaining \$70 Billion

- Additional distributions to providers are expected to focus on “providers in areas particularly impacted by the COVID-19 outbreak, rural providers and providers of services with lower shares of Medicare FFS reimbursement or who predominantly serve the Medicaid population”
- Application process contemplated by CARES Act language but no guidance as to how to apply as of this date



Telehealth & Medicare

- Medicare requirements loosened March 17, 2020, and March 30, 2020, via CMS directives
 - Previously, Medicare paid only if patient in a rural area and went to a facility for telehealth
 - Medicare now will pay for office, hospitals and other visits furnished via telehealth in patient's residence
 - Range of providers may offer telehealth
 - OIG will be flexible with providers reducing or waiving cost-sharing



Medicare Payment/Rules for Telehealth

- Telehealth visits considered same as in-person visits and will be paid at the same rate
- HHS will not enforce the requirement that a patient be an “established patient”



HIPAA

- March 17, 2020: Office of Civil Rights (OCR) published a Notice of Enforcement Discretion saying it would not impose penalties re: providers' good faith use of telehealth modalities that typically can't be used because they don't meet HIPAA security requirements
 - Now can use Skype, FaceTime, Zoom, etc.
 - Not just for COVID-19 treatment
 - Can use these even without getting a BAA if they refuse to sign BAA



Prescribing Narcotics

- Ryan Haight Act: No controlled substance may be delivered, distributed or dispensed by means of the internet without a valid prescription. A valid prescription is one issued for a legitimate medical purpose in the usual course of professional practice by:
 - 1) a practitioner who has conducted at least one in-person medical evaluation of the patient; or
 - 2) a covering practitioner

Exceptions included presence in a hospital or clinic



DEA Waiver Re: Prescribing Narcotics Via Telehealth

- March 17, 2020: DEA is allowing DEA registered practitioners to prescribe controlled substances during telehealth visits without a prior in-person medical evaluation
 - The DEA practitioner must use interactive, real-time audio-video telehealth
 - Practice must be in accordance with federal and state law



Telehealth & Licensing Rules

- The location of the patient is considered the “place of service” (or “originating site”) and the provider must comply with the laws of the state where the patient sits
- Practitioner must be licensed in state in which the patient sits
- May be an exception for border states (depending on the state)
- New York introduced legislation to join the Interstate Medical Licensure Compact (makes licensing process easier)



CMS Waives In-State Licensing

- Temporary waiver of requirements that out-of-state providers be licensed in the state where they are providing services when they are licensed in another state
- This applies to Medicare and Medicaid only. State law still applies

March 13, 2020 COVID-19 Emergency Declaration Health Care Providers Fact Sheet



Fox Rothschild LLP
ATTORNEYS AT LAW

Licensure Requirements Relaxed

- Federation of State Medical Board (FSMB) issued a press release offering assistance to state medical boards and health departments in verifying licenses and credentials of providers to practice across state lines to assist those impacted by COVID-19
- FSMB enables states to instantly verify licensure and disciplinary history for physicians across country



State Medical Boards and Licensure

- A number of states have waived certain health care provider licensing requirements
- Some states provide exception for in-state licensing for HCPs in an emergency
- Check specific state requirements, e.g., Florida
 - HCPs with valid unrestricted licenses in other states may provide care to patients located in FL without first becoming licensed in FL
 - MDs, DOs, PAs and NPs with license in other state may provide telehealth services to Floridians (must still abide by FL telehealth standards)



HIPAA Security

- Storage of electronic files, images, etc.
- Technology used for telehealth needs to ensure high-level security and prevent breaches of patient personal health
- Encryption to protect data hacking
- Do risk assessment with respect to data transmission as required by HIPAA



Informed Consent

- Consider what type of informed consent patient must provide before telehealth used
 - Explain purpose, risks, benefits, alternatives
- Also consider:
 - What documentation exists of consent
 - Where patient signs
 - Where documentation is maintained



Cancellation of Elective Surgeries

- Depends upon state
 - E.g., New York executive order: All general hospitals, ASCs, office-based surgery practices and D&Ts shall cancel all elective surgeries
 - But reproductive procedures may be different



Contracting With Hospitals and Employers

- Consider opportunities for contracting
 1. Hospitals
 - Coverage
 - Stark waivers
 2. Employers
 - Screening/employee education and policies (administrative/non-medical services)



Medical Staff Bylaws

- Need privileges to perform services for hospital patients
 - Disaster privileges
 - Temporary privileges



Medicare Upfront Money

- On March 28, 2020, CMS announced expansion of the Accelerated and Advance Payments Program (AAPP) to all eligible Medicare-Medicare providers and suppliers during the period of the COVID-19 public health emergency
- For hospitals, doctors and DME suppliers
 - Hospitals can request 6 months of money
 - Doctors can request 3 months of money



Upfront Medicare Payments

- Eligibility:
 - Billed Medicare for claims within 180 days
 - Not be under program integrity investigation and not have any outstanding delinquent Medicare overpayments.
 - Once approved, paid within 7 days
 - Repayment starts 120 days after payment (over 7 months after payment, 1 year for hospitals)



Federal Requirements Re: Group Health Plans

- Families First Coronavirus Response Act
- Most group health plans must provide full coverage without cost and no prior authorization
 - COVID-19 testing authorized by FDA
 - Items or services furnished during a health care visit that result in an order for COVID testing, whether in person or telehealth
- High-deductible plans may be flexible to cover COVID testing and treatment on predeductible basis (IRS guidance)



Professional Immunity

- Depends upon specific state
 - E.g., NY Executive Order 202.10 makes physicians, PAs, SAs, NP, RNs and LPNs immune from civil liability “for any injury or death alleged to have been sustained directly as a result of an act of omission by such medical professional in the course of providing medical services in support of the State’s response to the COVID-19 outbreak, unless it is established that such injury or death was caused by” gross negligence



Liability Protection

- HHS issued a Public Readiness & Emergency Preparedness (PREP) declaration on March 10, retroactive to February 4, providing liability immunity for activities related to medical countermeasures against the coronavirus
 - Protects Qualified Persons (those who prescribe, administer, deliver, distribute or dispense a covered countermeasure) and their agents, employees, contractors and volunteers
 - Covered Countermeasure: Any antiviral, other drug, biologic, diagnostic or other device or vaccine to treat, diagnose, cure or prevent COVID



Liability Protection

- Liability immunity in two situations:
 - 1) If Qualified Person acted pursuant to federal contract or agreement
 - 2) If Qualified Person acted in accordance with the public health and medical response of the public agency with authority for responding to an incident
- Recourse for injured patient
 - Can make a claim within one year of injury, to the Countermeasures Injury Compensation Program (special recovery fund established by Congress)



Topics Covered Today

- Converting to telehealth
- Contracting with hospital and employers
- Ability to do procedures
- Drive-by COVID testing
- CARES Act
- Getting money upfront



Federal 1135 Waiver

- In a national emergency, Section 1135 of the Social Security Act allows federal waivers to be granted from certain regulatory requirements
 - Only as to federal requirements
- Blanket waivers of federal requirements include:
 - Waiver of the 3-day prior hospitalization requirement for coverage of a nursing home stay
 - Waiver of face-to-face visits
 - New physician's order for replacing DME
- Effective retro to March 1, 2020



COVID-19 Economic Impact

- Too early to know full economic effects of crisis
- Most are predicting significant recession
- Will affect your business either directly or indirectly



Bankruptcy

- Chapter 7 Liquidation
 - Trustee liquidates assets and pays creditors
 - Most common type of bankruptcy, particularly for individuals
- Chapter 11 Reorganization
 - Debtor continues operating while reorganizing its business with a goal of new profitable business or controlled liquidation
 - Much more complicated than Chapter 7
- Receiverships
 - A kind of state law form of bankruptcy



Financially Troubled Business Partners

- Variety of Possibilities
 - Hospitals
 - Landlord/tenant
 - Service providers/suppliers
 - Laboratories
 - Actual business partners
- Signs of Trouble
 - Failure to perform
 - Request for new credit terms
 - No payment/late payment
- Response
 - Decide/negotiate whether and on what terms to continue relationship
 - Have a bankruptcy attorney review your contract



Responding to a Bankruptcy

- Automatic stay
 - Particularly for patients
 - Stop sending bills
- Executory contracts
- Post-bankruptcy transactions



Opportunities in Bankruptcy

- Free and clear acquisitions.
- Possibly hiring professionals leaving failed entities
- Personal services contracts with doctors generally not enforceable



What To Do If Your Health Care Business Is Facing Financial Distress

- “Cash is king”
- If you cannot pay all your bills, which default will cause least legal issues or impact on business?
 - Review contract
 - Employee issues
 - Consider implications of personal liability and guaranties
- Sources of credit
- Many types of financial restructuring alternatives both in and out of court
 - Retain counsel early to help manage the process
 - Strategies will vary depending on business
 - Workout with lenders typically is the first and best remedy.
 - Composition agreements: Negotiating with groups of vendors
 - Assignment for the benefit of creditors
 - Bankruptcy



Bankruptcy Reorganization

- Companies often wait too long to obtain restructuring advice
- Best to file for bankruptcy knowing how you will get out
 - Reorganization
 - Sale in bankruptcy to maximize value
- “Barbarians at the gate” - Automatic stay will stop most creditors
- The Golden Rule
 - The entity with the gold makes the rules
 - maintain good communication with lenders – you’ll need it
- Don’t transfer assets of group to others. Litigation will follow in the bankruptcy case to recover the assets for the benefit of creditors



Unique Issues in Bankruptcy for Health Care Businesses

- Continuity of patient care remains the paramount issue – maintain that focus
- Privacy and data security
- Medicare administrative freezes
- If the intent of the bankruptcy is to sell the practice:
 - Employment agreements with doctors are not assignable absent consent
 - Noncompete provisions therefore will go away and be unenforceable
- Possibility of appointment of patient care ombudsman
- State licensure and change of ownership provisions remain intact in bankruptcy. Anticipate effect on length of case



In Summary: What If Your Organization Is in Financial Difficulty?

- Get advice early from your financial and legal advisers
- Explore options under the CARES Act and other financing options
- Consider renegotiation of existing credit arrangements
- Evaluate implications of existing or new personal guaranties and liabilities



Thank you!

Robert Amkraut, Esquire

206.389.1747

ramkraut@foxrothschild.com

Margaret J. Davino

646.601.7615

mdavino@foxrothschild.com

Allen J. Guon, Esquire

312.980.3806

AGuon@Foxrothschild.com

Susan McNear Fradenburg

336.378.5482

sfradenburg@foxrothschild.com



Fox Rothschild LLP
ATTORNEYS AT LAW