

## Updates

March 31, 2020

### Healthcare Industry Implications of the CARES Act



The [Coronavirus Aid, Relief, and Economic Security Act](#), known as the "CARES Act," became law on March 27, 2020. The CARES Act implements wide-ranging changes to law and funding designed to ameliorate the coronavirus pandemic's impact on the American economy and its workers. Title III of the CARES Act specifically addresses support for the nation's healthcare system to address the surge of COVID-19 cases. Through the CARES Act, the U.S. Congress appropriated \$100 billion in emergency funding for eligible healthcare providers and loan availability to businesses confronting the pandemic. In addition, Medicare and Medicaid reimbursement for COVID-19-related hospital and other services has been augmented, testing and treatment coverage has been expanded, and rural healthcare providers have obtained certain regulatory flexibility.

This update summarizes key provisions of the bill that relate to the healthcare industry. It is not exhaustive, so for more particulars or any other aspect of the CARES Act that is not covered in sufficient detail for your purposes, please inquire of counsel.

- **\$100 Billion in Increased Reimbursement to Providers:** The new law provides up to \$100 billion for a "Public Health and Social Services Emergency Fund" to reimburse, through grants or other mechanisms, eligible healthcare providers for expenses or lost revenues attributable to coronavirus. Providers who provide COVID-19 diagnoses or testing, or who care for individuals with possible or actual cases of COVID-19, are eligible to apply for funding. Eligible expenses include those for, among other things, construction of temporary structures, leasing of properties, emergency operation centers, personal protective equipment and other medical supplies and equipment, and increased workforce. To receive funds, providers must apply to the U.S. Department of Health and Human Services (HHS). More guidance on the application process is forthcoming, but because payments will be awarded on a rolling basis until the funds are expended, providers seeking reimbursement should be prepared to apply as soon as practicable.

The CARES Act also suspends the sequestration of Medicare payments to providers, which had reduced payments by 2%. Specifically, the law exempts Medicare from sequestration from May 1, 2020, through the end of the calendar year but extends the sequestration order for an additional year (through FY 2030).

- **Increased and Accelerated Medicare Payments for Hospital Services:** Inpatient Medicare reimbursement for hospitals providing services to COVID-19 patients will include a 20% addition to the weighting factor for the associated diagnosis-related group. This adjustment may also apply in states which have a section 1115A waiver. In addition, the CARES Act changes CMS policy permitting advance payments to hospitals during an emergency. Advances of expected Medicare payments, now of 6-month duration, have increased from 70% to 100% (125% for critical access hospitals), and the recoupment period has extended to 120 days. The CARES Act newly allows critical access hospitals, pediatric facilities, and cancer treatment hospitals to apply for accelerated payments.
- **Other Increased Medicare Payments:** Scheduled reductions in Medicare payments for durable medical equipment were halted for the duration of the COVID-19 public health emergency. Post-acute care providers, including inpatient rehabilitation facilities and long-term care hospitals, also received relief from certain service minimums and other payment rules. The law newly allows Medicare payment for home care services ordered by physician assistants, nurse practitioners, clinical nurse specialists, and certain other providers. Finally, the geographic wage index floor that affects Medicare payments to physicians has been extended through the end of the year, in a move that should buttress physician reimbursement particularly in lower cost or rural areas.
- **Changing Coverage for COVID-19 Testing and Vaccines:** The CARES Act expands and clarifies coverage for diagnostic testing and expands coverage for vaccines, which are covered without patient cost sharing. Under the recent Families First Coronavirus Response Act and now the CARES Act, Medicare Part B, Medicare Advantage, Medicaid, private health plans, and private insurers must cover COVID-19 diagnostic testing and vaccines without cost sharing. The CARES Act also freezes negotiated reimbursement rates for diagnostic testing (or, if there are no negotiated rates, the cash price identified on the provider's website) through the emergency period. In turn, providers are required to publish the cash price for COVID-19 diagnostic testing on their respective internet sites.
- **Expansion of Telehealth Service Access and Coverage:** The CARES Act includes several provisions expanding access and coverage for telehealth services. Medicare beneficiaries are no longer required to have a pre-existing relationship with a provider in order to utilize telehealth services, codifying a policy position that CMS had already taken. Telehealth access is increased for patients in high-deductible plans, as such plans are now allowed to cover telehealth services without patients first reaching the applicable deductible. The law now permits Medicare payment to Federally Qualified Health Centers and Rural Health Clinics for telehealth services for Medicare beneficiaries irrespective of whether the patient is located in the same site as the provider. Face-to-face visit requirements between physicians and those receiving home dialysis are also removed on a temporary basis. Similarly, recertifications required for eligibility or recertification for hospice care may temporarily occur via telehealth.
- **Medicaid Provisions:** The CARES Act includes several less substantial changes that affect Medicaid programs, including ushering in:
  - An increase in funding for grants, and an extension of such funding through November 1, 2020, under the Money Follows the Person Rebalancing Demonstration, a program to increase the use of home- and community-based long-term care services
  - A delay of the planned reduction of Medicaid Disproportionate Share payments from May 23, 2020, to December 1, 2020
  - The Community Mental Health Services Demonstration Program, an extension of the demonstration period from May 22, 2020, to November 30, 2020, with an additional 2 states allowed to participate
- **Forthcoming HIPAA Guidance and Changes:** The CARES Act includes several changes related to protected health information (PHI):

- Within 180 days, the HHS secretary is to issue guidance regarding the sharing of patient protected health information (PHI) during the COVID-19 pandemic response
- With respect to *substance use disorder (SUD)* records:
  - A patient's written consent is required only once to allow for future uses or disclosures for purposes of treatment, payment, and health care operations, until such consent is revoked in writing.
  - SUD records may not be used without patient consent in any civil, criminal, administrative, or legislative proceedings conducted by a federal, state, or local authority, or in order to discriminate in access to healthcare, employment, worker's compensation, housing, or access to courts or governmental benefit programs. Within one year, the HHS secretary is to update federal regulations to provide patients with a notice of their rights.
- **Protecting Healthcare Volunteers:** Volunteer healthcare professionals are shielded from federal, state, or local negligence claims related to services rendered within the professional's license, registration, or certification during the COVID-19 public health emergency.
- **Liability Protection for Respiratory Protective Devices:** In order to promote production and distribution of personal respiratory protective equipment, the law classifies such equipment as a countermeasure protected from liability.
- **Mitigating Drug and Device Shortages:** The CARES Act compels the U.S. Food and Drug Administration to expedite the review of drugs critical to the public health during the emergency. The act also increases reporting requirements for medical device manufacturers regarding device shortages during public health emergencies when the devices are critical to public health. The law also directs the National Academies of Sciences, Engineering, and Medicine to study the manufacturing supply chain of critical drugs and medical devices.
- **Expanding the Strategic National Stockpile:** The CARES Act requires the Strategic National Stockpile to include personal protective equipment (PPE) and other supplies required for the administration of drugs and vaccines.
- **Other Emergency Appropriations and Program Extensions:** The CARES Act provides significant emergency appropriations to HHS and other agencies, including:
  - As much as \$250 million for the grantees and sub-grantees of the Hospital Preparedness Program
  - Over \$16.4 billion to the Veterans Health Administration for responding to the coronavirus outbreak (of which over \$2 billion is dedicated to medical community care)
  - As much as \$16 billion for HHS to obtain PPE and other material for the Strategic National Stockpile
  - \$4.3 billion to the U.S. Centers for Disease Control and Prevention for public health preparedness, global health efforts, data infrastructure for state and local health information related to COVID-19, and other uses
  - Over \$945 million to the National Institutes of Health for research into a vaccine for COVID-19 and other related therapeutic and diagnostic research
  - Funding extensions were provided to the National Health Service Corps, the Teaching Health Center Graduate Medical Education program, and the Special Diabetes Program and the Special Diabetes Program for Indians, among other programs.
- **Paycheck Protection Program and Loan Forgiveness:** The CARES Act includes approximately \$350 billion for a "Paycheck Protection Program" (PPP) loan program to support businesses in making payroll and other essential payments during the coronavirus crisis. The PPP loan program is an extension of the Small Business Administration's Section 7(a) loan guarantee program for small businesses, expanded to include business concerns, nonprofit (tax-exempt) organizations, veterans' organizations, and certain tribal business concerns with not more than 500 employees (or 500 employees per location for certain businesses). Loans will be made by SBA-certified lenders, are 100% guaranteed by the federal government, and will be available through June 30, 2020. Loans must be used for payroll, employee

benefits, rent, utilities, and interest payment on debt existing before February 15, 2020. These loans will be forgiven to the extent used for permitted purposes during an 8-week period after the loan is made.

Federal funding and regulatory changes created by the CARES Act are likely to be augmented by future congressional action, and implemented by HHS, CMS, and state and local governments. We intend to keep you advised of those developments.

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