SQUIRE PATTON BOGGS

Financial Lifelines, Waivers and Other Support for Hospitals and Healthcare Systems Responding to the Coronavirus Pandemic

In just the past week, the federal government has issued a flurry of legislative and regulatory aid packages, programs and rule changes for hospitals and health systems responding to the COVID-19 pandemic. These measures are designed to give emergency financial support and to cut through regulatory roadblocks to delivering care during the crisis. The federal government's work is not done; as the size and scope of the crisis expands, we expect further legislative and regulatory actions focused on assisting healthcare entities during this national emergency.

CARES Act Provides US$100 Billion Emergency Fund and Other Payment Support

The Coronavirus Aid, Relief, and Economic Security (CARES) Act throws a lifeline to hospitals and providers confronting the COVID-19 pandemic. The act includes US$100 billion emergency fund for hospitals and healthcare providers to ensure these entities continue to receive support for COVID-19-related expenses and lost revenue. We expect the Department of Health and Human Services (HHS) to review applications and make payments on a rolling basis, and many stakeholders are already considering how to secure funding through this process. In recent days, the for-profit and nonprofit hospital associations have weighed in on disbursement of the emergency fund. The American Hospital Association (AHA) urges the Centers for Medicare and Medicaid Services (CMS) to use Medicare Administrative Contractors (MACs) to administer these emergency funds and to authorize the immediate disbursement to every US hospital at the rate of US$25,000-$30,000 per bed, for a total of about one-quarter of the US$100 billion fund. The Federation of American Hospitals (FAH) recommends initially targeting payments to hospitals that experienced a recent 20% or more disruption in non-emergent clinical activity and have COVID-19-related costs. Both the AHA and FAH list the types of costs and lost revenues that should qualify for funds, such as expenses relating to creating the physical facilities and ensuring an adequate workforce for surge capacity, and lost hospital and physician revenue due to directives to cancel elective procedures (see here and here). HHS will soon be issuing guidance on how the funds will be distributed.

The law also provides enhanced payments for COVID-19 care and expands an existing Medicare accelerated payment program for the pandemic emergency period. CMS has now provided additional eligibility and process details on the accelerated payment program here. Additional details on the financial and operational support in the CARES Act is summarized here.

CMS Announces More Flexibility for Treating COVID-19 Patients

On March 30, 2020, CMS made several announcements to allow the healthcare system more flexibility in treating COVID-19 patients. Hospitals and health systems have faced strain on their workforce, supplies and capacity as coronavirus diagnoses have increased. Among other changes, healthcare systems and hospitals may now provide care in locations outside their own buildings, including at ambulatory surgery centers, inpatient rehabilitation hospitals, hotels and dormitories. CMS also issued a waiver to allow hospitals to provide more benefits and support for medical staff, including meals, laundry service for personal clothing and child care services while these healthcare workers are providing care. In order for teaching hospitals to expand their workforce, CMS has offered supervision flexibilities: teaching physicians may supervise residents utilizing audio/video communication technology. In terms of paperwork, hospitals will not be required to have written policies focused on the processes and visitation of COVID-19 patients in isolation, and entities will have more time to provide patients their medical records. CMS is also expanding access to telehealth, allowing more than 80 additional services to be provided by telemedicine technology. CMS has compiled a list of provider-specific coronavirus waivers and flexibilities here.

CMS Issues Blanket Stark Waivers for Arrangements Needed During COVID-19 Response

On March 30, 2020, CMS issued waivers for certain provisions of the physician self-referral law, commonly referred to as the Stark Law. To ensure there will be sufficient capacity to handle the unique challenges of the COVID-19 pandemic, CMS is permitting certain financial arrangements, without fear of Stark sanctions, for entities and physicians acting in good faith and not engaged in fraud and abuse.

These nationwide waivers require no further approval from CMS. They apply to financial relationships and referrals related to "COVID-19 Purposes," which broadly include not only arrangements directly involving COVID-19 treatment, but also arrangements for securing healthcare professionals to ensure available services, expanding facility capacity and addressing medical practice or business interruption due to the pandemic. CMS expects parties to keep records relating to the waivers; though CMS has not specified required documentation, it would be prudent to detail the COVID-19 purpose in any arrangement utilizing the waivers.

There are 18 specific waivers covering numerous types of compensation arrangements. CMS also gives examples of its application. For example, hospitals may pay physicians above their previously contracted rate for treating COVID-19 patients in particularly hazardous or challenging environments, and may even provide free office space on campus for physicians to treat patients who may not need inpatient care. Entities may also provide telehealth equipment or personal protective equipment (PPE) to physicians for less-than-fair-market-value. The full list of the CMS waivers and list of examples is available here.

The waivers are retroactive to March 1, 2020. Any revisions or additions to the waivers will be posted on CMS's website; any that narrow or terminate waivers will be prospective only.

DOL Exempts Most Healthcare Workers From COVID-19 Sick and Family Leave

The Families First Coronavirus Response Act (FFCRA), which takes effect April 1, 2020, requires employers with fewer than 500 employees and public sector employers to provide public health emergency paid sick leave and emergency Family and Medical Leave Act (FMLA). The Department of Labor (DOL) recently published guidance on who is a "healthcare provider" who, in the employer's discretion, may be denied paid sick leave or paid family leave. "Healthcare provider" is defined expansively to include individuals employed by virtually all types of healthcare providers and suppliers, companies that contract to provide services to providers or maintain their facilities, and companies involved with making of COVID-19-related medical equipment, tests, drugs, vaccines, diagnostic vehicles or treatments.

The upshot is that most employees of hospitals and other healthcare providers may be exempt from FFCRA paid leave where their services are necessary during the COVID-19 crisis. The DOL encourages employers to be "judicious" when using the exemption to minimize the spread of the virus.

Capitol Hill and HHS Continue Their Work

On Capitol Hill, there are already discussions of additional legislative packages to focus on pandemic aid. We expect the government to take further administrative and regulatory actions to implement these new laws and address the increasing needs of the health sector in its response to the coronavirus.

President Donald Trump has tweeted his support for another relief bill focused solely on jobs and infrastructure projects. Congressional Democrats have stated that the next aid bill should include financial measures to reduce the cost of care and coverage, an increase and expansion of healthcare tax credits, a special enrollment period of the Affordable Care Act's exchanges and incentives for remaining states to expand Medicaid. It remains to be seen how congressional Republicans will respond to a push for another large legislative package.

Officials on both sides of the aisle are focusing on healthcare workers. House Committee on Education and Labor Chairman Bobby Scott (D-VA) has stated that the next package of relief legislation must include a requirement that the Occupational Safety and Health Administration (OSHA) "issue an Emergency Temporary Standard within seven days that requires employers to implement protections for at-risk workers" against airborne diseases. President Trump indicated the Administration is looking at hazard pay for hospital workers, though it is unclear how such money could be sourced or distributed. Treasury Secretary Steven Mnuchin said the pay should be included in the next legislative package.

We expect Congress to continue to advance other significant health-related legislation later in the year. Before the pandemic, Congress was contemplating legislation to eliminate surprise medical bills and rein in the cost of prescription drugs. Lawmakers were focused on resolving any differences by May 22, 2020, when several other Medicare and Medicaid policies known as "extenders" were set to expire and a health-related legislative vehicle would be available. The CARES Act extended these provisions through November 30, 2020, making it possible lawmakers will revisit legislation on surprise bills and drug pricing during a lame duck session free from re-election pressures. We expect discussions and advocacy to continue through the election season.

Our Healthcare team, including lawyers and public policy professionals, is assisting all health-related entities in anticipating and complying with these changes. We have set up a dedicated resource center for business on the legal, regulatory and commercial implications of COVID-19. You may access it here.

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37830/04/20