

## HHS Provider Payments: Lack of Clarity Means Risk of Retention

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Pursuant to the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as of April 10, 2020, many health care providers began receiving deposits to their financial accounts. This portion of the CARES Act is intended to provide swift financial assistance to health care providers involved in responding to the COVID-19 pandemic. Providers received payments regardless of their medical specialty or the depth of their involvement in combatting COVID-19. The initial \$30 billion of the \$50 billion allocated to these payments was distributed to providers proportionate to their 2019 share of Medicare fee-for-service reimbursements. As of April 24, 2020, additional payments have been made available to the health care industry.

Although these payments undoubtedly will be of great assistance to most health care providers, they come with specific conditions that, if overlooked, will result in providers retaining payments to which they are not entitled. Most notably, as a condition of receiving payment, providers must sign designated Health and Human Services (HHS) attestations. The following two attestation points may be challenging for some providers:

The Recipient certifies that it billed Medicare in 2019; provides or **provided after January 31, 2020 diagnoses, testing, or care for individuals with possible or actual cases of COVID-19**; is not currently terminated from participation in Medicare; is not currently excluded from participation in Medicare, Medicaid, and other Federal health care programs; and does not currently have Medicare billing privileges revoked.

The Recipient certifies that the Payment will only be used **to prevent, prepare for, and respond to coronavirus, and shall reimburse the Recipient only for health care related expenses or lost revenues** that are attributable to coronavirus.

Although CMS Administrator, Seema Verma, previously stated the CARES funds are being provided with “no strings attached,” these attestations surely create such “strings.” Neither CMS nor HHS has made any real effort to provide clarifying or explanatory guidance or direction. As a result, a fundamental question exists whether a provider must actively treat and/or have direct expenses related to the treatment of COVID-19 to retain CARES funds.

With respect to the required treatment of COVID-19 patients, HHS has stated that it considers *any* person a possible case of COVID-19. Based on this statement, it would seem that as long as a provider maintained an open practice and was available to treat patients after January 31, 2020, it could make the attestation that it diagnosed, tested, or cared for individuals with possible or actual cases of COVID-19. This interpretation might mean, for example, that a physician practicing aesthetic medicine who provided only laser cosmetic treatments after January 31, 2020 would meet this requirement. That, however, conflicts with the intent and purpose of these payments. Absent more direction from HHS on the types of patients and services which meet this requirement, providers will need to consider carefully whether they can make this attestation.

The attestation language further limits the retention of funds to expenditures which can be substantiated by the provider for health care-related expenses or lost revenues attributed only to the coronavirus. It is clear that this directive covers expenses for PPE or purchasing COVID-19 tests. There is no authoritative guidance or examples, however, evidencing how a loss of revenue attributable to COVID-19 is to be determined.

Making it even more critical that providers have a reasonable basis to accept and retain these funds, the attestation language currently on the HHS website, provides as follows:

*The Recipient acknowledges that any deliberate omission, misrepresentation, or falsification of any information contained in this Payment application or future reports may be punishable by criminal, civil, or administrative penalties, including but not limited to revocation of Medicare billing privileges, exclusion from federal health care programs, and/or the imposition of fines, civil damages, and/or imprisonment.*

Moreover, at a recent White House Press briefing, United States Treasury Secretary Steven Mnuchin was asked how the government would deal with persons who improperly retained funds from the various relief programs. He indicated that he expected that people receiving and retaining the government's COVID-19 relief payments would be acting in good faith and then went on to add that, in order to retain funds, organizations would have to sign very carefully worded attestations. If there was a later issue for improperly retained funds which violated the terms of the attestation, there would be "consequences."

Although a formal audit and monitoring system has not been made public, the government has indicated payments will be subject to audit. This is a clear indication that there will be oversight of the acceptance and use of these funds. The government also will confirm compliance with associated administrative obligations. These requirements include written policies and procedures to assure adequate financial management and record retention requirements, as well as policies outlining internal controls to assure full compliance with the Terms and Conditions established by HHS.

At Roetzel & Andress we are prepared to guide your organization through an analysis of the HHS Terms and Conditions to help you determine and analyze any risk in retaining HHS funds. We have developed the required policies and procedures and can assist in the preparation of the additional mandated compliance precautions unique to your organization. Please reach out to our health care attorneys so we can help you through this process.

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