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Recent HHS Provider Relief Payment Updates

By Christina Kuta

Since our May 11, 2020 Alert "HHS Provider Payment Updates," the Department of Health and Human Services (HHS) has issued additional guidance through updated FAQs for payments health care providers received pursuant to phases of the Coronavirus Aid, Relief, and Economic Security (CARES) Act ("Cares Act"). This alert highlights the substantive information and guidance, updated as of June 9, 2020, that will impact many health care providers who received relief CARES Act payments ("Provider Relief Payments").

1. Change in Attestation Deadline. Cares Act recipients originally had 30 days from the date they received a payment to attest to the HHS Terms and Conditions. That deadline later was extended to 45 days. HHS again has extended the deadline, requiring recipients to make the required attestations within 90 days from the date of receipt of payment. If an attestation is not made within 90 days, a recipient is deemed to have accepted the Terms and Conditions by default.

2. Executive Level II Compensation. The Terms and Conditions for accepting Provider Relief Payments require that the payment not be used to pay the salary of an individual at a rate greater than Executive Level II compensation (currently $197,300). For the purposes of this limitation, the direct salary is exclusive of fringe benefits and indirect costs. Additionally, HHS clarified that a provider receiving Provider Relief Payments may pay an individual's salary amount in excess of the salary cap as long as such amounts are paid with non-federal funds.

3. Providers Who Ceased Operations. Because Provider Relief Payments were based on prior year Medicare FFS payments, providers who ceased operations in 2020 still may have received payments. HHS addresses this scenario by requiring that a provider must have been open and able, after January 31, 2020, to diagnose, test or care for individuals with possible or actual cases of COVID-19 in order to retain the Provider Relief Payments. As previously indicated, HHS considers every patient as a possible COVID-19 patient.

4. Sale/Mergers/Subsidiaries. Providers who were involved in a sale or merger between January 1, 2018 until January 31, 2020, may not be eligible to retain Provider Relief Payments in the following circumstances:

   A. In the event one entity merged into another entity, or two entities consolidated to form a new entity, if a non-surviving entity received Provider Relief Payments, but was not providing services as January 31, 2020, such entity must reject the payment in full. For example: if Practice A merged into Practice B, such that all services were billed under Practice B's TIN as of January 1, 2020, any Provider Relief Payments received by Practice A must be returned and cannot be retained by Provider B.

   B. Provider Relief Payments can not be transferred to the purchasing entity. For example: Provider A purchased Provider B in December 2019, and Provider B stopped providing services when the sale became effective. Provider B received Provider Relief Payments. Provider B cannot transfer the payments to Provider A, and therefore, must reject the payments entirely.

C. If a provider sold part of a business in 2019 or January 2020, and received a Provider Relief Payment that reflects the Medicare FFS payments for that part of the business that was sold, the provider may accept the funds so long as the provider can attest to meeting the Terms and Conditions. The provider will be required to substantiate that the funds were used for increased healthcare-related expenses or lost revenue attributable to COVID-19, and reimbursed from other sources.

5. Subsidiaries. Parent organizations can control and allocate Provider Relief Payments to their subsidiaries. In this instance, the parent organization must attest to accepting its subsidiaries' payments and agree to the required Terms and Conditions. Alternatively, the parent organization with subsidiary billing TINs that received payments may attest and keep the payments as long as providers associated with the parent were providing diagnoses, testing, or care for individuals with possible or actual cases of COVID-19 on or after January 31, 2020, and can otherwise attest to the Terms and Conditions.

6. Health Care Related Expenses Attributable to COVID-19. As a condition to accepting Provider Relief Payments, providers must attest that they will use the funds only for health care related expenses attributable to COVID-19. In prior guidance, HHS provided no detailed information or examples of how it would interpret these expenses. In most recent guidance, HHS indicated the following will qualify as expenses attributable to COVID-19:

   - supplies used to provide healthcare services for possible or actual COVID-19 patients;
   - equipment used to provide healthcare services for possible or actual COVID-19 patients;
   - workforce training;
   - developing and staffing emergency operation centers;
   - reporting COVID-19 test results to federal, state, or local governments;
   - building or constructing temporary structures to expand capacity for COVID-19 patient care or to provide healthcare services to non-COVID-19 patients in a separate area from where COVID-19 patients are being treated; and
   - acquiring additional resources, including facilities, equipment, supplies, healthcare practices, staffing, and technology to expand or preserve care delivery.

In addition, HHS will permit the use of Provider Relief Payments for expenses incurred prior to the date on which the provider received payment, as long as those expenses were attributable to COVID-19 and were used to prevent, prepare for, and respond to COVID-19. HHS has stated it does not anticipate accepting, and likely will scrutinize, any expenses prior to January 1, 2020.

7. Lost Revenues Attributable to COVID-19. Provider Relief Payments also may be used to reimburse providers for losses attributable to COVID-19. Current HHS guidance provides that the term "lost revenues that are attributable to coronavirus" means any revenue that a healthcare provider lost due to COVID-19. HHS broadly interprets this to include revenue losses associated with fewer outpatient visits, canceled elective procedures or services, or increased uncompensated care. In addition, providers can use Provider Relief Payments to cover any cost that the lost revenue otherwise would have covered, and such costs do not need to be specific to providing care for possible or actual COVID-19 patients, but the lost revenue must have been lost due to COVID-19.

HHS specifically encourages the use of funds to cover lost revenue so that providers can maintain healthcare delivery capacity, such as using payments to cover:

   - Employee or contractor payroll;

- Employee health insurance;
- Rent or mortgage payments;
- Equipment lease payments; and
- Electronic health record licensing fees

In prior Alerts, we acknowledged it was unclear how broadly "lost revenues that are attributable to COVID-19" would be interpreted. Based on updated guidance and examples, it appears that HHS will afford providers the flexibility to use Provider Relief Payments to pay for expenses they otherwise would have paid for out of funds received had they not lost income due to COVID-19.

8. Timing of Eligible Expenses. HHS has determined providers do not have to substantiate, at the time they accept Provider Relief Payments, that prior and/or future lost revenues and increased expenses attributable to COVID-19 will meet the total sum of the Provider Relief Payments. HHS indicates that if providers have leftover Provider Relief Payments that they cannot attribute to permissible expenses or losses, they should return this amount to HHS pursuant to its future directives.

9. Provider Bankruptcy. HHS has indicated that Provider Relief Payments are not subject to the claims of creditors. Providers may remit payment to creditors, but only to the extent that such claims constitute eligible health care related expenses and lost revenues attributable to COVID-19 and are made to prevent, prepare for, and respond to COVID-19.

10. Publication of Payments. HHS maintains a publicly-available list of all providers who have attested to the Terms and Conditions or retained the Provider Relief Payments for 90 days without making such attestation. The list will include the total amounts attested-to by the provider from each of the Provider Relief Fund distributions.

HHS continues to remind providers that they must maintain certain policies and procedures mandated by acceptance of the Terms and Conditions. The health care attorneys at Roetzel have reviewed all policy requirements and drafted a complete set of policies and procedures for our clients. Please contact a member of the health care team regarding the necessary policies and for continued assistance navigating your practice through the COVID-19 pandemic.

Ericka Adler, Manager
312.582.1602 | eadler@ralaw.com

Avery Delott
312.582.1636 | adelott@ralaw.com

David Hochman
312.582.1686 | dhochman@ralaw.com

Christina Kuta
312.582.1680 | ckuta@ralaw.com

Lee Levin
312.580.1248 | llevin@ralaw.com

Judith Sherwin
312.580.1268 | jsherwin@ralaw.com

John Waters
312.582.1685 | jwaters@ralaw.com