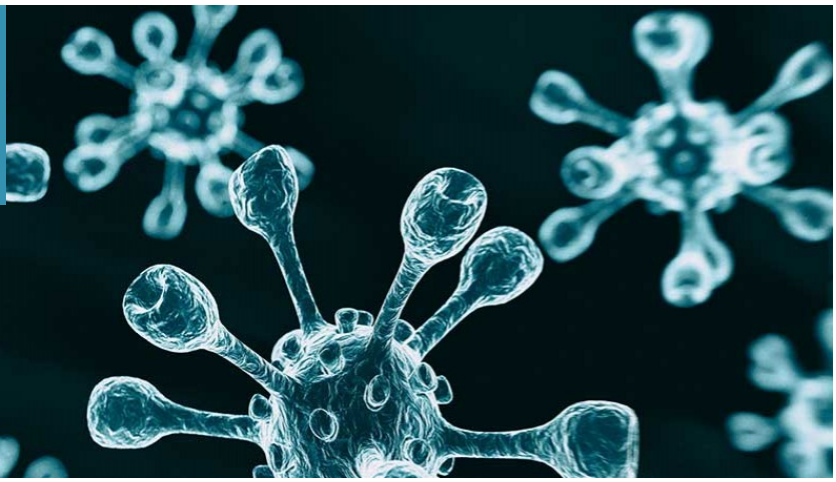
FOULSTON
ATTORNEYS AT LAW

COVID-19



CORONAVIRUS: KEY HEALTHCARE COMPONENTS OF THE CARES ACT

April 2, 2020

By: Alex W. Schulte and Kyle E. Calvin

Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available here.

On Friday, March 27, Congress passed and President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). This sweeping legislation provides more than $2 trillion to combat the COVID-19 pandemic, aid individuals and entities impacted by the crisis, and stimulate the economy. While the CARES Act touches nearly every sector of the economy, this issue alert addresses its key healthcare measures, including substantial funding for eligible providers responding to the crisis, increased and accelerated Medicare payment initiatives, expanded telehealth coverage during the emergency period, and improvements to the American healthcare infrastructure.

FUNDING FOR COVID-19

The CARES Act creates a $100 billion fund to be managed by the Department of Health and Human Services ("HHS") to cover expenditures or lost revenues incurred by hospitals and other eligible providers stemming from the COVID-19 crisis. Providers may use these funds for expenses related to the building or construction of temporary structures, leasing of properties, procurement of medical supplies and equipment including personal protective equipment (PPE) and testing supplies, developing workforce and training programs, developing emergency operation centers, retrofitting facilities, and increasing surge capacity.

The CARES Act states that a wide variety of providers are eligible for grants from the fund, including all Medicare or Medicaid enrolled suppliers and providers, regardless of whether they are for-profit or not for-profit entities. Medicare or Medicaid participating hospitals, surgery centers, physician clinics, long-term care providers, and other healthcare entities should consider applying for grants from the fund. At a minimum, the CARES Act requires providers to submit applications with a statement justifying the provider's need for such grants. We anticipate that the HHS Secretary will issue guidance regarding the grant and disbursement process and administration of the fund within the coming days.

FOULSTON
ATTORNEYS AT LAW

ACCELERATED MEDICARE PAYMENTS TO PROVIDERS (HOSPITALS, AMBULATORY SURGERY CENTERS, PHYSICIAN PRACTICES, AND SKILLED NURSING FACILITIES)

The CARES Act increases cash immediately available to a variety of hospitals by expanding Medicare's accelerated payment program ("APP") for the duration of the COVID-19 emergency period. The APP had previously been unavailable to children's hospitals, cancer hospitals, and critical access hospitals (CAHs), but the CARES Act expressly extended the program to all such hospitals. Under the CARES Act, most eligible hospitals may elect to receive up to 100% of their Medicare payments for a period of up to six months as an advance. That advance is increased to 125% of Medicare payments for CAHs. Hospitals may either receive the payments in a lump sum or in periodic increments. HHS will not begin recouping these payments through offsets until 120 days after a hospital receives its first payment, and a hospital will not be required to repay in full the advance until 12 months after the first payment date.

On March 28, HHS extended the APP to other Medicare providers and suppliers impacted by COVID-19. The change opens the program to physician practices, surgery centers, skilled nursing facilities, and others furnishing Medicare-reimbursable services. For most non-hospital providers, the accelerated payments are limited to a three-month advance of Medicare payments, rather than the six-month advance available to hospitals, and advances to non-hospital providers must be recouped within 210 days, rather than the 12-month repayment period the CARES Act offers hospitals. CMS' fact sheet regarding the APP may be accessed here.

INCREASED MEDICARE REIMBURSEMENT FOR INPATIENT COVID-19 TREATMENT

The CARES Act includes a new 20% add-on payment to hospitals for inpatient treatments for COVID-19 patients. Under the Inpatient Prospective Payment System, a diagnosis-related group ("DRG") is used to classify various diagnoses into groups and subgroups for Medicare reimbursement of inpatient hospital stays. Each DRG is assigned a weighted factor based on the estimated related hospital cost of treating such DRG. The CARES Act increases the weighted factor by 20 percent for the DRG applicable to COVID-19, providing hospitals direct financial relief for COVID-19 patients.

LOOSENED TELEHEALTH RULES

The CARES Act gives providers further incentives to provide services via telehealth. In the first COVID-19 legislation, signed by President Trump on March 6, 2020, Congress temporarily removed the Medicare requirement that the originating site (the patient's physical location) be a healthcare facility in a rural area. As a result of that change, patients may receive Medicare-reimbursed telehealth services from their homes and other locations. The CARES Act goes one step further and provides that, during the COVID-19 crisis, a treating physician is not required to have a preexisting treatment relationship with the patient in order for telehealth services rendered to that patient to be reimbursed by Medicare. Previously, federal law required that the treating physician or a member of the physician's group practice had seen the patient within the past three years in order for the telehealth services performed during national emergencies to be reimbursable under Medicare.

Additionally, the CARES Act suspends the Medicare face-to-face visit requirements for home dialysis patients and eliminates the requirement of an in-person assessment to recertify the necessity of hospice care. These changes will permit providers to perform more assessments and visits through telehealth. The CARES act also establishes a number of grant programs for telehealth initiatives and instructs the HHS Secretary to encourage other uses of telehealth during the emergency period, particularly for home health services. The CARES Act builds significantly on Congress' and CMS's prior efforts to develop and expand the delivery of healthcare services through telehealth during this emergency period.

PUBLIC-HEALTH INFRASTRUCTURE IMPROVEMENTS

The Act also includes provisions aimed at strengthening the American public-health infrastructure, which has been strained in significant ways by the COVID-19 outbreak. The Act includes measures to improve the national supply chain for drugs and medical devices, including a governmental assessment of the U.S.'s dependence on products manufactured abroad. The Act also instituted new supply-chain reporting and emergency-planning requirements that apply to entities that produce critical drugs. Finally, the Act provided significant additional funding for community health centers and other state and local government initiatives launched in response to the COVID-19 outbreak.

ADDITIONAL HEALTHCARE PROVISIONS IN THE ACT

In addition to the significant changes outlined above, other provisions in the CARES Act that could significantly impact providers include the following:

- Provisions mandating that health plans cover, without cost-sharing, COVID-19 testing and vaccines.
- Cancellation of sequestration-required Medicare reductions until January 1, 2021, effectively increasing Medicare reimbursement for all services by two percent for the remainder of 2020.
- Authorizations for mid-levels and other practitioners to certify care, in lieu of physicians.
- Exemptions from liability of volunteer healthcare providers performing services related to the diagnosis, prevention, and treatment of COVID-19 during the emergency period.
- Extensions of numerous existing Medicaid demonstration projects and other initiatives, many of which were set to expire in May.
- Delaying scheduled reductions to Medicaid Disproportionate Share ("DSH") payments to providers who serve a large number of low-income or uninsured patients.

FINAL NOTE

The CARES Act is a massive piece of legislation, and this issue alert only addresses a subset of the Act. The full text of the CARES Act is available here. For more information related to provisions in the Act related to Small Business Administration loans, unemployment insurance, payroll tax credits, and related issues, please see Foulston's earlier CARES Act issue alert concerning key tax and business issues, available here.

FOR MORE INFORMATION

If you have questions or want more information regarding the CARES Act, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston's healthcare lawyers maintain a high level of expertise regarding federal and state regulations affecting the healthcare industry. At the same time, our healthcare practice group's relationship with Foulston's other practice groups, including the taxation, general business, labor and employment, and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For more information, contact **Alex Schulte** at 913.253.2155 or aschulte@foulston.com, or **Kyle Calvin** at 316.291.9561 or kcalvin@foulston.com. For more information on the firm, please visit our website at **www.foulston.com**.

Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Wichita, Kansas City, and Topeka, Foulston provides a full range of legal services to clients in the areas of administrative & regulatory; antitrust & trade regulation; appellate law; banking & financial services; business & corporate; construction; creditors' rights & bankruptcy; e-commerce; education & public entity; elder law; emerging small business; employee benefits & ERISA; employment & labor; energy; environmental; ERISA litigation; estate planning & probate; family business enterprise; franchise & distribution; government investigations & white collar defense; governmental liability; government relations & public policy; healthcare; immigration; insurance

FOULSTON
ATTORNEYS AT LAW

regulatory; intellectual property; litigation & disputes; long-term care; mediation/dispute resolution; mergers & acquisitions; Native American law; oil, gas & minerals; OSHA; privacy & data security; private equity & venture capital; product liability; professional malpractice; real estate; securities & corporate finance; supply chain management; tax exempt organizations; taxation; trade secret & noncompete litigation; water rights; and wind & solar energy.

HEALTH LAW RESOURCES

Sign up to receive these issue alerts straight to your inbox here.

PRACTICE AREAS

- Healthcare
- Long-Term Care