AN UPDATE FOR MANAGING PERSONNEL IN THE TIME OF COVID-19

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Pharmacist and Pharmacy Technician Learning Objectives

2. Identify what you can and cannot legally require of staff regarding the COVID-19 vaccine.
3. Discuss important end of year considerations regarding the CARES Act and PPP loans.
COVID-19 IN 2020 AND 2021

• Over 300,000 Americans have died from Covid-19 since the pandemic began in March 2020. Of that number, 50,000 have died in the last month

• Since March of 2020, over 57 million Americans have filed for unemployment compensation

• More than 100,000 businesses have shut down

• Tens of thousands of businesses and individuals have filed for bankruptcy protection

• A real anomaly: Health Care companies are needed more than ever, but many have declining revenue and increasing debt

BREAKING NEWS:
NEW COVID RELIEF LEGISLATION
COVID RELIEF LEGISLATION

- Government funding will run out on 12/18/20. Congress is trying to pass a massive $1.4 trillion spending bill.
- Separate COVID Relief legislation will likely be attached to the spending bill.

COVID RELIEF LEGISLATION

- The relief legislation will likely be close to $900 billion. This is twice the amount that Senate Republicans wanted and less than the $2.2 trillion that House Speaker Pelosi wanted.
- Both sides are having to compromise:
  o Republicans are, for now, backing off on their demand for lawsuit protection.
  o Democrats are, for now, backing off on their demand for money to state and local governments.
COVID RELIEF LEGISLATION

• The relief legislation is expected to include stimulus checks of $600 per individual.
• It is also expected to include (i) an additional $300 per week in jobless benefits and (ii) up to $330 billion for small business loans and money for vaccine distribution.
• In a floor speech on 12/16/20, Senate Majority Leader McConnell said that Hill leaders have “made major headway toward hammering out a targeted pandemic relief package that would be able to pass both chambers with bipartisan majorities” and further said “we agreed we will not leave town until we’ve made law.”

COVID RELIEF LEGISLATION

• On 12/16/20, House Speaker Pelosi blamed GOP insistence on lawsuit protections for businesses and others as a reason why state and local aid was not included in the proposal.
  o Speaker Pelosi did point to other areas of the emerging proposal – school funding, vaccine distribution and transportation projects – where states and local governments will receive money.
COVID RELIEF LEGISLATION

• Here is how the legislative process will work:
  o Once leadership has finalized the legislation, then leadership from both parties will brief rank-and-file members to convince them to vote for the legislation…and then move quickly to hold a vote in both houses.
  o Possible House vote on 12/17/20 and possible Senate vote on 12/18/20.
  o Negotiators will introduce a $1.4 trillion government spending package. Then when the House Rules Committee meets to tee up the House vote, an amendment will be offered to tack the COVID relief legislation before sending the full package to the floor.
  o With such a narrow margin for error, rank-and-file members may attempt to exert influence on the process in an effort to win concessions.

EMPLOYEE PAY AND LEAVE LEGISLATION CURRENTLY IN EFFECT THROUGH 2020
FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- This law includes the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act

- Both laws became effective on April 1, 2020, and they will expire on December 31, 2020 unless extended after December 15, 2020 (date this slide was prepared)

- The Department of Labor has issued regulations and guidance, and the laws are enforced by the DOL’s Wage & Hour Division

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- All employees are eligible who have been employed for at least 30 days, but the Department of Labor may exclude certain health care providers and emergency responders.

- Employers with fewer than 500 employees must provide expanded FMLA leave, but the Department of Labor may exclude certain small businesses with fewer than 50 employees if providing paid sick leave would jeopardize the business as a going concern.

- 12 weeks of FMLA leave is available if qualifying condition exists.
EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

• An employee can use expanded FMLA when he/she is unable to work (or telework) due to a need to care for his/her minor child whose school or daycare has been closed due to a public health emergency declared by a federal, state, or local authority related to COVID-19.

• The first 10 days may be unpaid, but don’t forget that employees get two weeks (10 workdays) of emergency paid sick leave.

• The next 10 weeks are paid at 2/3 of an employee’s regular rate of pay, up to a cap of $200 per day or $10,000 total.

EMERGENCY PAID SICK LEAVE ACT (EPSLA)

All employees are eligible regardless of their length of service, but the Department of Labor may exclude certain health care providers and emergency responders.

Employers with fewer than 500 employees must provide paid sick leave, but the Department of Labor may exclude certain small businesses with fewer than 50 employees if providing paid sick leave would jeopardize the business as a going concern.
EMERGENCY PAID SICK LEAVE ACT (EPSLA)

• For full-time employees, 80 hours of sick leave is available.
• For part-time employees, the average number of hours the employee works in a two-week period of sick leave is available.
• For example, if a part-time employee regularly works 25 hours per week, he/she would be eligible for 50 hours of paid sick leave.
• When is the sick leave available for use?
  • It must be made available immediately.
  • Employers cannot require waiting periods.
  • Employers cannot require employees to use other available PTO or sick time first.

EMERGENCY PAID SICK LEAVE ACT (EPSLA)

Circumstances where an employee can use emergency sick leave
1. The employee is subject to a federal, state, or local quarantine or isolation order concerning COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis.
4. The employee is caring for someone subject to an order of quarantine or isolation or someone who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for his/her minor child whose daycare or school has been closed or whose childcare provider is unavailable due to COVID-19.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
EMERGENCY PAID SICK LEAVE ACT (EPSLA)

Employers must only provide paid sick leave to employees who are unable to work or telework due to a covered reason.

For reasons 1-3 on the last slide, employers must pay the greater of minimum wage or the employee’s regular rate of pay up to a cap of $511 per day or a total of $5,110.

Most employers will pay the employee’s regular rate of pay.

The minimum wage provision was likely included for tipped employees like waiters who are paid less than minimum wage.

For reasons 4-6 on the last slide, employers must pay 2/3 of an employee’s regular rate of pay up to a cap of $200 per day or $2,000 total.

HEALTH CARE PROVIDER EXEMPTION

An employer whose employee is a health care provider or an emergency responder may exclude such employee from the EPSLA and/or EFMLEA. A “health care provider” is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

• According to the Department of Labor (DOL), employers should determine which of their workers are “health care providers” on a case-by-case basis.

• The DOL also encourages employers to be judicious when using the definition of “health care provider” to exempt employees from the provisions of the FFCRA.
INTERMITTENT LEAVE

• If employers allow it, employees who are teleworking due to one of the qualifying reasons, can take paid sick leave intermittently
• If employees are prevented from teleworking their normal schedule since they are caring for a child, employers can allow them to take expanded family medical leave intermittently
• The intermittent leave can be taken in any increment to which the employer and employee agree
• DOL encourages employers and employees to collaborate to provide flexibility and meet mutual needs

INTERMITTENT LEAVE

• Unless employees are teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments
• Unless employees are teleworking, once they begin taking paid sick leave for a qualifying reason other than to care for a child whose school or place of care is closed, they have to continue to take paid sick leave each day until they either use the full amount of paid sick leave or no longer have a qualifying reason
• Paid sick leave can be taken intermittently where employees are taking care of their children whose school is closed
  • DOL example: Paid sick leave could be taken on Mondays, Wednesdays, and Fridays, and employees could work at their worksites on Tuesdays and Thursdays
INTERMITTENT LEAVE

Expanded family and medical leave can be taken intermittently where employees agree even for those who cannot telework.

TELEWORK LEGAL CONSIDERATIONS

- The Labor Department provides that the FFCRA and the regulations encourage employers and employees to implement highly flexible telework arrangements that allow employees to perform work, potentially at unconventional times, while tending to family and other responsibilities, such as teaching children whose schools are closed for COVID-19 related reasons.
- Where allowing flexibility employers would not be required to count as hours worked all time between the first and last principal activity performed by an employee who is teleworking.
- Employers and employees can set flexible schedules and employees must be paid for all hours actually worked.
IMPA-HR SURVEY
Thank you to IMPA for this content and some of the federal legislation content!

• IPMA-HR is conducting surveys on coronavirus workforce issues:
  • 30% of respondents had a telework policy prior to the crisis
  • Top struggles with remote work are 1) technical issues, 2) balancing work-family needs, 3) feeling socially isolated
  • Top benefits are 1) schedule flexibility, 2) less time/resources spent on commuting, 3) work-life balance
  • 55% say they are planning to continue telework after they reopen
  • 72% say they will maintain an expanded telework program

VACCINE AND RETURN TO WORK CONSIDERATIONS
Organizations are planning return to work strategies and some considerations:
• Communication strategies/planning
• Use phased-in approach specific to business needs
• Ensure social distancing is maintained – reconfigure office space as needed
• Use virtual meetings
• Limit the use of shared office equipment
• Regularly disinfect private and common areas
• Regulate the flow of customers in common areas and consider installing plexiglass at customer service counters
COMMON RETURN TO WORK ISSUES FOR EMPLOYERS

- Allow the use of face masks and provide them if possible
- Encourage good hygiene – frequent washing of hands, use of sanitizer, etc.
- Consider taking employee temperature
- Remember that emergency paid sick leave and leave under the expanded FMLA is available until December 31st
- Allow part-time teleworking, alternative work schedules, staggered shifts, alternative work locations
- Provide accommodations for high-risk employees
- Consider dependent care issues while schools/day care/camps are closed
- EAP for employees experiencing fear, isolation, etc.

VACCINE AND RETURN TO WORK CONSIDERATIONS

Timing and Availability

- Vaccine is government allocated
  - Employers have limited access
  - Employers have no control over who gets it when

- CDC is working with various jurisdictions – including all 50 states – to allocate what is currently available

Special Thanks to Miller Johnson for preparing these vaccine slides
VACCINE MANDATE CONSIDERATIONS

• This situation is unprecedented

• Global pandemic
  • Effort to give vaccine under Emergency Use Authorization to millions (billions) of people
  • Federal conditions for EUA include that recipients are informed of the option to accept or refuse administration of the product
  • Limited availability
  • Employers do not control who gets it when

• For many employers, we will have more information and answers before making this decision.

VACCINE MANDATE CONSIDERATIONS

What we know now:

• ADA/Title VII analysis based on flu vaccine
  • Largest consideration; required process
  • EEOC has not yet spoken regarding COVID vaccine

• OSHA guidance based on flu vaccine
  • 2009 letter; can mandate but are not required to do so

• Collective bargaining agreements

• NLRA/anti-vax movement in the workplace
  • Beware of protected and concerted activity

• State privacy laws
VACCINE MANDATE CONSIDERATIONS

Experts say that private U.S. companies may have the general right under the law to require employees to get vaccinated against Covid-19 but are unlikely to do so because of the many legal risks and possible cultural backlash against such emergency return to work measures.

Many employers regard the vaccine as the green light for workers to return to work in larger operations such as factories, production lines, sales floors, and office settings.

Lawrence Gostin, a Global Health Law Professor at Georgetown University, says that: “Companies have every good reason to get all of their employees vaccinated and also have an obligation to keep all employees and customers safe.”

Professor Gostin and a number of other health law experts said private companies in the U.S. have broad liberties to set health and safety standards, which would allow them to mandate vaccinations as a condition of employment with some exceptions.
VACCINE MANDATE CONSIDERATIONS

United States courts have ruled on past lawsuits brought by healthcare workers opposing employer-mandated flu vaccines primarily in favor of hospitals as long as they provided reasonable exemption policies.

The Occupational Safety and Health Administration (OSHA) has ruled in the past that employers have the right to mandate employee vaccination.

WHAT WILL LIKELY HAPPEN WITH EMPLOYERS IN 2021?

Well.........Many Americans are scared of vaccines. Surveys have shown that many Americans have safety concerns about a COVID vaccine, with nearly half of the 10,000 individuals surveyed in a September Pew research survey saying that they would definitely or probably not get the vaccine.

However, vaccine mandates are common in the U.S. healthcare industry, where may hospitals require staff to take annual flu shots and all U.S. states mandate vaccines for school children.

Source: Insurance Journal December 3, 2020
VACCINE ADA MEDICAL EXAM CONSIDERATIONS

• Courts have treated vaccinations as “medical exams” under the ADA
  • Must be job related and consistent with medical necessity

• Could be an issue if vaccine not safe and effective

• Based on EEOC’s current guidance regarding COVID testing, health assessments, etc., they likely would defer to the CDC and FDA.

VACCINE ADA MEDICAL EXAM CONSIDERATIONS

• Employees with ADA-covered disability may be entitled to exemption if disability prevents them from safely taking the vaccine

• Establish interactive reasonable accommodation process
  • Can require medical documentation

• Employers can select alternative accommodations (e.g., masks, barriers, protective gear, etc.)
  • Exclusion from workplace a last resort
VACCINE ADA MEDICAL EXAM CONSIDERATIONS

Title VII Religious Accommodation

• Title VII requires employers to reasonable accommodate an employee’s sincerely held religious beliefs
  • Unless it would be an undue hardship on business operations
  • Undue hardship is “more than de minimis cost,” which is much lower standard than under the ADA

VACCINE ADA MEDICAL EXAM CONSIDERATIONS

Title VII Religious Accommodation

• Focus is usually on undue hardship

• Religion = moral or ethical beliefs as to right or wrong that are sincerely held with the strength of traditional views.
  • Religious beliefs generally concern “ultimate ideas” about “life, purpose and death”
  • More than personal preferences, medical beliefs and political philosophies
  • Does not have to be widely practiced
VACCINE ADA MEDICAL EXAM CONSIDERATIONS

Title VII Religious Accommodation

• Examples
  • “Our bodies are a temple and God gave us dominion over our bodies”
  • “Injecting the flu vaccine into my body is morally wrong”
  • Followers of my religion are healed by plants, fruits and grains"

• Can require additional supporting documentation if there is objective basis for questioning the religious nature or the sincerity of a belief.

REASONABLE ACCOMMODATIONS

What is a Reasonable Accommodation?

• Application or hiring process
• Job
• The way work is done
• Work environment

….that allows a person with a disability who is qualified for the job to perform the essential functions of that job and enjoy equal employment opportunities.
REASONABLE ACCOMMODATIONS

A Reasonable Accommodation Request During 2021 May Not Be Vaccine-Related At All

• An employee may seek a reasonable accommodation for self-protection from individuals who do not work at the pharmacy.

• An employee may seek a reasonable accommodation for limited interaction with co-workers.

• An employee may seek prophylactic measures such as required masks even for inoculated employees.

• Employees may seek different reasonable accommodations whether the employer requires COVID inoculation or Not!

REASONABLE ACCOMMODATIONS

Accommodations Must Be Reasonable

• ADA requires an employer to make an accommodation for a disabled employee when that accommodation is reasonable.

• Accommodations are reasonable if they do not create an undue hardship on the employer or a direct threat to safety.
UNDUE HARDSHIP

• An employer need not provide a reasonable accommodation that would cause an undue hardship to the employer.

• Undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.

UNDUE HARDSHIP FACTORS

• Nature and cost of the accommodation requested
• Overall financial resources of the facility
• Effect on expenses and resources of the facility
• Type and location of employer; and
• Impact of accommodation on the facility
**GENERALLY REASONABLE ACCOMMODATIONS**

- Change in job tasks
- Providing reserved parking
- Improving accessibility in a work area
- Providing or adjusting a product, equipment, or software
- Allowing a flexible work schedule
- Reassigning the employee to a vacant position

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**GENERALLY REASONABLE ACCOMMODATIONS**

What Are Some Examples of Possible Claims For Reasonable Accommodations in Pharmacy or Healthcare Settings?

- No direct customer interaction
- Workspace spacing with co-workers
- Continued remote work
- Private bathroom and kitchen access
- Others?
THE ADA’S INTERACTIVE PROCESS OBLIGATIONS FOR EMPLOYERS WHEN ADDRESSING ADA CLAIMS

RELIGIOUS ACCOMMODATION STEPS

Generally, the steps are:

- Accommodation request or employer notices need for accommodation (thus obligated to offer one)
- Employer gathers information
- Explore accommodation options
- Choose an accommodation
- Implement the accommodation
- Monitor the accommodation
- Adjust the accommodation in some cases
New Guidance from EEOC Yesterday, December 16, 2020, on COVID-19 Vaccinations

“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”

Technical Assistance Questions and Answers – Updated on Dec. 16, 2020

Question:

For any COVID-19 vaccine…., is the administration of [the vaccine] to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) a “medical examination” for purposes of the ADA?
EEOC GUIDANCE ON VACCINATIONS

Answer:

No. The vaccination itself is not a medical examination.

... 

If a vaccine is administered to an employer by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.

Question:

According to CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If the employer requires an employee to receive the vaccination from the employer (or a contracted third party) and asks these screening questions, are these questions subject to the ADA standards for disability-related inquiries?
EEOC GUIDANCE ON VACCINATIONS

Answer:

Generally yes, so if an employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening questions are “job-related and consistent with business necessity” (employer must have reasonable belief based on objective evidence that an employee who refuses to answer these questions and thus does not receive a vaccine will pose a direct threat to the health or safety of her or himself or others.

Question:

May an employer ask for proof of receipt of a Covid-19 vaccination?
EEOC GUIDANCE ON VACCINATIONS

Answer:

Yes, but be careful in this discussion. Simply requesting proof of receipt of a Covid-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry.

However, subsequent employer questions, such as asking why the employee did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.” If an employer requires employees to provide proof that they have received a Covid-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

ADA AND VACCINATION QUESTIONS

Question:

If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a Covid-19 vaccination because of a disability?
ADA AND VACCINATION QUESTIONS

Answer:
First, the employer must be able to show that an unvaccinated employee would pose a direct threat due to others that cannot be eliminated or reduced by a reasonable accommodation for the unvaccinated employee. The direct threat may be that the unvaccinated individual will expose others to the virus at the worksite. However, the employer cannot exclude the unvaccinated employee from the workplace unless there is no way to provide a reasonable accommodation that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. Examples include, can the unvaccinated employee work remotely? Can the employer take steps in the workplace to accommodate the employee’s request? The employer must engage in the flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship to the employer.

SINCERELY HELD RELIGIOUS BELIEFS AND VACCINATION

Question:
If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a Covid-19 vaccination because of a sincerely held religious practice or belief?
SINCERELY HELD RELIGIOUS BELIEFS AND VACCINATION

Answer:

First, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. If, however, an employee requests a reasonable accommodation and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

PROTOCOL RECOMMENDATIONS FOR RETURNING EMPLOYEES TO WORKPLACE

First and Foremost, Implement (or update) a COVID-19 Workplace Prevention and Safety Protocol

Some common sections of an effective Protocol include:

• Introduction, Purpose, Covid-19 Defined, Applicable Laws
• Workplace Safety and Prevention Plan
  • Basic Prevention Measures
  • Workplace Controls
PROTOCOL RECOMMENDATIONS FOR RETURNING EMPLOYEES TO WORKPLACE

How To Address Suspected and Confirmed Covid-19 Positive Employees:

• Confirmed Covid-19 Positive Employee
• Employee Exposure and Suspected Covid-19 Positive Employees
• Clean and Disinfect the Workplace

• Appendix A: CDC Guidelines for Discontinuation of Isolation for Persons with Covid-19

REAL LIFE

An Example of Recent Employer Protocol
LATEST LEGAL DEVELOPMENTS IN THE COVID WORLD

LABOR ORGANIZATIONS OPPOSE LIABILITY SHIELDS

- Labor advocates strongly oppose Republicans’ intent to include COVID-related liability protections for employers in COVID relief legislation.
- Advocates contend that liability relief legislation would hamper OSHA and other agencies from protecting workers from the virus.
- Over the weekend of 12/12/20 and 12/13/20, the AFL-CIO sent letters to Senators and Representatives urging them to “reject any broad liability shield legislation that would prevent the federal government from ensuring that workers are protected from the spread of COVID-19 in our workplace.”
- For the sake of passing COVID relief legislation, it is likely that Republicans will back off, for now, in achieving its goal of passing legislation providing liability protection. However, this will be an issue that will be debated in the future.
LAWSUIT AGAINST AMAZON

- On 12/14/20, California Attorney General Xavier Becerra (who has been chosen by President-elect Biden to be the DHHS Secretary) filed a lawsuit against Amazon…accusing the company of refusing to hand over information about its COVID safety protocols and potential outbreaks at its facilities.
- The lawsuit comes nearly six months after the California A.G.’s Office began investigating (i) Amazon’s workplace safety practices and (ii) whether the company is complying with California labor laws in light of the coronavirus outbreak.
- In a statement, Attorney General Becerra said that Amazon has made billions during the pandemic by relying on the labor of essential workers who “get the job done while putting themselves at risk.”

PPP DEDUCTIBILITY

- Senate and House leaders are negotiating a COVID relief bill that resembles a proposed bipartisan $908 billion Senate bill. The proposed bill includes several tax provisions, including a highly sought-after change making expenses (paid for with federal loans) tax deductible.
PPP AND CHANGE OF CONTROL

- The Paycheck Protection Program ("PPP"), created under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), has provided approximately $670 billion in loans to small businesses to help cover their costs associated with payroll, benefits, interest, rent and utilities during the pandemic.
- The loans were generally obtained under the premise that they would be forgiven.
- However, the question arises: What happens if a recipient company has a change of control or is trying to enter a sales transaction?

In November 2020, the SBA announced the procedures for entities that have received a PPP loan and are contemplating a sale or a change of control or ownership in a Procedural Notice that went to SBA employees and the SBA's lender base. The Procedural Notice states, in part:

- A change of ownership ("CHOW") occurs when (i) at least 20% of the equity of the PPP borrower is transferred, (ii) the PPP borrower transfers at least 50% of its assets, or (iii) a PPP borrower is merged with another entity.
- A PPP borrower remains responsible, after the CHOW, for continued performance of the PPP loan obligations.
- The PPP borrower must notify the lender before the CHOW occurs. This notification is not required if the loan has been repaid.
CARES ACT – PAYCHECK PROTECTION PROGRAM (PPP)

PAYCHECK PROTECTION PROGRAM

• Employee Threshold: The small business must have fewer than 500 employees (or, alternatively, the size standards in the number of employees established by the Administration for its industry).
  • The term “employee” for purposes of this Act includes individuals employed on a full-time, part-time, or other basis. For eligibility purposes, the SBA takes the average number of employees per pay period for the 12 preceding months. If the business has not been in business for a full year, the SBA takes the average number of employees per pay period during the business’ operation.

Exception: If the business has more than one physical location and is assigned an NAICS code beginning with 72 (i.e., is in the accommodation or food services industry) at the time of loan disbursement, the 500-employee threshold is per location.
PAYCHECK PROTECTION PROGRAM (CONTINUED)

• Eligibility: Employers may receive loans for “covered small business concerns.” A small business concern is defined as a small business concern that the applicant has experienced, as a result of COVID-19:
  1. Supply chain disruptions, including changes in: (a) quantity and lead time, including the number of shipments of components and delays in shipments; (b) quality, including shortages in supply for quality control reasons; and (c) technology, including a compromised payment network;
  2. Staffing challenges;
  3. A decrease in gross receipts or customers; or
  4. A closure.

PAYCHECK PROTECTION PROGRAM (CONTINUED)

• The maximum loan amount for employers doing business during the period beginning on February 15, 2019 and ending on June 30, 2019 shall be the lesser of the sum of the product obtained by multiplying the average total monthly payments by the employer for payroll costs incurred during the 1-year period before the date on which the loan is made (except in the cases of seasonal employers) by 2.5 or $10 million.

• The outstanding amount of an Economic Injury Disaster Loan (“EIDL”) made between January 31, 2020 and the date on which Paycheck Protection Program loans are made available to be refinanced under the Paycheck Protection Program loan.

  For employers not in business February 15, 2019 through June 30, 2019, the maximum loan amount is the lesser of the sum of the two factors above or $10 million.
PAYCHECK PROTECTION PROGRAM (CONTINUED)

- Allowable uses for the loan, to potentially receive loan forgiveness, include:
  1. Payroll costs;
     i. “Payroll costs” means the sum of payments of any compensation with respect to employees that is any: (a) salary, wage, commission, or similar compensation; (b) payment of cash tip or equivalent; (c) payment of vacation, parental, family, medical, or sick leave; (d) allowance for dismissal or separation; (e) payment required for the provisions of group health care benefits, including insurance premiums; (f) payment of any retirement benefit; or (g) payment of State or local tax assessed on the compensation of employees.
  2. Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
  3. Employee salaries, commissions, or similar compensations;
  4. Payments of interest on any covered mortgage obligation;
  5. Covered rent obligation;
  6. Covered utility payments; and
  7. Interest on any other debt obligations that were incurred before February 16, 2020.

PPP FLEXIBILITY ACT

- Loan Forgiveness – portion of PPP loan proceeds that must be used for payroll costs reduced from 75% to 60%.
- Loan Maturity – extended from 2 years to 5 years.
  - Loans made before June 5, 2020 had a maturity of 2 years. Borrowers and lenders may mutually agree to extend the maturity to 5 years.
- Covered Period – extended from 8 weeks to 24 weeks (not to go beyond Dec. 31, 2020).
- Payment Deferral – Extended the deferral period to the “date on which the amount of forgiveness determined under Section 1106 of the CARES Act is remitted by lender.”
- Full Time Employee (“FTE”) Salary/Hourly Wage Re-Hire Safe Harbor – recipients have until December 31, 2020 to fully restore FTEs and/or salary/hourly wages.
  - Original date was June 30, 2020.
PPP LOAN TRANSFER GUIDELINES

• On October 3, 2020, the SBA issued key guidance for small businesses that received PPP loans and are thinking of selling or merging their businesses.

• According to this new guidance, businesses contemplating such a transaction will now need to notify their PPP lender in writing of the contemplated transaction and provide the PPP lender with copies of the proposed arrangements to obtain, where required, lender and SBA approval of the transfer.

• This requirement creates a new layer of complexity and delay for business owners who may be struggling through this ongoing pandemic.

• There are a number of detailed rules and exceptions to the sale/merger approval required above, many of which are beyond the scope of these slides.

PPP LOAN TRANSFER GUIDELINES

• However, here are some critical points:
  • If a PPP note is fully satisfied, the notice requirement will no longer apply. Fully satisfied is defined to mean:
    • the note has been repaid by borrower in full;
    • the SBA has remitted funds to the bank lender in full satisfaction of the PPP note; or
    • the borrower has repaid any balance on the note and has achieved full forgiveness pursuant to PPP rules.
  • A change of ownership does not include transfer of less than 20 percent to total ownership or an asset transfer of less than 50 percent of the assets of the entity.
  • A sale or transfer of more than 20 percent, but less than 50 percent, of total ownership will require lender acknowledgment but not SBA approval.
  • Sellers may utilize escrow deposits in combination with the submission of a forgiveness application to avoid the need for SBA approval.
CARES ACT – PROVIDER RELIEF FUND (PRF)

• On April 10, 2020, HHS announced immediate payments to Medicare providers in connection with the $100 billion Provider Relief Fund passed by Congress as part of the CARES Act. These immediate payments totaled $30 billion and were being disbursed directly and immediately through direct deposit to eligible providers.

• HHS has made it clear that these funds are payments—not loans—and do not need to be repaid by the providers receiving them.

• Eligible providers include:
  • All facilities and providers who billed Medicare on a fee-for-service basis in 2019.
  • Payments to larger groups will be made to the central office according to the billing organization’s TIN.
  • In Late October – HHS expanded the entities eligible to receive funds
CARES ACT – PROVIDER RELIEF FUND (PRF) – (CONTINUED)

• There are some restrictions on the use of these funds, which providers will need to review. Three restrictions of note, however, are the following:
  • Providers must agree to not seek out-of-pocket payments (due to being out-of-network) from a COVID-19 patient that are greater than what the patient would have had to pay if he/she were receiving care from an in-network provider.
  • Providers receiving greater than $150,000 total in funds from acts making appropriations for Coronavirus relief funds will be required to provide quarterly reports regarding the use of such funds. The exact nature of which funds will trigger this reporting requirement and the detailed nature of the reports required are not currently available.
  • Within 30 days of receipt of payment under this program, providers must accept the Terms and Conditions of the program via an online portal on the HHS website. If providers are unwilling or unable to accept the Terms and Conditions of the program, they should contact HHS and return any funds received within 30 days.

PRF’S “CATCH-22” FOR MEDICAID/CHIP PROVIDERS HHS SOLUTION

• On June 9, 2020, HHS announced that it was allocating $15 Billion to Medicaid and CHIP providers impacted by COVID-19 and that did not receive prior PRF funding.
  • If the provider received any Medicare relief payment in the first PRF distribution, then that provider is technically barred from applying for this round of funding.
  • On August 10, 2020, HHS reopened the Phase 1 PRF application portal to allow entities caught in the above situation to apply for additional funds to reach the 2% of revenue standard being used to calculate provider PRF funds.
PROVIDER RELIEF FUND PHASE 3 FUNDING

• On October 1, 2020, the U.S. Department of Health and Human Services (“HHS”) announced a third phase of PRF funding for a total amount of $20 billion.

• This new round of funding became available for application beginning on October 5, 2020 and was open through November 6, 2020. HHS encouraged providers to apply as soon as possible to expedite HHS’s review and award process.

• All providers that had already received PRF payments were invited to apply as were some previously ineligible providers, such as those who began operating in 2020 and an expanded group of behavioral health providers.

PROVIDER RELIEF FUND PHASE 3 FUNDING

• HHS stated that the award of the third phase of the PRF would take into account the loss and additional expenses associated with the pandemic. In a simplified form, HHS stated that it would work to ensure that providers have received an equitable payment of two percent of annual revenue plus add-on payments to account for revenue losses and additional expenses due to COVID-19.

• HHS states that it will calculate equitable add-on payments by considering the following factors:
  • A provider’s change in operating revenues from patient care;
  • A provider’s change in operating expenses from patient care, including expenses incurred related to coronavirus; and
  • Payments already received through prior PRF distributions.
INITIAL PRF REPORTING GUIDANCE

• The Notice initially set forth two broad categories that must be reported by entities:
  • Health care related expenses that the entity may attribute to the pandemic that have not been reimbursed from other sources - these expenses can include general and administrative expenses as well as actual health care operating expenses.
  • The second bucket of amounts to be reported includes losses in net patient care operating revenue from 2019 to 2020 that will be calculated as patient care revenue LESS patient care related expenses for the two fiscal years. This unexpected as previous guidance on this topic focused solely on lost revenue. This distinction has since been changed in follow-up guidance.

INITIAL PRF REPORTING GUIDANCE

• In the Notice, HHS does include an additional six-month period, through the end of June 2021, for providers to expend PRF funds consistent with the formulas described above if the provider has not used all funds by the end of 2020.
  • If any funds remain after 2020, providers will be required to submit a second and final report to HHS on the use of funds by July 31, 2021.
  • While there is not explicit language regarding repayment of unused PRF funds at this time, that concept does seem implicit in the Notice.
UPDATED PRF REPORTING GUIDANCE

• All who received $10,000 or more must comply with the reporting requirements
• HHS has posted the required data elements that must be reported
• January 15, 2021 – HHS opens the online reporting system
• February 15, 2021 – First Reporting deadline
• July 31, 2021 – Reporting deadline for those who did not fully expend funds prior to 12/31/20

TELEHEALTH
TELEHEALTH POLICY CHANGES

- The government has issued an unprecedented number of waivers, regulations, and new rules pertaining to telehealth since March to:
  - Expand the health care system workforce by removing barriers to providing care
  - Ensure that local hospitals and health systems can handle a potential surge of COVID-19 patients
  - Ensure patients have access to care while remaining home
  - Expand in-place testing
  - Put “patients over paperwork”

CORONAVIRUS PREPAREDNESS AND RESPONSE SUPPLEMENTAL APPROPRIATIONS ACT (MARCH 6, 2020)

- Congress authorized HHS to waive certain Medicare telehealth requirements.
- Expands coverage to patients outside of rural areas and patients in their homes.
- Expands coverage to new (not just established) patients.
CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES LAW, MARCH 27, 2020)

• Broader waiver authority—HHS can waive statutory coverage requirements for telehealth.
• Increased funding, e.g., for remote care technologies.
• Effective March 1, 2020, through the end of the Public Health Emergency (“PHE”).

ISSUED RULES

• CMS Has Issued Rules (CMS-1744-IFC, CMS-5531-IFC) and Numerous FAQ Documents for Physicians/Practitioners Detailing Telehealth Expansion During the PHE
  • Medicare now pays for telehealth services at the same rate as in-office visits for all diagnoses, not just services related to COVID-19.
  • Physicians can reduce or waive Medicare beneficiary cost-sharing for telehealth visits, virtual visits, e-visits, and remote monitoring services.
  • CMS FAQ: COVID-19 FAQ on Medicare Fee-For-Service Billing
  • CMS FAQ: Physicians and other Clinicians: CMS Flexibilities to Fight COVID-19
SUMMARY OF MEDICARE TELEHEALTH CHANGES

- All patients can now receive telehealth and other technology-based services wherever they are located.
- Services can be provided to new or established patients.
- Health care providers can waive Medicare co-payments for beneficiaries of original Medicare.
- Certain evaluation and management (E&M) services, behavioral health visits, and educational services can be provided via audio only (see Centers for Medicare & Medicaid Services’ (CMS) published list of telehealth CPT codes for requirements).
- Other services must be furnished with audio and video technology, but IT and location requirements have been relaxed.

SUMMARY OF MEDICARE TELEHEALTH CHANGES

- CMS has expanded types of practitioners who may provide telehealth services.
- Telehealth can now be billed by all provider types who are eligible to bill Medicare for their professional services.
- CMS can now add new CPT codes to the list of services that can be provided via telehealth at a sub-regulatory basis, which should result in the quicker addition of CPT codes to the list of codes that may be provided via telehealth.
SUMMARY OF MEDICARE TELEHEALTH CHANGES

- Clinicians can now provide remote evaluation of patient video and images, and virtual check-in services to both new and established patients (Healthcare Common Procedure Coding System [HCPCS] codes G2010).
- Medicare payment for telephone E&M codes (CPT codes 99441-99443) are equivalent to payment for office and/or outpatient visits with established patients.
- Clinicians can now provide remote patient monitoring services to both new and established patients, and these services can now be provided for patients with only one disease. To the extent that a National Coverage Determination (NCD) or Local Coverage Determination (LCD) would require a face-to-face visit for evaluations and assessments, clinicians do not have to meet those requirements for the duration of the PHE.

SUMMARY OF MEDICARE TELEHEALTH CHANGES

- Beneficiary consent can be obtained remotely.
- Physician supervision of other health care professionals can be performed remotely for services that require it.
- Temporarily waived the requirement that practitioners be licensed in the state where they are providing services (note state requirements still apply).
- The CARES Act permanently allows mid-level providers, including nurse practitioners (“NPs”) and physician assistants (“PAs”), to prescribe durable medical equipment (“DME”) for patients.
- These changes also apply in many instances to Medicaid.
- Commercial payers have adopted many of these changes and have expanded access to telehealth in significant ways.
OFFICE FOR CIVIL RIGHTS ("OCR")
RELAXATION OF TECHNOLOGY REQUIREMENTS

- Historically, telehealth requirements limited access to telehealth to those with access to advanced technologies.
- OCR relaxed HIPAA requirements for the use of technology to facilitate the relaxed CMS guidelines for telehealth, including standards of good faith for HIPAA requirements when using alternate technology.
- This allows providers to utilize other mediums including Zoom, FaceTime, Webex, Skype, and other platforms that did not meet previous OCR requirements for telehealth.
- Public-facing technologies like Facebook Live, Twitch and TikTok remain prohibited.
- Providers that wish to seek additional privacy protections should identify technology providers that will enter into HIPAA compliant Business Associate Agreements. Examples of such providers include Skype for Business and Zoom for Healthcare.

WHAT DOES THIS MEAN FOR PROVIDERS?

- Goal is to provide patients with the best possible care with minimal interruptions due to COVID-19 or for any other reason.
- Patients can be treated via telehealth. Evaluations and new plans of care can also be accomplished remotely.
- Referrals will likely continue to increase as providers become more comfortable with telehealth.
FUTURE OF TELEHEALTH

• Most experts anticipate that the expansion of telehealth is here to stay.

• The best analogy may be that we are experiencing 10 or more years of progress towards telehealth in a matter of months – it is very unlikely that all of this progress will be reversed.

• Incorporate telehealth into your workflow- but be mindful of AKS and other regulatory restrictions when entering in third party agreements.

• As further evidence, President Trump has signed multiple executive orders with an intent to expand telehealth and to make some past changes permanent. HHS has demonstrated a willingness to make some of these changes permanent.

2021 PHYSICIAN FEE SCHEDULE

• In its final rule, CMS continued to expand telehealth:
  • Added more than 60 codes to the telehealth list on a permanent basis
  • CMS created a new category of telehealth services, Category 3, which will remain on the list through the end of the calendar year in which the PHE ends, likely December 31, 2021 at the earliest.
  • Increasing the allowed frequency of subsequent nursing facility telehealth visits.
2021 PHYSICIAN FEE SCHEDULE

• Other important additions include:
  • Clarifying that licensed clinical social workers, clinical psychologists, physical and occupational therapists and speech-language pathologists can deliver certain existing and new telehealth services.
  • Creating a new code for longer virtual check-in visits
  • Updating and clarifying coding for remote physiologic monitoring services

THE END

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