

The Health Care Group COVID-19 Resource for OMS Practice Owners, Associates and Managers

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During this rapidly evolving public health challenge, all team members in your practice are impacted. Following is a summary of significant legal developments in response to the COVID-19 situation. The Health Care Group and Health Care Law Associates are available to provide guidance to owners, associate doctors and management in terms compliance and strategy.

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I. MANDATED PAID TIME OFF

Emergency legislation has been enacted mandating that small and medium-sized employers provide two separate PTO benefits linked to the COVID-19 crisis. There are two new laws: the “Emergency Paid Sick Leave Act,” and the “Emergency Family and Medical Leave Act.”

Both laws:

- are applicable starting April 2, 2020;
- are available for employee absences relating to COVID-19 through December 31, 2020;
- apply to all private employers who have less than 500 employees;
- apply to all staff, both providers and non-providers, part-time and full-time. However, the employer may elect to exclude providers from the benefit;

- allow employers who provide these benefits in a given calendar quarter to take a dollar-for-dollar reduction in employer payroll taxes for that quarter. However, there is a “catch”: if the employer takes the payroll credit, it must include this same amount in its gross income for income tax purposes (employers receive a corresponding tax deduction).

A. Emergency Paid Sick Leave Act

The amount of sick pay that the employer must provide is 10 days of pay. So full-timers get 80 hours of sick time. Part-timers get credit for the average number of hours that the employee normally works in a two week period. The pay rate per day or per hour is either 100% of the usual pay rate or 2/3rds of the usual pay rate, depending on the exact reason why the employee is unable to work.

Not every employee is entitled to sick pay. The employee must be unable to work (or telework) because of one of the following COVID-19-related reasons:

1. The **employee** is subject to a **federal, state or local quarantine or isolation order** relating to 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 seeking a medical diagnosis**;



4. The employee is **caring for an individual** who is subject to a **quarantine order** or been **advised by a health care provider to self-quarantine** due to COVID-19 concerns.
5. The employee is **caring for a son or daughter** of the employee if the **school or place of care** of the child has been closed, or the **child care provider for the child is unavailable** due to COVID-19 precautions.
6. The employee is experiencing “**any other substantially similar condition**” as specified in **future regulations** to be issued by the federal government.

The first three categories are eligible for sick pay at **100%** of the employee’s normal pay rate.

The next three categories are eligible for sick pay at only **2/3rds** of the employee’s normal pay rate.

If the employee is entitled to the sick pay benefit, it must be made **available immediately**. The employer cannot require the employee to use other paid leave first. The sick pay benefit cannot be carried over to 2021.

There are dollar limits on the amount of the net benefit payable to each employee. For categories 1-3 above, the limit is \$511 per day and \$5,110 in total per employee (equates to maximum annual compensation of \$132,860). For categories 4-6 above, the limit is \$200 per day and \$2,000 in total per employee (equates to maximum annual compensation of \$78,000)¹.

B. Emergency Family and Medical Leave Expansion Act

To qualify for benefits, the employee must:

1. Have been **employed for 30 days** (with no minimum number of hours required); and
2. Be **unable to work (or telework)** due to a need to **care for the employee’s son or daughter under the age of 18** because the **school or place of care of the child has been closed** pursuant to a federal or state or local declaration of emergency due to COVID-19, or the regular child care provider for such child is unavailable due to the emergency declaration.

If the employee meets these requirements, there is a **10 day waiting period** to access the special emergency leave benefit. During this 10 day period, the employee must be permitted to

¹ Taking into account the 2/3rds multiplier



use any accrued PTO. If the employee does not have any accrued PTO, or has it but does not want to use it, then the 10 days is unpaid.

Once the 10 day period has run, any further qualifying absence must be compensated **at least 2/3rds** of the employee's usual rate, subject to a **maximum benefit of \$200 per day and \$10,000 total**.

In addition to mandating paid benefits, the Emergency Family and Medical Leave legislation provides FMLA job and benefits protection for up to 12 weeks of protected leave (continuous or intermittent), but not beyond December 31, 2020 (unless subsequently extended by Congress.) The criteria for FMLA job and benefit preservation during the period of leave are basically the same as those for the paid benefit (caring for a child who is home due to closed school or daycare because of COVID-19 declared state of emergency). This COVID-19 related job protection applies to employers who normally are not subject to FMLA due to small size (below 50 employees). However, the very smallest employers (below 25 employees) are granted leeway on this requirement if they make reasonable efforts to restore the employee to a comparable position.

C. Available Tax Credits for Employers and Self-Employed Individuals

Employers that provide paid sick leave and expanded family and medical leave required by the Acts are eligible for reimbursement of the costs of that leave through refundable tax credits. The Acts provide for a refundable credit equal to 100 percent of the “qualified sick leave wages” and “qualified family leave wages” paid by an employer with respect to leave taken between April 1, 2020 and December 31, 2020. The credit is allowed against employer's share of the 6.2 percent FICA tax imposed on all wages and compensation paid to all employees. If the amount of the credit exceeds the amount of such taxes, the excess is treated as an overpayment refundable to the employer. Technical corrections and future guidance are expected to clarify how long these tax credits may be available to small employers and self-employed individuals.

D. US Department of Labor Exemption for Small Employers

According to the Department of Labor (“DOL”), an employer with fewer than 50 employees may be exempt from certain paid sick leave and expanded medical leave requirements if it meets one of three criteria showing that “providing the leave” will be a burden on the business.

These employers are exempt from the requirement to provide paid sick leave or expanded FMLA leave, in both cases, due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. The DOL explains that a small business may claim this exemption if an “authorized officer” of the business has determined that:



- the provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- the absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

II. PAYCHECK PROTECTION PROGRAM UNDER THE CARES ACT

The Coronavirus Aid, Relief and Economic Security (CARES) Act is the new stimulus bill aimed at providing relief options for practices during the COVID-19 emergency. The CARES Act provides \$350 billion in funding to create a new program called the Paycheck Protection Program through the Small Business Administration (SBA). It will provide small businesses and other entities with zero-fee loans of up to \$10 million.

A. Eligibility

The program is open to small businesses, including dental and medical practices, sole-proprietors, independent contractors and other self-employed individuals.

B. Application Process

The loans will be made available through SBA-certified lenders or lenders approved by the Treasury Department. If you have an existing relationship with an SBA-certified lender, contact the lender immediately to apply. If you do not have an existing relationship, see the SBA website to identify a lender in your area. Plan to prepare for the application by gathering this financial information:

- W-2 payroll;
- 1099s for 2019 employees and independent contractors;
- All health insurance premiums paid by the business under a group health plan;



- Retirement plan funding paid for by the practice.

C. Application Timeline

Starting April 3, small businesses and sole proprietors can apply for and receive loans to cover their payroll and other certain expenses through existing SBA lenders. Independent contractors and self-employed individuals can begin applying on April 10. The Paycheck Protection Program will be available through June 30, 2020.

D. Purpose of Loans

Loans through this program can be used for payroll support, such as employee salaries, paid sick or medical leave, insurance premiums and mortgage, rent and utility payments.

E. Terms

The amount of the loan is capped at the lesser of \$10 million and 2.5 times the average monthly payroll costs incurred in the one-year period before the date of the loan. Payroll costs include salary/wages/tips, sick/family leave/PTO, severance payments, group health benefits (including insurance premiums), retirement benefits, and state or local taxes assessed on employee compensation. However, for any employee who is paid more than \$100,000 salary, only the amount up to \$100,000 (prorated for the covered period) is calculated into the number.

F. Forgiveness

Loans received through this program are eligible to be forgiven if employees are retained. Forgiveness can cover payroll costs, mortgage interest, rent and utility pay for up to an eight-week period. To receive forgiveness, practices will need to meet employee retention and compensation requirements. You will owe money when your loan is due if you use the loan amount for anything other than payroll costs, mortgage interest, rent, and utilities payments over the 8 weeks after getting the loan. The amount of the loan that is forgivable is the sum of the payroll costs, mortgage interest payment, rent, and utilities incurred or paid by the borrower during the 8-week period beginning on the loan origination date. Any portion of the loan that is forgiven is excluded from taxable income. If the recipient of the loan laid off employees or reduced wages/salaries of its workforce in the period between February 15, 2020 and June 30, 2020, the amount of forgiveness is reduced proportionally by (i) any reduction in employees retained compared to historical levels, and (ii) the decrease in pay of any employee beyond 25% of their historical compensation. Furloughs would necessarily impact this loan forgiveness analysis as well. To encourage workforce stabilization, the CARES Act takes into account that many businesses might already have or are planning to lay off personnel or cut salaries. If those changes were made between February 15, 2020 and April 26, 2020, those changes are not counted if the business rehires the number of personnel or returns the adjusted salary, as applicable, by June 30, 2020.



G. Ongoing Loans Not Forgiven

Any loan amounts not forgiven at the end of one year are carried forward and have a maturity of two years at 1% interest. The first payment is deferred six months. Interest will accrue on the loan during the deferment period.

H. Related Assistance through Expanded “Disaster Loan” Program

The CARES Act also creates a new grant program under the SBA’s Office of Disaster Assistance to provide quick relief for applications awaiting processing of SBA Economic Injury Disaster Loans (“EIDL”). Loan applicants can get up to \$10,000 to cover immediate payroll, mortgage, rent, and other specified expenses. This grant does not have to be repaid. A business that receives an EIDL can apply for, or refinance its EIDL into, the forgivable loan product.

III. RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS RELIEF

The CARES Act provides additional relief with respect to distributions and participant loans under defined contribution plans, funding relief for defined benefit plans and enhanced flexibility for health care options and tuition assistance. The deadline for amending retirement plans for these changes is the last day of the first plan year beginning on or after January 1, 2022. These provisions can be implemented immediately.

These provisions offer employees and employers additional options to address the potential financial hardships that arise as a result of the effects of COVID-19 and offer additional ways to access health care and prescriptions.

A. Minimum Required Distributions

The CARES Act temporarily waives the required minimum distribution rules for 2020 with respect to certain defined contribution plans and IRAs.

B. Coronavirus-Related Distributions

Individuals may take coronavirus-related distributions from qualified retirement plans of up to \$100,000 without such distributions being subject to the 10% early distribution tax. Such distributions are subject to federal income taxation, which may be ratably spread over the three taxable year period beginning with 2020. An individual who takes a coronavirus-related distribution may repay the distribution to an eligible retirement plan during the 3-year period



beginning on the day after the date of the distribution. Repayments within the 3-year period will result in the distribution not being subject to federal income taxation, or in the case that the income tax has already been paid, permit the individual to receive a refund of the previously paid federal income tax. An individual must satisfy certain requirements in order to qualify for coronavirus-related distributions.

Coronavirus-related distributions are defined as any distribution made from an eligible retirement plan, provided the distribution is made on or after January 1, 2020 and before December 31, 2020 to an individual:

- who has been diagnosed by a test approved by the Center for Disease Control and Prevention (CDC) with COVID-19;
- whose spouse or dependent has been diagnosed by a test approved by the CDC with COVID-19;
- who has experienced adverse financial consequences as a result of being quarantined, furloughed, laid off, or having their hours reduced as a result of COVID-19;
- or who is unable to work due to lack of child care resulting from COVID-19, or who owns or operates a business that is closed (or has experienced a reduction in hours) as a result of COVID-19; or
- is subject to other qualifying factors as determined by the Secretary of Treasury.

C. Participant Loans

A participant who qualifies for coronavirus-related distributions is permitted to take loans of up to the lesser of (1) \$100,000 (increased from \$50,000) or (2) 100% (increased from 50%) of the participant's vested account balance. In addition, loans from qualified retirement plans with respect to participants who qualify for coronavirus-related distributions are subject to participant loan delayed repayment relief. This relief provides that any due date for a participant loan repayment that occurs during the period beginning March 27, 2020, and ending December 31, 2020, shall be delayed for one year.

D. Relief for Defined Benefit Plans

Any required minimum contributions for a single employer defined benefit that are due during the 2020 calendar year are not required to be made until January 1, 2021, with accrued interest from the original payment due date to the actual payment date.

E. Health Care-Related Changes

For plan years beginning on or before December 31, 2021, a high-deductible health plan may cover all telehealth services prior to a covered individual reaching the applicable deductible.



Employees covered under a high deductible health plan providing these services prior to reaching the deductible will continue to be eligible to make contributions to a health savings account. This change is intended to increase access for patients who may have the coronavirus and to protect other patients from potential exposure. Individuals may also use funds in health savings accounts and health flexible spending accounts for the purchase of over-the-counter medical products, without a prescription from a physician.

IV. CMS ACCELERATED AND ADVANCE PAYMENTS PROGRAM

The Centers for Medicare & Medicaid Services (CMS) has expanded its current Accelerated and Advance Payment Program to a broader group of Medicare Part A providers and Part B suppliers. The expansion of this program is only for the duration of the public health emergency.

A. Accelerated/Advance Payments

An accelerated/advance payment is a payment intended to provide necessary funds when there is a disruption in claims submission and/or claims processing. These expedited payments can also be offered in circumstances such as national emergencies, or natural disasters in order to accelerate cash flow to the impacted health care providers and suppliers. CMS is authorized to provide accelerated or advance payments during the period of the public health emergency to any Medicare provider who submits a request to the appropriate Medicare Administrative Contractor (MAC) and meets the required qualifications.

B. Eligibility

To qualify for advance/accelerated payments the provider must:

- Have billed Medicare for claims within 180 days immediately prior to the date of signature on the provider's request form,
- Not be in bankruptcy,
- Not be under active medical review or program integrity investigation, and
- Not have any outstanding delinquent Medicare overpayments.

C. Amount of Payment



Qualified providers will be asked to request a specific amount using an Accelerated or Advance Payment Request form provided on each MAC's website. Most providers will be able to request up to 100% of the Medicare payment amount for a three-month period.

D. Processing Time

Each MAC will work to review and issue payments within seven (7) calendar days of receiving the request. A step by step application guide can be found on the CMS website.

E. Repayment

CMS has extended the repayment of these accelerated/advance payments to begin 120 days after the date of issuance of the payment. The repayment timeline is broken out by provider type - - Part B suppliers will have 210 days from the date of the accelerated or advance payment was made to repay the balance. The provider can continue to submit claims as usual after the issuance of the accelerated or advance payment; however, recoupment will not begin for 120 days. Providers/ suppliers will receive full payments for their claims during the 120-day delay period. At the end of the 120-day period, the recoupment process will begin and every claim submitted by the provider will be offset from the new claims to repay the accelerated/advanced payment. Thus, instead of receiving payment for newly submitted claims, the provider's/supplier's outstanding accelerated/advance payment balance is reduced by the claim payment amount.

F. Application

CMS will start accepting and processing the accelerated and advance payment requests immediately. An informational fact sheet on the accelerated/advance payment process and how to submit a request can be found on the CMS website (www.cms.gov).

The information in this Resource is intended to provide good, accurate and timely advice. However, it should neither be construed as client-specific advice, nor used alone to resolve specific legal or practice management problems. Consult your personal attorney or consultant for specific legal or business advice. Similarly, the content of this Resource is subject to agency interpretation and continuing modification in light of this unprecedented environment.