

THOUGHT LEADERSHIP

LEGAL UPDATES

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Best Practices Related to Public Health and Social Services Emergency Fund Payments

If you received an unexpected payment on or about Friday, April 10, 2020, via Optum Bank with "HHSPAYMENT" as the payment description, that payment was from the Public Health and Social Services Emergency (Relief) Fund established pursuant to the CARES Act to provide \$100 billion of relief funding to healthcare providers. The payment received on or about April 10 is from the first \$30 billion of the total \$100 billion Relief Fund.

The Relief Fund payments, while welcome, come with a series of terms and conditions requiring provider attestation. Because these payments are not, on their face, traditional Medicare fee-for-service payments, it is not totally clear what to call them. Specifically, no provider asked for the payments; they simply appeared. There were no Medicare claims made for reimbursement. The payor was not a fiscal intermediary or Medicare administrative contractor or carrier; rather, it was Optum Bank, a subsidiary of United Healthcare, with whom the Department of Health and Human Services (HHS) has partnered to provide the payments. Thus, the traditional audit and appeals mechanisms for Medicare payments may not apply. Also, the payments are, according to HHS, specifically not "loans." *Id.*

The terms and conditions specifically require compliance with 45 CFR §§75.302, 361 and 365, all of which relate to record keeping under the uniform administrative requirements, cost principles and audit requirements for HHS awards. Thus the terms and conditions should likely be reviewed as the terms of an HHS award. And in any event, the HHS Office of Inspector General is tasked to enforce the terms and conditions.

Unfortunately, these terms and conditions are vague and raise a series of questions that will necessitate additional guidance from HHS. Specifically, the

terms and conditions create many questions about, for example, whether providers who are not actively treating COVID-19 patients may keep the Relief Fund payments, and, if they can, on what those Relief Fund payments may be spent.

In any event, within 30 days of receiving the payment, and in order to retain the payment for potential use, the recipient provider must sign the attestation confirming receipt of the funds and agreeing to the terms and conditions of payment. This attestation will be available on the HHS website during the week of April 13, 2020. Providers should carefully review the final attestation language as well as terms and conditions before signing. Based on current information, it appears that signing the attestation will allow the provider to retain the payments while it evaluates whether and what amount of expenses can be paid with those funds and ensures that it can appropriately document the use of those funds, in the manner required by the terms and conditions. The provider can ultimately return any unused funds to the government.

Consequently, pending more useful guidance from HHS regarding who may use the Relief Fund payments and how they may be spent, there are a number of best practices we recommend providers take related to tracking and allocating expenses to the Relief Fund payments. How providers spend the Relief Fund will be audited at some future point, so any documentation must be auditable and supported.

1. Segregate the Relief Fund payments into a separate account so expenditures from that account may be tracked.
2. You probably received a separate payment for each of your Taxpayer Identification Numbers (TIN). Until further guidance is received, the Relief Fund payment attributable to that TIN should be used only for authorized COVID-19 expenses related to that TIN.
3. If you are not currently providing (and are not likely in the future to provide) diagnoses, testing or care for individuals with possible or actual cases of COVID-19, consider not using the Relief Fund payments until additional guidance is given on what those terms mean.
4. If you are comfortable that you are or will provide diagnoses, testing or care for individuals with possible or actual cases of COVID-19, develop a system to track which expenses (general and specific) you can allocate to these COVID-19 patients.
 - a. General expenses: Work with your accounting team to allocate general expenses, such as rent payments, based on the number of cases in the facility that are COVID-19 cases or possible cases and those that are not. We recommend further splitting that general COVID-19 allocation between funded and uninsured/unreimbursed COVID-19 cases.
 - b. Specific costs: Specific costs should include any and all specific increases in cost or

expenses that can be clearly tracked back to the COVID-19 emergency. This could include, for example, additional personal protective equipment, specific staffing needs, enhanced compensation to retain staff, administrative costs (including outside vendors, e.g., consultants or lawyers who are assisting you with your COVID-19 preparation) and physical plant changes.

c. In all cases, procedures need to be implemented to ensure that these costs meet the principles of costs allocated under the rules established by HHS for awards. Specifically, the provider must demonstrate that it has effective control over, and accountability for, these Relief Fund payments to ensure they are used solely for authorized purposes.

i. The provider must adopt written procedures to implement the requirements of 45 CFR § 75.302 “Financial management and standards for financial management systems.”

ii. The provider must adopt written procedures for determining the allowability of costs allocated to these funds in accordance with Title 45, Chapter A, Part 75, Subpart E “Cost Principles” of the Code of Federal Regulations. Id.

5. Track your revenue losses as they relate to COVID-19 preparation and operations. Did you lose revenue because elective surgery/procedures were ordered to stop? Document and track as much as possible how much you lost and why you lost that revenue.

In conclusion, these funds come with significant strings. And if you don’t have expenses that qualify they will need to be paid back. As this develops, there will be many practical questions regarding what expenses (and lost revenue) qualify as “valid” costs for these funds. We’re monitoring HHS’s communications related to this program.

Contact us

If you would like more information regarding terms and conditions on provider Relief Fund payments and your business model, please contact your Husch Blackwell healthcare attorney.

Comprehensive CARES Act and COVID-19 guidance

Husch Blackwell’s CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis.