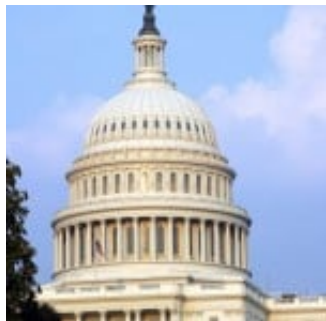


Part I: The Coronavirus Aid, Relief and Economic Security (CARES) Act: Provisions Relevant to Healthcare Providers



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(March 31, 2020): On March 27, 2020, the Coronavirus Aid, Relief and Economic Security (CARES) Act^[1] passed the House of Representatives by a voice vote. The President then signed the bill into law. The bill is the third round of federal government support in the wake of the coronavirus public health crisis and associated economic fallout, succeeding the [\\$8.3 billion](#) in public health support passed two weeks ago and the Families First Coronavirus Response Act. Liles Parker has published a series of articles highlighting the waivers and other actions taken by the Centers for Medicare & Medicaid Services and other Federal and State agencies to ease the burden on healthcare providers during the COVID-19 public health emergency.^[2] This article is the first in a two-part series that will highlight some of the more significant provisions of the Cares Act.

I. Support for Healthcare Providers

- **Section 3211, Supplemental Awards for Health Centers:** The CARES Act provides for supplemental awards for FY 2020 for federally qualified health centers, including an additional \$1,320,000,000 for the prevention, diagnosis, and treatment of COVID-19 or the detection of SARS-CoV-2.
- **Sections 3212 – 3213, Reauthorizations of HRSA Rural Development and Telehealth Network Grant Programs:** The Act reauthorizes HRSA's Rural Health Care Services Outreach, Rural Health Network Development and Small Health Care Provider Quality Improvement grant programs, as well as the Telehealth Network and Telehealth Resource Center grant programs.
- **Section 3214, Modernization of the Public Health Service:** The legislation creates a Ready Reserve Corps to ensure that there are enough doctors and nurses ready to respond to public health emergencies like COVID-19.

- **Section 3215, Limitation of Liability for Volunteer Health Professionals During COVID-19 Emergency Response:** This section holds harmless from liability under federal or state law, health care professionals who volunteer their service during the public health emergency for the COVID-19 pandemic declared by the Secretary of HHS. There are a number of conditions that must be satisfied for this limitation of liability to be effective.

Among these, the limitation of liability covers only professionals who are truly volunteers and who do not receive compensation in the course of providing health care services in the diagnosis or treatment of COVID-19. The professional must be acting within the scope of her/his license, registration, or certification under the State of licensure/certification, and may not exceed the scope of the license/certification of similar professionals in the State in which the action or omission occurs. The limitation of liability does not cover willful or criminal misconduct, gross negligence and other similar types of flagrant misconduct.

The provision applies only to conduct that occurs on or after the date of enactment of the CARES Act and is only in effect during the period of the public health emergency declared by the Secretary during the pandemic.

- **Section 3216, Flexibility for Members of the National Health Service Corps During the Emergency Period:** During the period of the emergency declaration, this provision allows the Secretary to temporarily re-assign members of the National Health Services Corps to provide service outside of the areas to which they have been assigned to respond to the COVID-19 pandemic. The assignment would need the member's voluntary agreement and would need to be "within a reasonable distance" of the original assignment, and the member would need to maintain the number of hours originally required of her/him.

II. Provisions Affecting Coverage and Payment Under the Medicare & Medicaid Programs

- **Section 3701, Health Savings Accounts for Telehealth Services:** This section allows a high-deductible health plan (HDHP) with a health savings account (HSA) to cover telehealth services prior to a patient reaching the deductible, increasing access for patients who may have the COVID-19 virus and protecting other patients from potential exposure.

- **Section 3702, Over-the-Counter Medical Products without Prescription:** This section allows patients to use funds in HSAs and Flexible Spending Accounts for the purchase of over-the-counter drugs and menstrual care products ***without a prescription from a physician***. This section appears to reverse the ACA ***and makes permanent the over-the-counter drug changes during the 2020 plan year and after***.
- **Section 3703, Expanding Medicare Telehealth Flexibilities:** This section eliminates the requirement included in the Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020 (Public Law 116-123) that limits the Medicare telehealth expansion authority during the COVID-19 emergency period to situations where the physician or other professional has treated the patient in the past three years. This enables beneficiaries to access telehealth, including in their home, from a broader range of providers, reducing COVID-19 exposure for the duration of the public health emergency.
- **Section 3704, Allowing Federally Qualified Health Centers and Rural Health Clinics to Furnish Telehealth in Medicare:** This section allows, during the COVID-19 emergency period, Federally Qualified Health Centers and Rural Health Clinics to serve as a distant site for telehealth consultations. A distant site is where the practitioner is located during the time of the telehealth service. This section will allow FQHCs and RHCs to furnish telehealth services to beneficiaries in their home. Medicare will reimburse for these telehealth services based on payment rates similar to the national average payment rates for comparable telehealth services under the Medicare Physician Fee Schedule. It will also exclude the costs associated with these services from both the FQHC prospective payment system and the RHC all-inclusive rate calculation.
- **Section 3705, Expanding Medicare Telehealth for Home Dialysis Patients:** This section eliminates a requirement during the COVID-19 emergency period that a nephrologist conduct some of the required periodic evaluations of a patient on home dialysis face-to-face, allowing these vulnerable beneficiaries to get more care in the safety of their home.
- **Section 3706, Allowing for the Use of Telehealth during the Hospice Care Recertification Process in Medicare:** Under current law, hospice physicians and nurse practitioners cannot conduct recertification encounters using telehealth. This section allows, during the COVID-19 emergency period, qualified providers to use telehealth technologies in order to fulfill the hospice face-to-face recertification requirement.
- **Section 3707, Encouraging the Use of Telecommunications Systems for Home**

Health Services in Medicare: This section requires the Department of Health and Human Services (HHS) to issue clarifying guidance encouraging the use of telecommunications systems, including remote patient monitoring, to furnish home health services consistent with the beneficiary care plan during the COVID-19 emergency period.

- **Section 3708, Improving Care Planning for Medicare Home Health Services:** This provision enables nurse practitioners, clinical nurse specialists, and physician assistants to order home health services, and certify and recertify patients for home health care. These changes also apply to Medicaid and become effective when HHS publishes implementing regulations, which must be within six months of the enactment of the CARES Act. *Unlike many of the provision of the Act, this provision is permanent and survives the end of the emergency.*
- **Section 3709, Adjustment of Sequestration:** The CARES Act suspends the mandatory 2% global reductions under the sequestration order for the period May 1 through the remainder of calendar year 2020.
- **Section 3710, Medicare Hospital IPPS Add-On Payment for COVID-19 Patients During Emergency Period:** The Act increases DRG weights by 20% for patients diagnosed with COVID-19 during the emergency period.
- **Section 3711, Increasing Access to Post-Acute Care During the Emergency Period:** The Act waives certain requirements for inpatient rehabilitation facilities (IRFs) and long-term acute care hospitals (LTCHs). For IRFs, the provision waives the requirement that a patient receive at least 15 hours of therapy per week. For LTCHs, the provision waives the requirement of a payment adjustment where an LTCH does not have a discharge percentage of 50% of patients who would meet the eligibility requirements during the emergency period. The provision also waives the site-neutral payment rate for discharges occurring during the emergency period that are in response to the public health emergency.
- **Section 3712, Revising Payment Rates for DME Under Medicare During the Emergency Period:** This Section prohibits scheduled payment reductions in Medicare DME during 2020 and the emergency period.
- **Section 3715, Providing Home and Community-Based Services in Acute Care Hospitals:** A number of waivers under sections 1915 and 1115 of the Social Security Act provide for home and community-based services for individuals who otherwise would require care in a hospital, nursing facility, or ICF/MR. This provision allows states to cover these services to individuals under certain of these waivers while they are in an acute care hospital if they meet certain conditions,

including that they are identified in the individual's care plan, not provided through the hospital, not a substitute for services that the hospital is otherwise required to provide, and are designed to ensure a smooth transition to the community and preserve the individual's functional abilities.

- **Section 3719, Expansion of Medicare Hospital Accelerated Payment Program During COVID-19 Public Health Emergency:** During the period of the emergency, this provision expands the accelerated hospital payment program by allowing acute care hospitals, cancer hospitals, children's hospitals, and critical access hospitals (CAHs) to apply for up to 6-months' advance payment of up to 100%, and for CAH's 125%, of anticipated payments. The provision also provides for 120 days before claims are offset to recoup these payments and not less than 12 months after the date of the first accelerated payment before the outstanding balance must be paid in full.

Administrative Implementation to Encompass All Providers: On March 28, 2020, CMS published a press release and a Fact Sheet that expanded the availability of the accelerated advance payment program to *all Medicare participating health care providers and suppliers*. These advance payments will be based on historical payments. The Press Release states that **"... [t]he payments can be requested by hospitals, doctors, durable medical equipment suppliers and other Medicare Part A and Part B providers and suppliers."** The applicants must: have billed Medicare for claims within 180 days of the request; not be in bankruptcy; not be under active medical review or program integrity investigations; and not have delinquent Medicare overpayments. Applications are made to the MACs, and CMS anticipates that payments will be issued within seven days of a request. Providers described in the legislation, above, can request payments for an amount for up to a six-month period, while other types of providers can request up to a three-month period. The Fact Sheet provides further instructions on the process.[\[3\]](#)

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Section 3720, Delaying Requirements for Enhanced FMAP to Enable State Legislation Necessary for Compliance: The The Families First Coronavirus Relief Act increases State Federal assistance matching percentages (FMAP) percentages by 6.2% during the calendar quarters that encompass the emergency period if the State meets certain conditions, one of which was that it did not increase premiums in excess of what they were on January 1, or impose new premiums, during this period. This provision gives any state that has raised or imposed such premiums since January 1, a thirty-day delay in the enforcement of that requirement – presumably to provide the State an opportunity to come into compliance without

losing the increased matching rate.

III. Health and Human Services Extenders

- **Section 3811, Extension of Money Follows the Person Rebalancing Demonstration:** The CARES Act extends and provides funds for the demonstration through November 30, 2020.
- **Section 3812, Extension of Spousal Impoverishment Protections:** This section of the Act extends certain protections from spousal impoverishment through November 30, 2020 to help a spouse of an individual who qualifies for nursing home care to live at home in the community.
- **Section 3813, Delay of DSH Reductions:** The CARES Act delays Medicaid DSH reductions that were to begin on May 23, 2020, to begin, instead, on December 1, 2010.

IV. Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy

Title IV of the Act provides \$500 billion in funding for loans and financial assistance to mid-size and large businesses, states and municipalities and non-profits. \$46 billion of these funds are specially allocated to the airline industry and industries critical to national security. Assistance to airlines and national security industries will be via direct U.S. Department of Treasury loans and investments.

The remaining \$454 billion is available to assist other businesses, states and municipalities and non-profits. The financial assistance will be made available via a Federal Reserve Act Section 13(3) program to provide financing through banks and other lenders. This assistance targets businesses employing between 500 and 10,000 employees. The assistance is contemplated primarily as low interest loans (interest rate not exceeding 2% per annum) with payments of principal and interest deferred for the first six months or longer.

The Act provides conditions on eligibility and terms and conditions of loans, including: (i) economic conditions make the loan necessary to support ongoing operations, (ii) funds will be utilized to retain or restore at least 90% of workforce, (iii) prohibitions on dividends and stock buybacks while the loan is outstanding, and (iv) restrictions on offshoring jobs and a requirement that a majority of employees are based in the U.S. Other requirements, terms and conditions for loans and

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assistance will be determined and set forth in the Department of Treasury and Federal Reserve guidelines. Title IV assistance does not provide for future loan forgiveness.

Application procedures and guidelines for the Title IV program are to be published shortly by the Department of Treasury and the Federal Reserve.

V. HHS – Public Health and Social Services Emergency Fund

The CARES Act establishes a \$100 billion “Public Health and Social Services Emergency Fund” to reimburse eligible providers for health care related expenses or lost revenues that are attributable to the coronavirus. The Act further defines eligible health care providers to be public entities, Medicare or Medicaid enrolled suppliers and providers, and other entities that the Secretary includes that provide diagnosis, testing, or care for individuals with possible or actual cases of COVID-19. These funds are available for building or construction of temporary structures, leasing of properties, medical supplies and equipment including personal protective equipment and testing supplies, increased workforce and trainings, emergency operation centers, retrofitting facilities, and surge capacity. To be eligible, providers are required to apply to HHS.

VI. Conclusion:

Liles Parker attorneys and staff are closely monitoring HHS, CMS and CDC guidance and will update as new information becomes available. Please contact us with questions or for assistance with your response to this unprecedented National Emergency.



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Michael Cook, Jennifer Papapanagiotou and Andy Lynch are Partners at Liles Parker, PLLC. They each have decades of experience representing health care providers and suppliers and other businesses around the country in connection with a wide range of matters. Questions regarding the impact of recent coronavirus guidance on your organization? *Call Liles Parker for a free consultation. We can be reached at: 1 (800) 475-1906.*

[1] See this [link](#) for a full copy of the CARES Act.

[2] For a collection of all articles written by Liles Parker attorneys related to the COVID-19 public health emergency, please visit our webpage at this [link](#).

[3] The CMS Press Release on the Accelerated and Advanced Payment process can be accessed [here](#) and the Fact Sheet can be accessed [here](#).