

Protecting Your Practice During COVID-19

Robert Wade, Partner, Barnes & Thornburg, LLP

Ross Taubman, DPM, President & CMO, PICA Insurance Company

Moderator: Danielle Butto, DPM, FACFAS



**American College of
Foot and Ankle Surgeons®**
Proven leaders. Lifelong learners. Changing lives.



Robert A. Wade
Partner
Barnes & Thornburg, LLP



Ross Taubman, DPM
President & Chief Medical Officer
Podiatry Insurance Company of America (PICA)



Danielle Butto, DPM, FACFAS
Practice Management Committee Chair
Trinity Health of New England



Fraud and Abuse

- Laws still apply
 - Stark Law
 - Anti-kickback Statues
 - False Claims Act
 - Litigation



CMS Waivers in Relation to Stark Law

Issued 3/30/20, Effective 3/1/20

Top Takeaways

- The application of the Waivers apply only if the failure to comply with an exception is due to COVID-19
- Although the Waivers were issued March 30, retro effective date is March 1
- Fair Market Value does not apply
- The Waiver applies to lease arrangements (office space and equipment) as well for personal services



CMS Waivers in Relation to Stark Law

- The Waiver applies to medical staff incidental benefits and nonmonetary compensation exceptions. Therefore, current annual limits do not apply as long as such incidental/nonmonetary benefits are related to COVID-19
- Physician ownership restrictions are essentially waived. Physician-owned hospitals can expand & ambulatory surgery centers can be converted into hospital beds as long as such complies with state requirements
- Hospitals can loan physicians money that may be below terms offered by financial institutions
- Signature requirement is waived, but future signatures should be obtained



Family First Coronavirus Response Act

EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- | | |
|---|---|
| 1. Is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; | 5. Is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or |
| 2. Has been advised by a health care provider to self-quarantine related to COVID-19; | 6. Is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
| 3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis; | |
| 4. Is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | |

ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information
or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd



WH-1023 REV. 03/20



American College of
Foot and Ankle Surgeons®

Proven leaders. Lifelong learners. Changing lives.

Family First Coronavirus Response Act

For Healthcare Providers, the Following Language Can be Added to the Notice:

As a healthcare provider [Name of Provider] is legally permitted to deny leave to our employee due to the critical nature of healthcare services we are providing during this health crisis. If you have a particular situation that would otherwise qualify for leave under one of these provisions, please contact Human Resources to discuss.



CARES Act

Small Business Loans (\$349 Billion)

- 500 employees or less
- Borrow up to \$10 million based on 2.5x avg monthly payroll
- 10-year-term, not to exceed 4%
- Can be used for payroll costs, group healthcare premiums, rent, utilities, interest on pre-existing debt
- Possible to have eight-weeks worth of loan forgiven (converting to a grant) if various criteria met
- Another resource outside the scope of the CARES Act (Economic Injury Disaster Loans (EIDs)) offers up to \$2 million (possibly more) in assistance to help overcome the temporary loss of revenue from COVID-19: 30 year term, up to 9 months to apply



CARES Act

Larger Loans

CARES Act authorizes the Treasury Secretary to use \$500 billion to backstop one or more Federal Reserve programs and lending facilities as well as provide direct loans and facilitate private lending through the strategic use of guarantees to aviation, national defense industries and businesses generally.

- \$454 billion in loans for qualifying businesses, states & municipalities
- \$454 billion is for programs or facilities established by Federal Reserve to inject liquidity into the financial system to support lending to eligible businesses, states or municipalities



Resources

- COVID-19 Resource Page: Barnes & Thornburg
<https://www.btlaw.com/en/work/practices/covid-19/coronavirus-resources#?section=insights-and-events>
- Specifics of CARES Act & Implications for Businesses and Individuals: Barnes & Thornburg
<https://www.btlaw.com/en/insights/alerts/2020/specifics-of-cares-act-and-implications-for-businesses-and-individuals>
- Coronavirus Small Business Guidance: Loan Resources
<https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>



Section 1135 State Medicaid Waivers

When Do Waivers Apply?

- What conditions must be in place?
 - Presidential declaration of an emergency or disaster under the Stafford Act or National Emergencies Act
 - Declaration by the Secretary of HHS of a public health emergency under Section 319 of Public Health Service Act
 - Secretary must specifically invoke Section 1135 authority
 - For the duration of a declared emergency or disaster, only in the geographical area specified
- What's required of providers?
 - A request to Secretary to operate under particular waiver
 - Submission of documentation of need for a grant of waiver of certain requirements
 - For some provisions, waivers apply only after the provider has activated its disaster plan



Nationwide Section 1135 Waivers Currently Invoked

- Waivers of certain conditions of participation, certification requirements, program participation for healthcare providers
- Waiver of requirements physicians or other healthcare providers hold licenses in the state in which they provide services, if they have an equivalent license from another state (and are not affirmatively barred from practice in that state or any state a part of which is included in the emergency area)
- Waiver of sanctions under certain provisions of EMTALA
- Waiver of sanctions for physician self-referral
- Waiver of limitations on payments for healthcare furnished to Medicare Advantage beneficiaries by out-of-network providers
- Waiver of sanctions and penalties arising from noncompliance with certain HIPAA provisions
- Modified deadlines and timelines for the performance of certain required activities



Requested 1135 Waivers

- States & territories may request 1135 Waivers to exempt providers in the state or territory from federal regulations on programs such as Medicaid and CHIP
- Individual providers may also submit requests to CMS for their particularized needs as they respond to the public health emergency
- Requests should include a justification for the sought-after relief as well as the expected duration of the waiver



Provider Enrollment

- Waive the enrollment requirement for state Medicaid for out-of-state providers once certain criteria is met
- Waiver authority to allow the state to expedite enrollment of providers not currently enrolled
- Waive payment of application fee, fingerprint-based criminal background checks, site visits & in-state licensure requirements
- States granted waiver:
 - AZ, CA, CO, CT, DE, FL, HI, ID, IL, IN, KS, KY, LA, MD, MA, MN, MS, NH, NJ, NM, NY, NC, ND, OK, OR, PN, RI, SD, WA, WY



Provision of Care in Unlicensed Facilities

- In the case that a hospital must be evacuated to make more space for victims of an ER, waiver would allow facilities to provide services to evacuated patients in alternative settings
- Services must still be provided by staff of the licensed facility
- Provider will determine how the unlicensed facility should be reimbursed
- States granted waiver:
 - CA, CO, CT, FL, HI, ID, IL, IN, KS, KY, LA, MD, MA, MN, MS, MO, NH, NJ, NY, NC, OK, OR, PN, SD, WA, WY



Suspend Fee-For-Service Prior Authorization

- CMS has interpreted state prior authorization processes to be a type of pre-approval requirement for which waiver and modification authority is available under Section 1135
- Prior authorizations may be waived during a public health emergency
- States granted waiver:
 - AZ, CA, CO, CT, DE, HI, ID, IL, IN, KS, KY, MD, MA, MN, MS, MO, NH, NJ, NM, NY, NC, ND, OK, OR, PN, RI, VA



Extension of Pre-Existing Prior Authorizations

- Prior authorization for services may have already been obtained but will be expiring during the emergency period on or after March 1, 2020
- Though its power to suspend prior authorization requirements, CMS may allow services to continue to be provided without a requirement for a new or renewed prior application
- This waiver is applicable through the termination of the public health emergency
- States granted waiver:
 - CA, CO, CT, DE, FL, ID, IL, IN, KS, MD, MA, MN, MS, MO, NH, NJ, NM, NY, ND, OR, PN, RI, VA, WA



Suspend PASSR Assessments

- Pre-admission Screening & Annual Resident Review (PASRR) Level I & Level II Assessments may be suspended for 30 days for facilities treating patients with intellectual disabilities & mental illnesses and nursing facilities
- After that period, patients with intellectual disabilities and mental illnesses should receive resident reviews as soon as resources are available.
- States granted waiver:
 - AZ, CO, DE, FL, HI, ID, IN, KS, KY, LA, MD, MA, MS, MO, NH, NJ, NM, NY, NC, ND, OK, OR, PN, SD, WA, WY



State Fair Hearing & Appeals Timelines

- CMS may grant requesting states the flexibility to reschedule and temporarily delay Medicaid fair hearings and issue decisions on hearings during the emergency period
- A relaxed timetable for hearing and deciding appeals is available, as well as an extension for the periods in which enrollees may assert their rights
- States granted waiver:
 - CA, CT, DE, FL, ID, IL, IN, KS, KY, LA, MD, MA, MN, MS, MO, NH, NJ, NM, NY, NC, ND, OK, OR, PN, RI, SD, VA, WA, WY



TeleHealth

Method of TeleHealth

- TeleHealth may be provided, depending on the relevant state law via:
 - Live video
 - Store and Forward
 - Remote Patient Monitoring
- State law and insurance policies may dictate which method is permitted and reimbursable



TeleHealth Concerns

- New vs. established patients
- Licensed to practice
- Medical record documentation
- Malpractice insurance: Does it cover TeleHealth services? Check your carrier
- Reimbursement concerns
- HIPAA considerations



Prescriptive Authority via TeleHealth

- The declaration of a national emergency enacted one of the exceptions to the Ryan Haight Act
- DEA-registered practitioners may issue prescriptions for controlled substances (even in the absence of an in-person evaluation) if all of the following are met:
 - Prescription is issued for legitimate medical purpose by a provider acting in the usual course of his or her professional practice
 - The TeleHealth communication is conducted using audio-visual, two-way interactive communication; and
 - The practitioner is acting in accordance with applicable federal and state law



TeleHealth

- CMS Expands Scope of TeleHealth During COVID-19
 - Now allows more than 80 additional services to be furnished with TeleHealth
 - Audio and video
 - Evaluate beneficiaries who have audio phones only
 - Bill for TeleHealth visits at same rate as in-person
 - TeleHealth visits include:
 - ER, nursing facility, therapy
 - New & established patients



TeleHealth & Podiatry

- During COVID-19, podiatrists can provide 4 non-face-to-face types to most patients
 - New & Established Patient Audio/Visual Encounters
 - CPT 99202-99215 for Medicare Part B & Medicare Advantage. Some private insurance made same allowance
 - Virtual Check-in
 - CPT G2012 must be used for Medicare Part B or Medicare Advantage patients.
 - Must be used with an established patient
 - Cannot originate from a related E/M or lead to an E/M



TeleHealth & Podiatry

- Telephone E/M Service
 - Documentation must support an E/M like any other time
 - Must be an established patient
 - Must be initiated by the established patient or the patient's guardian
 - Providers may educate patients about this option
 - Are not reimbursable by Medicare and some private payors
- Online Digital Evaluation/Management Services
 - For patients with any insurance – check with provider



TeleHealth

TYPE OF SERVICE	WHAT IS THE SERVICE?	HCPCS/CPT CODE	Patient Relationship with Provider
MEDICARE TELEHEALTH VISITS	A visit with a provider that uses telecommunication systems between a provider and a patient.	<p>Common telehealth services include:</p> <ul style="list-style-type: none"> • 99201-99215 (Office or other outpatient visits) • G0425-G0427 (Telehealth consultations, emergency department or initial inpatient) • G0406-G0408 (Follow-up inpatient telehealth consultations furnished to beneficiaries in hospitals or SNFs) <p>For a complete list: https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes</p>	<p>For new* or established patients.</p> <p>*To the extent the 1135 waiver requires an established relationship, HHS will not conduct audits to ensure that such a prior relationship existed for claims submitted during this public health emergency</p>
VIRTUAL CHECK-IN	A brief (5-10 minutes) check in with your practitioner via telephone or other telecommunications device to decide whether an office visit or other service is needed. A remote evaluation of recorded video and/or images submitted by an established patient.	<ul style="list-style-type: none"> • HCPCS code G2012 • HCPCS code G2010 	For established patients.
E-VISITS	A communication between a patient and their provider through an online patient portal.	<ul style="list-style-type: none"> • 99421 • 99422 • 99423 • G2061 • G2062 • G2063 	For established patients.



Protecting Yourself with Malpractice Insurance

- Expanded Scope of Practice for DPMs during COVID-19
- TeleHealth Coverage – will my carrier protect me?
- My patient Flow is Now a Trickle – What if I can't pay my premiums?



Small Business Insurance

- Business Interruption Insurance – Friend or Foe?
- Workers Compensation – Does it cover COVID-19 issues for my employees?



Questions and Answers



**American College of
Foot and Ankle Surgeons®**
Proven leaders. Lifelong learners. Changing lives.



**American College of
Foot and Ankle Surgeons®**

Proven leaders. Lifelong learners. Changing lives.