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COVID-19 Client Alert – CARES Act: Supporting the Healthcare System

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By: Jennifer L. Smith

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law on March 27, 2020. It provides more than $2 trillion dollars to assist individuals, private businesses, non-profits and state and local governments in dealing with the impact of COVID-19.

Title III of the CARES Act, entitled Supporting America's Health Care System in the Fight Against the Coronavirus, is specifically geared toward assisting the healthcare industry. This section of the Act contains multiple provisions for supporting health care providers and patients, addressing supply shortages, and improving access to care through telehealth services and reducing regulatory burdens. A summary of some of the key provisions follows.

Support for Healthcare Providers

The ACT allocates $100 billion for an emergency fund that will be available to eligible healthcare providers to assist with certain expenses or lost revenue associated with the COVID-19 pandemic. The U.S. Department of Health and Human Services (DHHS) will accept applications and determine how funds are allocated. The criteria for submitting applications and awarding funds are pending.

The Act increases payments to hospitals that treat inpatients with COVID-19 by twenty percent. It also temporarily suspends current payment policies that reduce Medicare reimbursement. Sequestration will be suspended through the end of 2020, but to make up for lost savings during this time, the program will continue through 2030. Payments to long-term care hospitals (LTCHs) subject to the site-neutral policy will be reinstated at the higher LTCH Prospective Payment System rates for the duration of the public health emergency period. Certain DME payment reductions will also be suspended through the end of the public health emergency.

The Act expands the CMS accelerated payment program (APP), which allows eligible hospitals to receive an advance on Medicare payments if they are under financial strain due to exceptional situations. The CARES Act increases the amount that can be prepaid, extends the time period for which advance payments may be received, and extends the time period for recoupment of overpayments and the due date for outstanding balances.

CARES also temporarily suspends current payment policies that reduce Medicare reimbursement. Sequestration will be suspended through the end of 2020, but to make up for lost savings during this time, the program will continue through 2030. LTCH payments subject to the site-neutral policy will be reinstated at the higher LTCH Prospective Payment System rates

for the duration of the public health emergency period. Certain DME payment reductions will also be suspended through the end of the public health emergency, and Disproportionate Share Hospital payment reductions scheduled to begin on May 23, 2010 will be delayed until December 1, 2020.

Access to Telehealth Services

To expand access to healthcare and reduce the need for in-person visits, thereby decreasing the risk of exposure for healthcare providers and other patients, the CARES Act contains several provisions to increase the use of telehealth technology. The number of healthcare providers who can provide telehealth services will be increased. Medicare will now cover telehealth services provided in locations other than a healthcare facility or rural area, so providers will be able to receive Medicare reimbursement for providing telehealth services to patients in alternate locations, including their homes. Rural health clinics and federally qualified health centers may also serve as a "distant site" for the provision of telemedicine services during the public health emergency. The Act further removes the requirement that the treating provider have a pre-existing relationship with the patient prior to providing telehealth services.

In addition, the Act allows for a face-to-face encounter for hospice recertification to be performed via telehealth during the public health emergency, and temporarily waives the requirement for face-to-face visits between home dialysis patients and physicians.

Diagnostic Testing and Prevention

To help ensure access todiagnostic testing and prevention services, the CARES Act allocates $27 billion for the production of diagnostic, preventive and therapeutic services for COVID-19. The Act also requires private healthcare payers to cover diagnostic tests for COVID-19, as well as certain vaccines and preventive services that are intended to mitigate or prevent the disease without cost sharing. Providers are required to list the cash price of the test on their public websites or face a potential penalty of $300 per day. Payers must provide reimbursement for testing at either the cash price or at the rate they have negotiated with the provider.

Medical Supplies

To help ensure healthcare providers have necessary supplies and equipment, the CARES Act designates $1 billion to the U.S. Department of Defense to increase the production of protective and medical equipment under the Defense Production Act. The Act also makes clear that the Strategic National Stockpile can include medical supplies as well as drugs to help prepare for future pandemics.

To address potential drug shortages, the Act requires the FDA to expedite and prioritize reviews of drugs for which there is a possible shortage. In addition, manufacturers of both drugs and devices will be required to notify the FDA of interruptions in their supply chains and contingency plans for ensuring sufficient supplies of life-saving and life-preserving items.

The CARES Act includes provisions requiring DHHS to work with the National Academies of Sciences, Engineering and Medicine to examine and report on the security of the medical

product supply chain and evaluate our dependence on critical drugs and devices that are manufactured outside of the U.S. To address potential drug shortages, the Secretary of DHHS is required to prioritize reviews of drug applications and take measures to prevent future shortages.

Limitations on Liability

The CARES Act limits malpractice liability for healthcare providers who furnish volunteer healthcare services, within the scope of their license and without any form of reimbursement, in response to the public health emergency. The limits apply only during the public health emergency and do not apply to gross negligence or criminal misconduct.

The Act also provides liability protection to manufacturers of certain types of medical equipment and supplies, including masks and ventilators. This liability protection will extend through the time the device is used even if it is after the public health emergency has ended.

HIPAA and 42 C.F.R. Part 2

To improve care coordination for patients with substance use disorder (SUD), the CARES Act makes it easier for providers to share SUD treatment records. The Act allows one consent to cover all disclosures within a healthcare system, rather than requiring a separate consent for each disclosure. DHHS will be issuing guidance on this provision as well as guidance on sharing protected health information under HIPAA during the public health emergency.

This memorandum is provided by Wright, Lindsey & Jennings, LLP for educational and informational purposes only and is not intended and should not be construed as legal advice. Businesses and individuals with additional questions should contact Jennifer Smith, Hayden Shurgar, Erika Gee or any other WLJ Business Team or Medical Malpractice attorney.

Jennifer Smith
479.631.3290
JSmith@WLJ.com

Hayden Shurgar
501.212.1288
HShurgar@WLJ.com

Erika Gee
501.212.1305
EGee@WLJ.com

Jennifer Smith is an attorney in WLJ's Rogers office. With more than 10 years of experience as a health law attorney, she focuses on administrative and regulatory issues, government investigations, and medical staff employment, privileging, peer review and bylaws.

Hayden Shurgar is an attorney in WLJ's Little Rock office. She has an active litigation practice, defending medical providers in malpractice and professional liability claims. She also advises healthcare providers on compliance and regulatory issues.

Erika Gee is an attorney in WLJ's Little Rock office. As a member of the firm's Government Relations practice, she assists clients in resolving their regulatory and administrative disputes with state government, and represents clients in government relations matters.

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