

Compliant Response: COVID-19

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Overview

- HIPAA Privacy
- HIPAA Security
- Substance Use Information under CARES
- Paycheck Protection Program
- CARES Act Relief Fund

HIPAA Privacy Issues

- Privacy Waivers
- Treatment
- Public Health Reporting
- Individuals Involved in Care
- Serious and Imminent Threat
- Employers
- Media

HIPAA Privacy Waivers

- Waiver of sanctions related to:
 - Patient agreement to speak with individuals involved in care
 - Opt out for facility directory
 - Distribution of notice of privacy practices
 - Request privacy restrictions
 - Request confidential communications
- Only applies for 72 hours from the time the hospital institutes a disaster protocol during a public emergency declaration

HIPAA - Treatment

- PHI may be disclosed without authorization for purposes of treating an individual
- This includes for the treatment of a different individual
- Minimum necessary does not expressly apply
- Note: State Law exceptions

HIPAA – Public Health Reporting

- Required or permitted by law
- To a person who may have been exposed to a communicable disease or may be at risk for contracting or spreading a disease or condition, if authorized by law to notify such person in the conduct of a public health intervention or investigation
- To an employer in limited situations

HIPAA – Individuals Involved in Care

- PHI related to a person's involvement in an individual's care may be provided, subject to the opportunity to object
- If in person, obtain agreement, provide opportunity to object, or infer from circumstances
- If not present or incapacitated, exercise professional judgment
- Subject to minimum necessary
- Must relate to the person's involvement

HIPAA – Serious and Imminent Threat

- May disclose PHI based on good faith belief that such disclosure:
 - Is necessary to prevent or lessen a serious or imminent threat to the health or safety of a person or the public
 - Is to a person reasonably able to prevent or lessen the threat or to law enforcement to apprehend an individual
- Subject to minimum necessary

HIPAA - Employers

- Worker's Compensation
- Under public health when:
 - Healthcare provided at the request of the employer
 - To evaluate possible work-related illness
 - PHI limited to the work-related illness
 - Employer needs the information to meet its OSHA obligations
 - Written notice is provided to the individual
- Minimum necessary

HIPAA - Media

- Facility directory
 - Hospital patients only
 - Subject to opt out
 - When requested by name
 - May give location in the facility and condition in general terms that does not include medical information
- All other media disclosures require patient authorization

HIPAA Security – Telemedicine

- Enforcement discretion announced March 17
- Continues for the national public health emergency
- No penalties for non-compliance with HIPAA related to the good faith provision of telehealth

HIPAA Security – Telemedicine

- Allows non-public facing communication product
- No enforcement for lack of a BAA
- Use does not have to relate to COVID

HIPAA Security - Telemedicine

- Business Associate Agreement
- User Controls
- Encryption
- Patient notice/consent
- Incidental Disclosures
- Device Security
- Monitoring and Maintenance

CARES Act – Substance Use Information

- Revises the statute underlying the 42 CFR Part 2 regulations
- Requires revision to the regulations within 12 months
- Attempt to align with HIPAA for treatment, payment, and health care operations
- Tied to initial consent from the patient
- Notice of Privacy Practices requirements
- Non-discrimination provisions
- Increases penalties

Paycheck Protection Program

- Overview
 - Coronavirus Aid, Relief, and Economic Security Act (CARES Act), 3/27/2020
 - Multiple Interim Final Rules (14 at last count. Most recent for this presentation, issued 5/22/2020)
 - Multiple Fact Sheets and FAQs
 - Multiple Forms (e.g., SBA 2483)

Paycheck Protection Program

- The Basics
 - Authorized SBA to guarantee loans (100%)
 - Full principal amount may qualify for forgiveness
 - Available widely to small businesses (i.e., not just healthcare-related businesses)

Paycheck Protection Program

- The Details
 - Loan application (through local lender) requires certification of eligibility
 - Loan forgiven if proceeds are used for specified purposes within an eight-week period (legislation is pending that would extend this period) and employee and compensation levels are maintained

Paycheck Protection Program

- The Details (continued)
 - Payroll costs capped at \$100,000 (annualized) per employee
 - If not forgiven,
 - Payments deferred for 6 months
 - Interest at 1%
 - 2-year term

Paycheck Protection Program

- Compliance Hot Buttons
 - PPP Loan Application Certification
 - PPP Loan Forgiveness Application
 - Maintaining Appropriate Documentation

Paycheck Protection Program

- PPP Loan Application Certification—key certifications include:
 - Size requirement: Employ no more than 500 FTE employees [or meet alternative size standard]
 - Economic uncertainty makes the loan request necessary (safe harbor for loans less than \$2M)
 - Applicant will provide documentation of number of employees and payroll and other costs
 (Loan recipients that subsequently determined they were ineligible had until May 18 to repay their loans.)

Paycheck Protection Program

- PPP Loan Forgiveness Application
 - Successful borrowers must separately apply (to servicing Lender) for forgiveness
 - Costs eligible for forgiveness include: salary, wages and commission payment (including to furloughed employees) and bonus and hazard pay during covered period (special rule for payroll cycle)
 - Non-payroll costs (rent, current mortgage interest, utilities) paid during covered period or incurred during covered period and paid on next regular billing date (pre-payment not allowed)

Paycheck Protection Program

- Maintaining Appropriate Documentation
 - SBA may review any PPP loan for:
 - Borrower eligibility
 - Loan amount and use of proceeds
 - Loan forgiveness amount

Paycheck Protection Program

- Maintaining Appropriate Documentation
 - Be able to account for use of all funds received
 - Document calculation of FTEs, salaries, and expenses
 - Document authority relied upon at the time (Interim Rules, FAQs, Fact Sheets, Forms, research) because the rules may have changed since determinations were made

CARES Act Relief Fund

- Overview
 - Authorized by CARES ACT, 3/27/2020
 - Funds distributed beginning 4/10/2020
 - Initial \$30B distributed to Medicare providers in proportion to their Medicare receipts in 2019
 - Initial statements from CMS (Seema Verma) that the funds were provided with “no strings attached”
 - However, subsequent guidance includes a number of requirements

CARES Act Relief Fund

- Terms and Conditions

Updated Terms and Conditions can be found at:

 - <https://www.hhs.gov/sites/default/files/terms-and-conditions-provider-relief-30-b.pdf>

CARES Act Relief Fund

- Key Terms and Conditions
 - Recipient provides or provided (after 1/31/20) diagnosis, testing, or care for individuals with *possible or actual* cases of COVID-19 (updated)
 - Recipient “certifies that the payment will only be used to prevent, prepare for, and respond to coronavirus, and the payment shall reimburse Recipient only for health care related expenses or lost revenues that are attributable to coronavirus”

CARES Act Relief Fund

- Key Terms and Conditions (continued)
 - “Recipient certifies that it will not use the payment to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse”
 - “Recipient shall submit reports as the Secretary determines are needed to ensure compliance with conditions imposed on the payment”
 - “Recipient acknowledges that deliberate omission, misrepresentation, or falsification may be punishable by criminal, civil, or administrative penalties”

CARES Act Relief Fund

- Compliance Hot Buttons
 - Recipient “provides or provided . . . diagnoses, testing, or care for individuals with possible or actual cases of COVID-19”
 - “payment will only be used to prevent, prepare for, and respond to coronavirus, and . . . only for health care related expenses *or lost revenues* that are attributable to the coronavirus”
 - Attestation required (failure to attest, funds deemed accepted)

CARES Act Relief Fund

- Compliance Hot Buttons
 - Reporting
 - Guidelines describe extensive reporting requirements
 - Recipients of more than \$150,000 total funds must report quarterly
 - Documentation and tracking of fund use
 - Document how funds are used and when
 - Separate accounts? (not required, but advisable)
 - Document contemporaneous guidance
 - Repayment?
 - Overpayment?
 - Apply grant rules?
 - Proceed with caution . . .

Emerging Compliance Challenges for PPP and CARES Act Relief Fund

- Individuals/entities who are not themselves eligible for, but demanding the benefit of, the funds—scenarios:
 - Income Guarantee
 - Management Agreement
 - Independent Contractor in 2019

Thank You



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