Health Law Alert: COVID-19 Survival Tips for Physician Practices

March 31, 2020

Physician practices around the country are facing unique challenges in the wake of the coronavirus (COVID-19) pandemic. Some practices are short-staffed and overworked, while others are grappling with a dramatic loss of revenue and the sudden inability to provide services. What all physician practices share, however, is the need to make difficult yet critical decisions in a rapidly changing environment.

As practices navigate this challenging time, close consideration should be given to physician coverage and credentialing, compensation, and financing options. For many practices, these three issues will be vital to weathering this storm.

1. Practice Financing Options

The COVID-19 pandemic has affected the economics of businesses in every sector, including health care. Physician practices may suddenly find themselves in financial trouble due to loss of revenue.

Federal Funding Sources:

On Friday, March 27, 2020, Congress enacted and the President signed into law the "Coronavirus Aid, Relief, and Economic Security Act" (known as the "CARES Act"). The CARES Act provides much needed stimulus and relief to individuals, businesses, and providers in response to the economic distress caused by the pandemic. Notably, the CARES Act allocated $100 billion for a new program to provide grants to hospitals, public entities, nonprofit organizations, and Medicare and Medicaid enrolled suppliers and institutional providers to cover unreimbursed "health care related expenses or ***lost revenues*** that are attributable to coronavirus." We expect the funds will be administered through a sub-agency of the U.S. Department of Health and Human Services (HHS). HHS will receive applications and make payments on a rolling basis until funds are expended.

The CARES Act also established federal loan assistance programs:

- Creates a new 7(a) Small Business Administration (SBA) Business Loan Program called the "Paycheck Protection Program," which authorizes the making of loans to eligible entities through June 30, 2020. Loans can be used to help pay operational costs like payroll, rent, health benefits, insurance premiums, utilities, and other costs. No personal guarantees or collateral are required and, subject to certain conditions, loan amounts are forgivable. Eligible businesses include those that employ not more than 500 employees (unless a higher standard has been established under the SBA rules). Generally, the maximum loan an applicant can receive is equal to 2.5 times the average monthly payroll costs incurred in the 1-year period before the date of the loan, up to a cap of $10 million dollars.

- Significantly expands, for a limited period ending December 31, 2020, the availability of Economic Injury Disaster Loans (an "EID Loan") under the SBA's 7(b) Disaster Assistance Program for COVID-19 related economic injury. Loans can be used to pay fixed debts, payroll, accounts payable, and other bills that can't be paid because of the pandemic's impact. Eligible businesses include those that employ not more than 500 employees. Loan amounts are based on the amount of economic injury, up to a cap of $2,000,000. Applicants may also request a small emergency advance (up to $10,000) for which no repayment is required.

Attached is a summary of the various loan programs available under the CARES Act.

Minnesota Funding Sources:

Minnesota passed emergency funding available to health care providers to support the costs to plan, prepare for, and respond to the COVID-19 pandemic. Currently there is a $150 million pool available. Applications are not yet published but should be available yet this week. More information can be found here.

In addition, the Minnesota Department of Employment and Economic Development (DEED) established a temporary Minnesota Small Business Loan Guarantee Program. DEED is not serving as the lender; rather, DEED is working with financial institutions and other lenders to issue the loans. The program provides an 80% guarantee up to a maximum of $200,000. Minnesota businesses with less than 250 employees are eligible. More information on the Minnesota Small Business Loan Guarantee Program can be found here.

Ultimately, practice financing options should be carefully evaluated. Physician practices must be sure to analyze program risks and opportunities, and evaluate strategic approaches for maximizing the use of loan proceeds.

Other Measures:

In addition to emergency funding options, practices could consider seeking a sizeable line of credit or loan to have cash on hand or within access. For some, the best approach may be to initiate a conversation with your bank and assess available options. Consideration should be given to the current state of your balance sheet and the ability to use hard assets as collateral. In the meantime, practices should do what they can to minimize expenses. This may mean furloughing employees and strategically paying bills to stretch reserves.

2. Coverage and Credentialing

Many hospitals and health systems are sorting through cross-coverage options. This will become even more critical as the demand for care increases and as medical professionals become infected and are placed in quarantine.

The Joint Commission allows the granting of temporary privileges to meet important patient needs — including emergency privileges (where already credentialed providers are allowed to practice beyond the scope of their current privileges as a life-saving measure or to prevent serious harm) and disaster privileges (where qualified professionals who are not credentialed at a hospital receive privileges to deal with a surge of patients in an event like the COVID-19 pandemic). Providers that are interested in seeking or providing additional coverage should review medical staff bylaws and emergency/disaster management policies to determine whether the granting of temporary privileges is allowed.

At the same time, practices must ensure that any cross-coverage solutions do not put the physician practice in breach of existing arrangements. Consider whether exclusivity or non-complete clauses are in place and, if so, whether these can be waived.

3. Physician Compensation

Surgeons and other proceduralists have been significantly impacted by the COVID-19 pandemic. The U.S. surgeon general asked hospitals to consider stopping elective surgeries to avoid using medical supplies, and the American College of Surgeons and U.S. Coronavirus Task Force made similar statements. In Minnesota, the Governor issued an Emergency Executive Order that placed an embargo on all non-essential or elective surgeries and procedures.

Physician practices that are faced with reduced productivity should consider whether agreements can be amended to provide for a guaranteed base compensation as opposed to work RVU productivity. Hospitals, systems, and clinics may receive emergency state or federal funding, putting them in a better position to support their physician practice partners. For those physician practices that are overworked, consider whether incentives and/or additional compensation can be provided to providers going above and beyond their standard schedules.

Of course, close attention must be paid when crafting any new compensation arrangement or amendment to ensure compliance with state and federal regulatory requirements. Although the regulatory requirements are complicated, federal and state agencies have issued a number of waivers that temporarily remove certain requirements and penalties, allowing greater flexibility during the pandemic. For example, on March 13, 2020, HHS Secretary Azar issued a national waiver that lifted sanctions for violations of the Stark Law, as CMS determines appropriate.

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The issues and options discussed above require careful thought and strategic planning. For more information about these strategies and available options, please contact Jennifer Reedstrom Bishop, Julia Reiland, or your regular Lathrop GPM contact.