

Hospice Insights: The Law and Beyond



Episode 9: COVID-19 Hospice How-To Series: \$30 Billion in Relief Funds Made Available but Strings are Attached!

April 14, 2020

Speaker	Statement
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Meg Pekarske

Hello! Welcome to “Hospice Insights: The Law and Beyond,” where we connect you to what matters in the ever-changing world of hospice and palliative care.

COVID-19 Hospice How-To: \$30 Billion in Relief Funds Made Available, but Strings are Attached. On Friday, April 10, the government began disbursing \$30 billion in relief funds directly to Medicare providers, including hospices. The use of those funds, however, is subject to a number of terms and conditions that raise significant questions. Failure to adhere to those terms and conditions could require the hospice to return those funds or could result in liability in future audits or enforcement actions.

In this episode, Meg and Bryan analyze those terms and conditions and provide a framework for how hospices should begin analyzing these requirements and establishing systems for compliance that mitigates against those risks.

The world is fast and furious here, so thanks for making the time to talk about these relief fund dollars.

Bryan Nowicki

Oh, you’re very welcome and we could probably have a daily podcast if we wanted to, to capture all the new information that’s out there. But we’ll spare the listeners from that.

This is a big one. This is a very important event that happened and it’s something that may take some providers a little bit by surprise once they



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dig into the details and see what's behind this \$30 billion of funds that has been released.

Meg Pekarske

And to set the stage here – and I think something that will be important for hospices to consider – is how this fits into the other funds they may be getting from the government. Whether or not that's your Medicare per diem payments. If it is, I've applied for a Payroll Protection Act loan. Have I also – under the Families First Coronavirus Response Act, if I'm getting payroll credits and all that stuff. There's a lot of moving parts here and I think more to come from us on these podcasts as we try to understand these terms and perhaps get more guidance from the government.

But I think while you, Bryan, and I wanted to have this conversation today is because these funds hit people's bank accounts Friday or today and I think it's important for people to take swift action in terms of – for hitting the pause, so to speak, in terms of what you should do now since you have this money. And it's a little bit of a hot potato because it's in your account and so you essentially have to reject it if you don't want it, but so – so let's start – because what I want to do today is to not give all the answers, because we don't know them, but talk about what's the framework that you have to consider.

So, first, Bryan, why don't you set the stage of what these funds are, where they came from, and what these terms and conditions that we're going to be referencing throughout today's podcast, what they are.

Bryan Nowicki

Sure. Well, these funds are part of the CARES Act, which we've talked about before on this podcast. In the CARES Act, there was \$100 billion of relief funding allocated (to healthcare). The funds that started hitting Medicare providers last week and this week is the first \$30 billion of that. So those are being allocated pursuant to a particular formula that's laid out at the U.S. Department of Health & Human Services (HHS) website. There's \$70 billion more to come at some future time. It may be under different rules for different persons, but at least for now we know there's this \$30 billion. And I did some rough math to try to figure out how much can a hospice expect to provide and you can check to make sure you're getting the allocation that you're supposed to get by going to the formula on the website. By my calculation, it's about a little less than a month's worth of revenue that you averaged in 2019. So that's what you should probably expect to get. When you get that payment, it's going to have a reference to HHS payment. It's going to come from a place called Optum Bank, which is the private entity that contracts with the government to be a clearinghouse for all of those payments. So if it's an unusual payment source – and we've gotten calls from clients saying, "I



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have no idea what this money is for or what it's from" – it's the relief funds. The HHS payment from Optum Bank, that's exactly what this is.

It comes with some strings attached, though, and if you dig into that payment and how it's publicized by HHS, you'll see that there's a set of terms and conditions that you can link to, to find out what you need to do in order to retain and use those funds.

One of the first things is an attestation requirement. So what the government expects is that within 30 days of your receiving those funds, you will need to obtain an attestation, which is going to be available at the HHS website. And sign that attestation confirming that you will use those funds or your use of those funds will be consistent with the terms and conditions. If you don't sign that attestation, they're going to assume that you agree to those terms and conditions anyway. If you don't think you're going to use those funds, then there's a process to return those funds to the government, either if you don't qualify for them in your view or for some other reason. There's a way to return those funds to the government.

But that's all kind of setting up the context around the terms and conditions that we can kind of begin getting into as they set that up. But just be aware, there's a lot of – even before you get to terms and conditions – there's some paperwork, some documents that have to be done just to make sure you're getting these funds and can retain them.

Meg Pekarske

Got it. And I think – and we're recording this on Monday, April 13, and so we think that that attestation language is going to be available on the website that you referenced here very shortly. And so we don't know exactly what that's going to say, but it's going to say something like you agree to these terms and conditions.

[See our April 16 [Alert](#) regarding terms and conditions]

And we're not going to read those, obviously, on this podcast. And we're going to be releasing a hospice tool with this podcast that breaks down sort of the construct we talked about today.

I want to focus on sort of what is it that you can use these funds for. But even before we go there, you've got to think about do you want to keep these funds and, if so, you're going to have to sign this attestation, but maybe before you do anything, try to get these in a segregated account.

Our leadership of our firm's healthcare practice met this weekend to strategize and brainstorm about this and I think this is a really important nugget of – create a segregated account from the get-go so you can track



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this money more clearly.

Bryan Nowicki

Absolutely. That was the very first reaction a lot of us had to these funds, is set them aside in a separate account and as we go through some of these terms and conditions and the documentation requirements that come with it, you'll see why it makes sense to do that. Because you want to be able to say here's what I did with each one of those dollars. Here's where it went to. Here's why it was eligible to go to that purpose. And that way, you can have that paper trail left behind in the coming months or years. The reason that's important is because this is going to be subject to an audit and for some providers, they'll need to provide – submit quarterly reports about their use of those funds. So you need to leave that paper trail. Assume it's going to be audited by the government to confirm that you followed these terms and conditions.

The risk that you're trying to mitigate against is the government several months or years from now saying you didn't document the appropriate use of those funds so you're going to have to pay them back. Or worse, maybe they think there was some intentionally inappropriate use of those funds. And if you didn't document it well, you're not going to have that paper trail to demonstrate the appropriate use of those funds, so you might be leaving yourself open to an accusation that there's a false claim involved here, whether it's through a government investigation or an internal whistleblower who sees how these funds were used and doesn't agree with them and decides, you know, they want to alert the government that there was a problem with these. So the segregated account is going to be critical to allow the documentation of the use of those funds to flow from that.

Meg Pekarske

Yeah. And I think that folks always think lawyers are the wet blanket and, you know, glass half empty, but I do think that the amount of money coming from the government, and everything that comes out generally says you can't double dip, that there's so much money coming out and they're really trying to provide relief, that there could be clean up on the back end because there is just so much money. And the thing is, this is very complicated, too, about how these different moving parts work together. And so I think, you know, both recognizing that yes, this is great we have this money, but then being prudent and really trying to understand how this works together. Because there is some back end risk here. And even if the government doesn't choose to go after you, as you said, perhaps a private whistleblower might do that.

So then it talks about what we can use these funds for and I'll say it generally is COVID-related expenses and revenue losses. And why don't you break that down for me, Bryan, about the types of things that they're



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saying you can – you know, qualifies for use of this money. Now we're not talking about specific expenses, but we've been talking about them as a sort of threshold requirement. So why don't you walk us through that, Bryan.

Bryan Nowicki

Sure. Yeah, I think there's really four – at least four significant threshold requirements. One of them is really what's your provider type, what are the qualities of you as a provider? Being a provider that billed Medicare in 2019, you're not terminated from the program – a lot of those are going to be black and white. It's going to be yes or no.

One that's a little fuzzy is that you have to currently provide diagnoses, testing or care for individuals with possible or actual cases of COVID-19. So as a provider, you have to ask yourself, do you fall into that category? It seems like a very broad category. You're providing care for individuals with possible or actual cases or because of the nationwide lockdown here, is everybody a possible person with COVID-19 given that? It seems like a pretty broad gatekeeper rule here. So that's a provider-centric threshold requirement.

After that, you get into some payment-specific threshold requirements where you're looking at the actual payment itself, not the provider type (the hospice).

So I think there's really three of them that are payment-specific. The first one is that you – per these terms and conditions, you have to commit that the funds will be used to prevent, prepare for or respond to coronavirus. So, again, very broad language used there as you're identifying a particular expense, a cost, expense or a loss. Is it somehow relating to the prevention, preparation and response to coronavirus. That's the first gatekeeping – or that's the second threshold rule, the first payment-specific one.

After that, you want to commit that the funds are used only for healthcare-related expenses or lost revenues that are attributable to coronavirus. So as you're going through expenses, you've got to ask yourself the question – is this healthcare related that's attributable to coronavirus? Is this a lost revenue attributable to coronavirus? If you can answer yes to either of those questions then, you know, so far, so good. So you're the right provider type, it relates to preparation, prevention or response to coronavirus. It's either healthcare related or lost revenue attributable to coronavirus.

The fourth threshold question is you have to confirm that you're not going to use the payment to reimburse expenses or losses that have been



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reimbursed from other sources or that other sources are obligated to reimburse. You can't use these funds to cover funds that would have been covered anyway by some other source.

And that's really the extent of the language they have about those four thresholds. And going through them, you can see, from a lawyer's perspective anyway, boy, there's a lot of gray area and wiggle room in those threshold requirements that we can play around with as lawyers and providers, but maybe the government is going to take a much more strict view of it when it comes time for them to audit these. So this is where the caution comes in. You've got to carefully evaluate each one of those thresholds and put each potential covered expense under the microscope with those and make sure you're going to be confident that it's going to be covered.

Meg Pekarske

And I think that Bryan is exactly right and it is – I think as we've been evaluating this, and will continue to do so and I expect have a follow-up podcast on this – think about the buckets of expenses and lost revenue people have and where they might fall on the continuum. Because, you know, there's probably a whole lot more you could argue might be – you could allocate here, but ultimately there may be some business decision as to what you feel comfortable doing. Because at the end of the day, you need to be able to defend this and have the documentation to do so. And I think, too, I just got off a call about potential additional funding for personal protective equipment (PPE). So PPE is one of these costs – additional costs. Your expenses for it might have increased because it's like the per-unit costs have gone up, your volume has gone up, other things. I don't know exactly what this PPE funding will look like, but again, if you're getting funding from elsewhere to cover this expense, you know, the whole – what you just got done saying is, is it being reimbursed by someone else? So I think that's an important consideration. As well as sort of these SBA loan issues and what-not.

Bryan Nowicki

Yeah, and I think another emerging question that's going to require more attention is, what if it's a choice between these relief funds or a loan? The relief funds are ideally free money, if you follow the terms and conditions. The government isn't expecting a repayment of those. Whereas a loan, you know, maybe it will be forgiven, but maybe not. Maybe it will have interest attached to it. So if you have something like this potential future Paycheck Protection Program (PPP) reimbursement program or expense covering, if that's a loan of some sort, wouldn't you be better off using free money through this relief fund than PPP loan money?

Right now, like you had mentioned, we don't have all the answers and



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the sparse language on these terms and conditions doesn't give a lot of guidance. The government may come out with more guidance or as these additional programs roll out, they might show how they relate to one another.

But right now, we have to make the decisions based upon what we do know and what we can know and a lot of that depends on making reasonable decisions that are backed by kind of healthcare-related and business judgments that are sound and make sense, and every step of the way, documenting it. From how you met those four threshold requirements through how you tracked the use of the funds.

Meg Pekarske:

You may attest that you, you know, would plan to use these funds in this way, but you may end up saying yeah, I had expenses that fall into these buckets; however, not equivalent to the sum that I received and you'd be refunding some money back. I mean, I think there is an opportunity to take a breath, so to speak. I think why we wanted to get on a podcast is, you want to set this up the right way and segregate it and begin looking at these questions sort of right away, because you don't want to get down the road and use this money and then think about this later. You want to be doing it contemporaneous with your use of those funds so, as you said, you can document this accordingly.

Bryan Nowicki

Yeah, I think as tempting as it is to make immediate use of these funds, especially given some of the cash flow and other financial problems that coronavirus, COVID-19, has caused. Meg, I think you mentioned early on kind of "hurry up and hit the pause button."

Meg Pekarske

Yes.

Bryan Nowicki

It's a good way to put it. This is exciting news. This is promising news. But hit that pause button, make sure you do it the right way so it can be good news in the long term. And that means being thoughtful and careful about it.

Meg Pekarske

You know, and I think some of the expenses that people are incurring right now might be – more clearly fall within these buckets, that might require less deliberation than others. But again, I think having our team of people from the get-go that are evaluating this and, even in large organizations, having a team so you can provide consistency to this. Because obviously if you have a lot of different provider numbers and tax IDs, I mean, it's a lot to keep track of and, you know, you don't want to have one program doing one thing and another program doing another thing. And so I think consistency in how you're interpreting these things and applying them and then, of course, documenting them. Which, I



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think as we move to the documentation piece – and the documentation requirements refer to some provisions in the law that are not things that you and I routinely look at, Bryan. Because what appears to apply to these funds as it relates to documentation is if you got a grant from the Department of Health and Human Services, would documentation requirements attach to those? Plus there's some reference to accounting principles and so I think bringing your auditors in or who does your accounting and cost reporting, I think will be really important to help you evaluate some of these questions. And I think some of the threshold questions, but also as we get into documentation. From an accounting standpoint, does this overlap with, you know, what we're reporting elsewhere or getting reimbursed for.

So why don't you walk us through broad-brush documentation requirements for, you know, different categories of expenses and revenue losses?

Bryan Nowicki

Well, sure. And just building off of a point you just made, this I think needs to take a multi-disciplinary approach. Attorneys can help in terms and conditions, but what is healthcare related, having clinicians in on that. Executives. Leadership at the hospice helping to define what has been the result of the coronavirus from a business standpoint. Accountants. Cost-reporting folks to help make sure that all of this can be tracked and allocated and described in an appropriate and reimbursable way. So for some of the complex ones, you might need to engage that full team to get through it.

But in terms of the documentation requirements, Meg, you know it does refer to some regulatory provisions that I am not – it's not the kind of work that I go in and out of every day. But it's more akin to what's involved in cost reporting, what kind of documents are created to withstand a future audit. So, you know, we can talk about generally what are the kinds of expenses that you can account for. Or that maybe there's specific examples of expenses that need to be reported in a particular way to satisfy a cost requirement or cost-reporting requirement.

So I guess that's what I would say about this is, you've got to engage your cost-reporting accounting people so you know you're documenting it the way that these government regulations would require.

Meg Pekarske

And I think that, you know, for hospice cost reporting, unlike other Medicare providers – because obviously these funds went out to all these different Medicare providers – our cost report, our rates aren't adjusted based on our cost report, but we are paid a per diem that says you're supposed to cover everything related to the terminal illness and related



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conditions and so, you know, I think this idea of what you're already getting paid for, you know, both in terms of wow, if our costs for PPE went up, you know, 10-fold – our costs report and saying, you know, our expenses went up 10-fold isn't going to adjust the amount of money that we get. And so I think the cost report is something that's important to understand in the mix here, but isn't as perhaps determinative of whether or not we get other payment as, you know, providers who actually – there is some type of true-up in terms of expenses and your rates and what not. So there could be some general expenses related to actually caring for COVID-positive patients. There could be specific costs and this could be, you know, staffing, potentially, needs, but I guess what other ideas on the specific costs are things that are jumping out at people, Bryan?

Bryan Nowicki

Right. Well, I think what are the expenses relating to telehealth? Telehealth has become increased in usage and allowed, so how have those – has that increased costs? Are there more kind of hard costs in terms of technology? Has it cost more in terms of personnel cost? You know, what has that increase in cost been? So I guess the technological type items.

We've had people encounter more HR issues relating to this, where they're dealing with employees who are exposed and now they have to work with HR professionals, maybe HR counsel, to figure out how do we deal with the exposed personnel in terms of treating patients or caring for patients. How does that effect that whole landscape?

So lost revenue might be a source – might come from a number of sources. So for example, if you're going to have a fundraiser and that's been cancelled because of COVID, is that lost revenue that can fall into being reimbursable by this fund?

A lot of hospices may have a retail or resale shop. And if that had to be closed to meet with government guidelines on social distancing, what about that lost revenue?

Meg Pekarske

And I think, Bryan, what we've been gathering as sort of examples from folks – because I don't think you and I know the answers to those questions about, you know, I have to close my shop, I had to cancel the fundraiser, does that constitute lost revenue? My census went way down, does that mean that there's lost revenue? Or my inpatient unit is way down. I think those are things that you and I want to give more consideration to, but I think in terms of, you know, if I were running a hospice, I think starting now to think – to ask these questions and put together your list so that you can start refining your thinking on this and then bringing in, as you said, your multidisciplinary team as you evaluate



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this. And perhaps we'll get additional clarity from the government on some of these points. But right now, I think getting things on the table early for consideration and then, so – because, again, you need to be contemporaneously documenting these things. And I think based on the conversations we've been having so far, I think there's a broad continuum. Some much more clear than others would, you know, be covered by these funds. So I think casting a wide net for your evaluating all of your expenses and losses and using this as a filter and then making, you know, sound business decisions that are supported by accounting principles.

And so there is a reference, Bryan, in the terms and conditions to these procedures, these written procedures you should have. Can you speak to that a bit more?

Bryan Nowicki

Sure. So what you'll need to do is, you'll have to have written procedures to show that the costs meet the principles.

Meg Pekarske

So what I hear you saying, Bryan, is that it is important to apply these filters and then be able to document your decision making and do so in a manner that meets accounting principles. Because I think in times like this where there's not a lot of guidance, what are some other things you can relay to help support your determination that these are indeed attributable lost revenue or expenses?

And so, as with everything, I feel like every podcast we say documentation is really critical and I think is going to be an area, too, where documentation is critical, but more maybe from the finance side than the clinical side here.

So Bryan, with all of this being said, and I think this is where we started, very good news that there's a recognition that healthcare providers are having to step up to the plate and incur a lot of expenses and lost revenue and all that stuff. So that's really good.

But, I guess, where do you leave things here, Bryan? What should people do now?

Bryan Nowicki

Well, I think as you had mentioned, there is time to do this evaluation. You have the funds. You have at least 30 days, and probably more, to make sure you're looking at your expenses, at your losses, that you're progressing through the threshold requirements, making sure you can document whatever you hope to get reimbursed for in the manner that these terms and conditions require. And then once you're comfortable that all the documentation is in place or can be put in place, then you can start disbursing those funds. There's no requirement that the funds be



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used in a specific amount of time. Now it may come down the road that they're going to ask for that kind of an accounting, but right now, it's funds that you have. You can evaluate. You can be thoughtful about applying them in the right way after you've documented it.

And Meg, I agree with you. We do talk a lot about documentation and I think that might just be the subject or the result of hospices being audited regularly. And all Medicare providers being audited on the medical front, on other documentation and now, more specifically, on the use of these kinds of funds. And the key to having a successful audit is often that great documentation. So you'll be doing yourselves a big favor by documenting now and not running into problems down the road when the government decides to figure out what happened to that \$30 billion and how effective of a program was it.

Meg Pekarske

Yeah. So I think that's exactly right, Bryan. And I think more to come on this, but I think that at this point in time, hospices are getting that sequestration money back, so that's going to be hitting. And we have these funds. And so it is prudent, Bryan, like you said, of segregating these funds in this other account and not, you know, mixing them with your general operating funds so you can do this type of analysis and track it, you know, separately from the get-go. And at the end of the day, you may very well be refunding some of this money if you don't use all of it. And there's not a lot of discussion – the terms and conditions are short but meaty, but don't get into how you would refund these funds, other than obviously if you don't sign the attestation, they'll be taken away from you. So I think there will probably be more guidance that will come out on that side.

Thank you, Bryan. This is a very helpful conversation to get people started on the right track in thinking about this. And as leaders of healthcare organizations, critical to develop that team now and be aware of this and sort of set the stage and then work through these issues over the next weeks to come.

Bryan Nowicki

Well, yeah, exactly. Start getting into the right mind set to make these decisions and then we'll be there with further guidance and obviously always available to walk you through fact-specific scenarios. Because we expect there to be a lot of unique situations coming up from this. So hopefully this framework has been helpful, but really, the work is going to be done on a case-by-case analysis of each particular expense or loss. And we're here to help throughout all that, throughout that entire process.



Speaker**Statement****Meg Pekarske**

That's a great point. And Bryan, we'll be publishing with the podcast our framework that we walked through in today's podcast so people will have that as a resource, as well as some other attachments. And, as always, they can go to the Husch Blackwell COVID toolkit page that will continue to have oodles of information on COVID and the daily changes in all aspects. And what is fantastic about our firm is that we do have an interdisciplinary approach to practicing in the healthcare space. So we have the labor and employment perspective and we talked to Tom O'Day last week about Families First Coronavirus Response Act and then we have people that are spending all of their time looking at the PPP and what not and so we're able to brainstorm these things from multiple different perspectives. Which ultimately I think is what needs to be done. Because all these funds, you're not going to be able to claim twice and so I think that that's something that we as a firm will be continuing to contemplate about how these – all of this money, you know, how it may overlap and how you need to prevent any double payments.

So anyway, Bryan, I really appreciate your time on short notice jumping on this and doing this podcast. I think it will be helpful to our listeners. And as always, if you have thoughts and ideas about our podcast, additional things you want us to cover, we'd really welcome that.

Well, that is it for today's episode of "Hospice Insights: The Law and Beyond." Thank you for joining the conversation. To subscribe to our podcast, visit our website at [HuschBlackwell.com](https://www.huschblackwell.com) or sign up wherever you get your podcasts.

Until next time, may the wind be at your back.

END OF RECORDING.

