

## MAKING TOUGH DECISIONS

# Managing the practice's employee costs

As the COVID-19 pandemic continues, physician practices are likely to confront unprecedented operational and business challenges. Specifically, despite the essential nature of medical care, many physician practices have experienced a decline in revenue because of postponed or canceled office visits and elective procedures. For practice owners, difficult decisions regarding cost management are likely to be required as the emergency continues. The largest cost of physician practices is often labor cost, which includes costs related to employee wages, benefits, payroll and related taxes. This guide outlines key options for physician practices to consider in order to control these costs, including redeployment, outside activities, compensation changes, workforce reduction, benefit modifications, legal compliance and stimulus relief considerations. The American Medical Association has additional resources to help practices navigate COVID-19 [here](#).

## Modifications to owner costs

When a business is facing financial challenges, how owners handle their own compensation is critical. Employee morale and loyalty can be negatively impacted if employees are being subjected to furloughs and pay reductions while owners continue to compensate themselves at pre-COVID-19 levels. Even though non-owners typically do not receive information about owner compensation, whether and the extent to which owners are making sacrifices could become known and/or otherwise be a source of friction.

In addition to considering whether to reduce salaries or production-based pay, owners should consider hold-backs and/or temporary decreases to or suspension of draws. Prior to making any such changes, governing documents and applicable policies, relevant employment agreements and applicable laws should be consulted to understand the necessary steps for modifying owner compensation practices. It is likely that such changes will require emergency modifications, board and/or owner approvals. The AMA's [financial checklist](#) for keeping your practice in business addresses other key business considerations.

## Redeployment within the practice

One option for practices trying to manage depleted cash on hand from reduced revenue is to redeploy clinical staff, either shifting to another service line or to a different modality, such as telemedicine. Redeployment allows the practice to address new needs, such as demand for COVID-19 related services, while also keeping the practice's clinicians on payroll and eligible for benefits. Most physician practice employment agreements allow the practice to define the employee's duties, meaning that the duties may be modified at the direction of the employer, if needed.

Here are four examples of redeployment strategies:

**Practice 1:** A large, multi-specialty practice is experiencing markedly reduced volume of specialty visits and procedures due to COVID-19. The practice redeploys its specialists to perform COVID-19 primary care services, which the specialist is also qualified to perform as a result of their medical training.

**Redeployment strategy:** While the decline in revenue for specialty services is partially mitigated by the redeployment, any production-based compensation formula previously used to compute the specialist's compensation no longer reflects the value of the specialist's services. Accordingly, in addition to modifying the duties of the specialists, the practice should make any needed amendments to the compensation provisions of employment agreements and/or any compensation policies. Given the extreme circumstances caused by the COVID-19 pandemic, the latter may be the more practical approach.

**Practice 2:** An independent primary care practice has a significant loss of revenue during the COVID-19 pandemic due to cancelled annual wellness visits, vaccine administration, and a major decline in routine sick visits. The practice engages a telemedicine vendor, at a significant cost, to allow its clinicians to see those patients who do require immediate care via a telemedicine visit.

**Redeployment strategy:** The practice does an assessment of telemedicine reimbursement by relevant payers in their market and ascertains that while some payers reimburse for covered telemedicine visits at the same rate as an in-person visit, other payers only pay a fraction of the in-person rate. First, the practice contacts their payers to discuss their payment policy and urge an increase to the payment levels for telemedicine to the in-person visit level. (Note: The AMA is actively engaged with payers to urge adequate reimbursement for telemedicine visits.) If this differential is not readily resolved, the practice may need to review and adjust the compensation of the practice's clinicians to account for the reduced patient volume, infrastructure costs of engaging a telemedicine vendor, and payment differential for telemedicine visits. The practice should communicate these realities clearly to its clinicians, update any compensation policies, and/or amend any employment agreements that require modification. See the AMA's [quick guide to telemedicine](#) for additional information.

**Practice 3:** A physician-led Accountable Care Organization (ACO) that employs care coordinators and data analysts is considering redeploying those staff to help manage new operational challenges associated with COVID-19, including management of in-home visits and supplies, patient portal messaging, and new remote patient monitoring technology. At the same time, the physician-led ACO is struggling to finance the costs of new vendor arrangements to enable this redeployment.

**Redeployment strategy:** The physician leadership of the ACO should communicate its modified care design plan to staff and assess any associated modifications related to quality and value-based measurement. Relatedly, staff compensation should be reviewed and potentially modified, and other potential sources of funds to finance unexpected operating costs, such as telemedicine, should be explored.

**Practice 4:** A primary care practice is experiencing low revenue due to social distancing and a Governor-ordered statewide "stay at home" order. While COVID-19 cases and the corresponding demand for services remain low in the practice's local market, the practice is in the same state as a nearby "hot spot" where there is a significant need for clinicians to run testing sites and triage COVID-19 patients.

**Redeployment strategy:** The practice enters into a professional services agreement with a major health system with facilities in the hot spot area. The practice then approaches its employees and several of the practice's clinicians to seek volunteers to help staff the testing site on a defined schedule. The practice receives payments from the health system and negotiates a special compensation rate with its employees. As part of the arrangement, the practice's clinicians assign any right to payment for professional services to the health system, and the health system operator of the testing site agrees to provide necessary personal protective equipment (PPE) for use while the clinicians are engaged in their services. The practice confirms with their professional liability and other carriers that the practice's coverage will apply while the clinicians furnish services under the professional services arrangement.

**Note:** The practice was also offered, but declined to enter into, a similar arrangement to support a testing site operated by an affiliate of the same health system in an adjacent state. While the arrangement provided financial opportunities, the practice declined to enter into a professional services agreement due to a number of regulatory and operational issues, including professional licensure in the adjacent state and insurance coverage (e.g., professional liability, workers compensation and others). However, because one of the practice's physicians was licensed in the adjacent state, the physician, practice and health system agreed that the physician could furnish services in the adjacent state as a part-time employee of the health system, but only so long as the physician was covered by the health system's professional liability, workers compensation and other applicable policies.

In addition to the redeployment strategies above, practices may also want to consider redeploying staff to tend to administrative back-log, catch up on CE/CME, advance quality improvement initiatives, and other practice-related activities that bring value to the practice and are likely to ensure the practice is prepared to emerge better positioned after normal operations resume.

### Support of outside activities

Some practice clinicians and staff may wish to provide services outside of the practice, either to supplement declining compensation or to meet critical patient care needs within the community. The practice should anticipate these requests and consider how best to respond, with the following elements in mind:

- **Communicate the policy.** Before the COVID-19 pandemic, many physician practices utilized contract provisions or adopted policies outlining limitations or expectations regarding outside services. In the context of COVID-19, practices may wish to loosen such limitations for financial or other reasons, or to address the issue for the first time. A practice's approach to outside activities should include a policy that defines expectations and approval procedures that employees must follow, including whether approval for activities during the COVID-19 pandemic will continue in effect afterward. Once a new or revised policy is established, compliance should be required and enforced. A clear policy at the outset will help the practice monitor and manage the impact of outside activities on employee productivity and help avoid challenges to returning to normal staffing and operations afterward. See the AMA's [volunteer guide](#) for additional information on efforts in your market.
- **Be consistent.** The practice should apply its outside activities policies in a consistent manner. This will enable the practice to avoid an appearance of permitting a more flexible policy for some employees than for others and will help avoid one-on-one negotiations of the policy.
- **Double-check liability coverage.** Practices should ensure that physicians and other clinicians such as physician assistants, nurse practitioners and others, have proper professional liability coverage for any outside activities (i.e., that the other practice or the hospital is providing such coverage). Further, practices should ensure that the physician and the third parties are clear and are making it clear to patients that the physician is not performing outside medical services on behalf of their primary practice. Moreover, the practice should clearly instruct the physician and other clinicians that the outside activities cannot interfere with their availability for and ability to deliver care for their primary practice.

### Furloughs and terminations

Physician practices may consider both employee furloughs and terminations to temporarily or permanently reduce employee costs.

- **Furloughs.** One cost-saving measure available for physician practices is a furlough of some employees, such as those who are currently non-essential. A furlough is a temporary unpaid leave of absence (sometimes termed a temporary layoff due to nuances in state law) with a set end date. Generally, furloughed employees are eligible for unemployment insurance benefits and retain employer sponsored insurance benefits (potentially at the employee's cost) during the furlough. A furlough is different from a termination or reduction in force because the employee remains employed and is expected to return to work at the end of the furlough. Accordingly, one benefit of a furlough is that it does not trigger termination provisions, such as payment of a severance or vacation benefits, which would otherwise be required under the terms of an employment agreement or wage laws. Indeed, subject to state law, some practices may not allow employees to access paid time off (PTO) or vacation during a furlough to reduce expenditures while other practices may want employees to use PTO and vacation to reduce balances that would have to be paid out if the employees have to be terminated later.

Whether an employee must be paid during a furlough depends on how the furlough is structured. Most often, if a furlough is in increments of at least a week, the compensation provisions of an employment agreement may not require the employee to be paid. Some physician practices may want to consider a partially paid furlough (through PTO or vacation or other payments) as a method of encouraging employees to remain with the practice. If the practice retains employees through the furlough, it will be less difficult to re-establish the full staffing that will be needed to provide care to the patients who were unable to pursue or did not want to seek treatment during the COVID-19 emergency. Further, a practice that can retain employees will avoid the time and expense of finding new employees and the loss of productivity when a new employee joins the practice.

When implementing a furlough, practices should clearly communicate, in writing, to affected employees the details of the furlough. This communication should explain that furloughed employees, including furloughed physicians, are not permitted to work or be at a practice's facility unless specifically directed to do so by the practice (in which case they will be paid); if the practice will permit physicians to seek other work during the furlough, it should explicitly state this and any requirements for doing so; explain whether paid leave benefits are or are not available for use during the furlough; explain which benefits eligible employees remain entitled to receive; and identify an end date or anticipated end date (depending on state law) for the work furlough. In some circumstances, a practice may need to make it clear that the practice may extend the furlough or implement another furlough. If a furlough is partially paid, the communication should explain what limited duties may be required of furloughed employees and explicitly state that the pay is intended to cover performance of such duties.

**IMPORTANT:** Before announcing and implementing a furlough, it is important for physician practices to seek legal advice. State laws on unemployment benefits, final paychecks, and notice of layoffs vary and the language used to describe a furlough must be carefully written to avoid accidentally triggering state law requirements that undermine the purposes of the furlough.

- **Terminations.** As indicated above, physician practices looking at termination should consider that furloughs may leave physician practices in a better position to operate after the COVID-19 pandemic than terminations, by keeping employees connected to the practice and willing to return to work at the practice. In addition, possible benefits under the Payroll Protection Program might not be available in the event of terminations (see section below on Stimulus Relief). While employees on furlough are allowed to seek other employment, as indicated above, physician practices should consider that employees who are terminated are likely to seek new employment, whereas the benefits a physician practice offers during a furlough may make employees less likely to seek employment with a competitor. Below are guidelines for physician practices that pursue termination.

When practices are faced with the difficult situation in which termination decisions appear necessary after all alternative approaches are explored, practices should first consider and review relevant employment agreements, policies, and handbooks for provisions related to and implicated by termination. Violations of employee agreements and other policies may result in the employee seeking financial damages or seeking relief from burdensome contractual limitations (like restrictive covenants) or other redress. To avoid this consequence, if a practice needs to deviate from the relevant employment agreement, a practice should obtain an employee's agreement to waive the contract provisions. Such agreements typically are part of a separation agreement that includes consideration from the practice to the employee, like severance. In addition, practices should seek legal advice prior to announcing and implementing termination decisions.

Practices may wish to keep staff on unpaid garden leave (meaning the person is an employee but no work will be performed) for a period of time while they search for new employment. Legal counsel should be consulted before offering garden leave to understand what impact garden leave would have on employee benefits.

- **Restrictive covenants.** Physician practices pursuing furloughs or terminations should prepare to address questions about enforcement and waivers of restrictive covenants and liquidated damages provisions. These clauses address whether an employee may solicit patients and/or fellow employees while still employed by the practice and following the end of their employment, and under what circumstances an employee may engage in a competing practice. State law may prohibit or limit enforcement of such provisions. Further, employees may be better able to weather financial difficulties caused by the COVID-19 pandemic if they are able to find new employment or supplement their incomes. Accordingly, physician practices should determine whether they plan to enforce such clauses or waive them due to the present unique circumstances. In making these decisions, it is important for the practice to keep in mind that an employer's past history of enforcement is a factor in court decisions about whether to enforce such provisions. See more AMA discussion of restrictive covenants and patient care during a pandemic [here](#).

### Teleworking options

Physician practice employees may wish to telework (i.e., work from home) during the COVID-19 crisis. For non-physician salaried employees, the FLSA requires that teleworking individuals still be paid their entire salary, even if they are working fewer hours. Physician practices should seek guidance before transferring a salaried employee to hourly pay due to the risk that the employee will lose their FLSA exempt status, which results in different employer obligations, such as overtime payment.

When implementing a teleworking protocol, practices can track and evaluate productivity by requiring employees to accurately record the amount of time worked. Likewise, practices can monitor electronic indicators, such as when an employee logs in and how much time is spent in certain platforms.

### Benefit structure and alternative cost-cutting strategies

Additional cost-cutting strategies include making thoughtful changes to existing benefit structures, such as reducing or suspending regular employer benefit plan contributions (e.g., retirement plan contributions or matching). Here are some issues to consider:

- **Is a plan amendment required?** Before making changes to a plan, physician practices should determine whether the plan needs to be amended for a change to occur. Regardless of whether an amendment is required, physician practices must adequately communicate the change to plan participants by explaining what changes are occurring, why they are necessary, and when full matching is anticipated to resume. While plans with only a discretionary employer contribution do not require an amendment, for non-safe harbor plans with fixed or non-discretionary matching, the plan sponsor should pass a resolution regarding the contribution change, notify participants, and adopt an amendment modifying the contribution formula.
- **Do safe harbor plan rules apply?** For safe harbor plans, which require a minimum level of matching contributions to avoid nondiscrimination testing, contributions can only be suspended during the plan year if: (1) the safe harbor notice indicates that the plan may be amended to remove or reduce the safe harbor contributions during the plan year; or (2) the employer is operating at an economic loss for the year. Additionally, employers must give participants a 30-day notice before reducing or suspending contributions and if the plan forfeits its safe-harbor status, then it must be amended to require annual nondiscrimination testing.
- **Will extended tax deadlines help?** If a retirement plan includes profit-sharing contributions, physician practices heavily impacted may choose to cut back or delay profit-sharing contributions. For practices delaying a profit-sharing contribution, the contribution can be made and claimed as a tax deduction in 2020 up until the due date (with extensions) of their 2020 corporate federal tax return. Taking advantage of these extended deadlines may also assist practices still in recovery from the COVID-19 crisis.
- **Does the existing benefits structure allow for flexibility?** Physician practices should additionally consider the implications and practicality of making temporary emergency modifications to compensation plans related to the percentage of guaranteed compensation and the percentage of variable, incentive compensation, such as that related to productivity, service quality, and clinical quality. For any incentive-based compensation, including bonuses, physician practices should review plans to determine whether the owners retain appropriate discretion to make adjustments, change performance metrics, or suspend the distribution of bonuses during the COVID-19 emergency. Similarly, physician practices can seek to implement deferred or reduced compensation plans to former owners during the COVID-19 crisis to increase current cash availability.

### Special considerations for practices with management services agreements

Practices that have entered into a management services agreement, or similar arrangement with a third party management services organization (MSO) or similar entity that manages the non-medical aspects of operating the practice should review the management services agreement and any other agreements in place with such third party management entity. Consider seeking guidance from legal counsel about available options and how to address provisions of such agreement(s) that may impact the decision-making of the practice with respect to any of the options referenced above.



### Legal compliance considerations

When making any employment decisions, it is important to consider how various state and federal laws impact and govern the employment relationship. Some key laws physician practices should consider when making employment decisions include:

- Federal and state laws prohibiting discrimination based on age, race, sex, disability, and other prohibited considerations. [Here](#) the Equal Employment Opportunity Commission provides an overview of federal discrimination and retaliation law.
- State wage laws and similar laws govern the amount, timing and payment of wages. Some states also require that employees receive a particular amount of advance notice of certain reductions in wages. When terminating employees, practices must ensure compliance with applicable laws governing when final paychecks are due to employees. The timeline for paying wages upon termination ranges from being due immediately at termination, to within a certain number of hours or days, to the next payday. For productivity-based pay, final compensation may not be due until after productivity can be determined or after payments are received from payers.
- Federal and state laws require that employers give advance notice (typically 60 days) to employees before a statutorily defined number of employees lose employment, including some furloughs. These laws typically include exceptions that shorten or eliminate the notice required in unanticipated situations and emergencies, but presently there is no explicit guidance on whether a pandemic, such as COVID-19, entitles an employer to invoke an exception. When determining notice obligations, physician practices must pay close attention to state laws to ensure that the state does not impose greater obligations than federal law. The U.S. Department of Labor (DOL) has published this [guide](#) for employer compliance for large-scale reductions in force.
- Federal and state laws govern health insurance availability after termination of employment or other loss of coverage under a group health insurance plan. Specifically, the Consolidated Omnibus Budget Reconciliation Act (COBRA) requires that group employer-sponsored health plans with 20 or more employees in a preceding year offer employees (and families) the opportunity for temporary continued coverage in the event of job loss or reduction in hours. The DOL has issued this [FAQ](#) regarding COBRA for employers. Note, however, that many states have adopted laws that provide continuation coverage for employees whose employers are not subject to COBRA.
- State laws govern the enforceability of restrictive covenants. Physician practices should consider whether applicable state law imposes prohibitions or restrictions on enforcement of such covenants because the activities of a furloughed or terminated employee could further determine the financial future of the physician practice.

### Stimulus relief

Depending on the size of a physician practice, the practice may be eligible for certain relief under federal law designed to assist small businesses and their employees that have been impacted by COVID-19. The AMA has prepared a [financial relief guide](#) which provides information about eligibility and application for federal stimulus funds related to COVID-19. The eligibility or retention of such funds may rely on employment decisions that the practice makes:

- **Payroll Protection Program (PPP).** Under the PPP of the CARES Act, physician practices with fewer than 500 employees are eligible to apply for forgivable small business loans, subject to certain conditions, if the practice retains employees at a comparable salary level prior to the COVID-19 crisis.

TIP: Recipients of PPP loans who are seeking the maximum forgiveness amount will have less flexibility in changing staffing and compensation for eight weeks following the funding of the loan. Any amounts that are not forgiven will be converted to a two-year loan (beginning at the date of the loan origination) with 1% interest.

- **Families First Coronavirus Response Act (FFCRA).** Under the FFCRA, employers with fewer than 500 employees (both full-time and part-time) must provide up to 80 hours of paid sick leave and up to 12 weeks of partially paid leave under the Family Medical Leave Act for qualifying employees experiencing specified impacts from the COVID-19 emergency. As an employer of health care providers, however, physician practices may exempt themselves from providing this leave. If a physician practice chooses to provide such paid leave, however, it is eligible for an equivalent payroll tax credit. Similarly, certain small businesses meeting certain standards may elect an exemption from certain provisions of the FFCRA related to the obligation to provide paid leave to an employee who requests leave due to school or childcare closures.

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