

## COVID-19

# Provider relief compliance checklist

Physician practices that are contemplating or have already received stimulus funding to help mitigate the financial impact of COVID-19 should be mindful of compliance issues related to the receipt and use of such funds. This checklist includes key considerations and best practices for physician practices related to COVID-19 provider relief funding.

This information is current as of June 18, 2020, and is subject to change as the federal agencies that oversee these programs continue to issue clarifying guidance. While American Medical Association encourages physician practices to use this checklist as a guide, how best to comply with the various stimulus fund requirements will depend on your individual practice situation. You should consult with your financial advisor or attorney about each of the options outlined here to avoid noncompliance that could lead to criminal or civil liability.

- Know the rules.** It is important to understand the rules of the road regarding COVID-19 stimulus funding eligibility and use before application for and after receipt of such funds. The [AMA Physician Practice Financial Guide](#) provides an overview of the COVID-19 federal stimulus programs available, including the U.S. Department of Health & Human Services Department (HHS) Provider Relief Fund, Small Business Administration (SBA) loans, Medicare accelerated and advance payments, and payroll tax-related benefits. The AMA also posts updated information regarding the [CARES Act/COVID 3.5: Loans and other financial assistance for physician practices](#) where you can see the latest developments. Be aware that these rules and related guidance change frequently, so it is important to stay abreast of current guidance.

## Snapshot: Paycheck Protection Program (PPP) Flexibility Act (the Act)

The [Act](#) includes key changes to the forgiveness portion of the PPP which is described in greater detail in the [AMA Physician Practice Financial Guide](#). The “covered period,” has been expanded from eight weeks to 24 weeks from origination or Dec. 31, 2020 (whichever date is earlier; borrowers who already have their loans can choose which timeframe to use). The Act also changes the payroll to nonpayroll cost ratio from 75/25 to 60/40. There are a number of changes to how forgiveness reductions will be calculated. The Act extends the date by which certain employees must be rehired from June 30 to Dec. 31, 2020. A new exemption from the loan forgiveness reduction was also established based on employee availability and an inability to return to the same level of business due to compliance requirements by HHS, the CDC and OSHA. Due to these changes, the SBA will need to release new guidance on forgiveness.

- Understand your liability.** Federal agencies are required to have mechanisms in place to ensure that funds disbursed are used by the recipient for the intended purpose(s). This general principle applies to well-established programs as well as emergency funding programs such as the COVID-19 stimulus packages. Misuse of COVID-19 stimulus funds may give rise to enforcement under the False Claims Act, as well as other enforcement actions by specific agencies responsible for oversight of the stimulus funds. In addition, the HHS Office of Inspector General (OIG) also has oversight responsibility for HHS distributed stimulus funding, such as the HHS Provider Relief Fund and the Medicare Accelerated and Advance Payments program.

### Snapshot: Liability under the PPP

As with any loan program, determining (and certifying) that your practice is eligible to participate is an important first step. More information about undertaking a certification analysis is included below. The enforcement standard is based on knowledge, so you should ensure that you made a reasonable effort to determine eligibility. You should only apply for the PPP if you are clearly eligible for the program, otherwise you could open yourself up to liability; seek advice from an attorney and/or other advisor(s) if you have questions. For the PPP loans over \$2 million, the SBA has said that if it disagrees with your need analysis, it will seek repayment of the outstanding PPP loan balance and will not allow you to seek forgiveness. If the borrower promptly repays the loan, then the SBA will not pursue additional enforcement with respect to the certification. Note that there may be personal and/or corporate liability for misuse of COVID-19 stimulus funds, and, in the context of civil litigation, claimants may include directors, officers, and depending on the structure of your entity, shareholders as well.

- Assess desirability.** Some stimulus fund applicants are finding restrictions concerning the loans to be unworkable. Conduct an upfront assessment of your practice's current financial condition and future outlook and the restrictions of the stimulus funding you are applying for to best determine whether stimulus funding makes sense for your practice.

### Q&A: Understanding Provider Relief Fund attestation deadlines

HHS previously announced that [providers needed to take action by June 3, 2020](#), regarding the CARES Act Provider Relief Fund distribution of the first \$50 billion, referred to as the General Distribution. Specifically, HHS indicated that by June 3, those who had received funds need to accept the HHS Terms and Conditions and submit revenue information to be considered for an additional General Allocation payment. Subsequently, HHS announced that it had extended the attestation deadline for an additional 90 days, but the June 3 deadline has remained on the Provider Relief Fund [website](#).

#### **Q: Why does the HHS website still have a deadline of June 3 when the attestation deadline has been further extended?**

**A:** Providers have a total of 90 days to *attest* to receiving funds, however, they only had until June 3 to access the application [portal](#) to *submit* their revenue and loss information. Providers must accept or reject funds in order to enter the application portal. If a provider was still deciding whether to accept funds on June 3, but has not yet submitted their tax information to the application portal, they should (1) reject the funds; or (2) submit info to the application portal for consideration. Providers will be reallocated all General Distribution funds they are owed based on their submitted application, and will then have 90 days to attest or reject. HHS has implemented this policy so that the agency can have all applications by June 3, and can start rolling out other distributions. The attestation [portal](#) (as opposed to the application portal) will remain open for 90 days. Only the application portal closes on June 3.

#### **Q: What is the attestation deadline for Medicaid and CHIP relief funds?**

**A:** HHS expects to distribute \$15 billion to eligible Medicaid and CHIP providers. The payment to each provider will be at least 2% of reported gross revenue from patient care; the final amount each provider receives will be determined after the data is submitted, including information about the number of Medicaid patients providers serve. **Providers must submit their data by July 20, 2020.**

Before applying through the [Enhanced Provider Relief Fund Payment Portal](#) applicants should:

- [Read the Medicaid Provider Distribution Instructions \(PDF\)](#)
- [Download the Medicaid Provider Distribution Application Form \(PDF\)](#)

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- Determine eligibility and prepare certification.** Conduct an analysis that addresses key questions such as:
- How will contract cancellations, a drop off in demand and increased costs impact my bottom line?
  - What is my projection for a “return to normal,” as well as any intervening model?
  - What are my liquidity options (debt, equity, cost of capital)?
  - Will I have to make salary reductions or institute layoffs or furloughs?
  - How will my reputation be impacted having the practice stimulus relief data made public? Provider Relief Fund recipients and the payments are publicly available at this [link](#).

COVID-19 stimulus funding is intended to be used for financial need, so conducting this analysis and documenting that you have done so will help you both understand whether you are eligible for such funding (which you may need to certify as a condition of receipt) and substantiate such eligibility at a later date if needed.

Note that the PPP certification safe harbor, which allowed PPP loan recipients to return funds for which they were not eligible, elapsed on May 18, 2020. Even though the safe harbor date has passed, if you realize that you need to return the PPP funds, you should pay back the loan as soon as possible. Your lender can assist you in this process. Please note that you may still be subject to SBA fines for failing to return the funds by the safe harbor date, and potentially statutory remedies under the False Claims Act.

- Document, document, document.** As Congress and the administration continue to pursue COVID-19 stimulus fund oversight activities, there will be a continuing focus on oversight of funds already dispersed. You should be prepared to submit reports and to undergo a government audit regarding your eligibility and use of the stimulus funds; that is why it is important to keep documentation. Best practice is also to keep the funds separate from your other operating funds, as this assists in clearly documenting how the funds are used.

For SBA loans, this may be particularly important because the SBA has stated that it will audit any PPP borrower that has a loan greater than \$2 million to determine whether they properly certified in good faith at the time of application that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Borrowers should take into account their business activity and their ability to access other sources of liquidity.

The SBA requires that borrowers maintain the following documentation for at least six years:

- Loan Forgiveness Application
- Documentation supporting payroll costs during the eight-week period
- Documentation regarding any employee job offers and refusals, firings for cause, voluntary resignations, and written requests by any employee for reductions in work schedule
- Documentation submitted with the PPP loan application
- Documentation supporting the borrower’s certification as to the necessity of the loan request and its eligibility
- Documentation demonstrating material compliance

Similarly, physician practices receiving and keeping HHS Provider Relief Fund payments must agree to submit reports as needed to ensure compliance with the [Terms and Conditions](#) and as specified in future directions issued by the HHS secretary. HHS Provider Relief Fund recipients receiving more than \$150,000 in federal stimulus funding will be required to submit any reports requested by the secretary that are necessary to allow HHS to ensure compliance with payment Terms and Conditions. Recipients of Provider Relief Funds do not need to submit separate quarterly reports; currently, HHS posting the names of payment recipients and the payments amount on the public website meets the reporting requirements under the CARES Act. Recipients should keep careful documentation to substantiate that funds were used for increased health care-related expenses or lost revenue attributable to COVID-19, and that those expenses or losses were not reimbursed from other sources.

- Avoid common pitfalls.** There are a number of common questions that stimulus fund borrowers and recipients may have. Check the website of the government agency dispensing the funding you are interested in for answers to frequently asked questions (FAQs). For example, the U.S. Treasury has a [running list of FAQs](#) on the PPP, and the U.S. Department of Health & Human Services has posted [revised FAQs](#) on the Provider Relief Fund General Distribution Portal.

### Q&A: Avoiding common pitfalls

**Q. The HHS Provider Relief Fund money is helpful, but our practice is still losing money on COVID-19 related care. Can our practice bill patients for these costs?**

**A:** No. Providers receiving funding from the Provider Relief Fund are prohibited from balance billing. The prohibition applies to all care for a presumptive or actual case of COVID-19.

**Q. I am concerned that my practice received more funding through the HHS Provider Relief Fund than it should have and that may give rise to overpayment liability. What should I do?**

**A:** Because HHS has clarified its prior guidance on this issue, it is important to review their most recent FAQs. To remain in compliance, a best practice is to clearly document the revenue losses and expenses the practice is incurring that are directly due to COVID-19, including losses related to social distancing (such as cancellation of visits and procedures, Part B drugs that have passed their expiration date), costs of new infection control practices, PPE, digital health equipment, etc., and that are not reimbursable from other sources (excluding loans that have to be repaid).

**Q: Our practice budget was established prior to the COVID-19 pandemic and we only budgeted a fraction of what we now find we will need to cover the cost of personal protective equipment (PPE) to safely reopen. Can I use the PPP funds to purchase PPE?**

**A:** No, you can only use the funds as stipulated by the PPP. Any other use of funds is considered a misuse of funds and could be subject to government enforcement actions.

**Q: My practice has been more severely impacted than anticipated and, even though the practice received PPP funds, we now need to lay off some employees. I know that my PPP loan forgiveness can be reduced for layoffs—are there any exceptions?**

**A:** Yes, there are a few exceptions. If an employee is fired for cause, voluntarily resigns, or voluntarily requested and received a reduction of hours, then your forgiveness will not be impacted. Additionally, if you made a good-faith, written offer to rehire an employee that was rejected, that employee will not be considered a layoff. Further, the newly enacted PPP Flexibility Act provides additional exceptions. If you can document an inability to rehire individuals who were employees on Feb. 15, 2020, and an inability to hire qualified employees for unfilled positions on or before Dec. 31, 2020, then you will not see a reduction in forgiveness for those employees. Additionally, if you can document an inability to return to the same level of business activity as you were operating at prior to Feb. 15, 2020, due to compliance requirements related to COVID-19 issued by HHS, CDC, or OSHA from March 1, 2020, to Dec. 31, 2020, then you will not see a reduction in forgiveness. Please note that you must have documentation, such as clear communication with employees.

**Q: I am selling my practice and have a PPP loan. How will this impact forgiveness?**

**A:** It depends when the sale is closed. If the sale is closed after the forgivable period, then there should be no impact on forgiveness (although there may be an impact on other representations/warranties, escrows or holdbacks). If the sale is closed during the forgivable period, the borrower may decide to wait to transition employees over until after the forgivable period. It is not clear how the SBA will view transitions mid-loan term, so it is administratively easier to wait until the forgivable period is over.

- Check your insurance.** Your insurance policy may include “overpayment” coverage that could be interpreted to cover the repayment of stimulus funding, or failure to do so. In the case of COVID-19 related loans, however, your insurer may take the view that because you have signed a note for the loan, you have assumed a liability contractually, and some malpractice insurance policies have carve-outs for contractually assumed liability. Business interruption or umbrella insurance may also provide coverage. Check with your insurance agent/broker to see if any coverage is available that would be applicable.

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