

Publications

Health Care Alert: Congress Enacts “Phase II” Coronavirus Response Legislation Impacting Testing Coverage and Reimbursement

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CLIENT ALERT | 3.19.2020

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (the Act or the FFCRA) into law. Of particular significance to the health care industry, the Act expands coverage for and reimbursement of coronavirus testing and related services by state and federal health care programs, private insurers, and self-insured group health plans. A brief summary of these changes, as well as other noteworthy health care provisions, is provided below.

Coverage for Coronavirus Testing and Related Services

Medicare

Effective immediately, the Medicare program (under both fee-for-service Medicare and Medicare Advantage) will pay for “specified COVID-19 testing-related services” at 100% of the amount allowed for such service under the applicable payment system (e.g., the Medicare Physician Fee Schedule or Outpatient Prospective Payment), with no cost-sharing requirements for beneficiaries. For purposes of this provision, a “specified COVID-19 testing-related service” is a medical visit that:

- Is in a designated category of HCPCS evaluation and management service codes;^[1]
- Is furnished during any portion of the federally-declared coronavirus public health emergency, beginning on or after the enactment of the Act (i.e., March 18, 2020);
- Results in an order for or administration of a clinical laboratory test for coronavirus; and
- Relates either to:
 - The furnishing or administration of such test; or
 - The evaluation of the patient’s need for the test.

Claims for such services will be identified and billed using a special modifier, to be created by the Secretary of Health and Human Services.^[2]

Medicaid

The Act requires state Medicaid programs to cover coronavirus testing, without imposing cost-sharing requirements on beneficiaries in connection with the testing or any related covered services. Additionally, the Act temporarily increases the percentage of state Medicaid expenditures to be matched by the federal government by 6.2%, provided that a state does not: (1) impose more restrictive eligibility requirements or higher premiums than it did as of January 1, 2020; (2) fail to provide that an individual eligible for medical assistance as of the Act's enactment will (with a few exceptions) remain eligible through the end of the month in which the public health emergency ends; or (3) fail to provide the required coronavirus testing coverage without cost-sharing.

The Act also gives state Medicaid programs the option to cover coronavirus testing for uninsured individuals during the declared public health emergency and requires the federal government to match the state's expenditures for any such services at a 100% rate.

Private Payors

Finally, the Act requires group health plans and health insurance issuers to provide coverage for coronavirus testing, as well as items and services that: (1) are furnished during a visit resulting in an order for or administration of a coronavirus test; and (2) relate either to the furnishing or administration of the test, or to the evaluation of the patient's need for it. In addition to cost-sharing requirements, plans and issuers are also prohibited from imposing prior authorization or other medical management requirements^[3] in connection with the required coverage.

Other Health Care Provisions

New Products Liability Protection for Manufacturers of NIOSH-Approved Respirators

To help address the current shortage of personal protective equipment (PPE) for health care providers, the Act expands the list of "covered countermeasures" under the Public Health Service Act (PHS Act) to include personal respiratory protective devices approved by the National Institute for Occupational Safety and Health (NIOSH) and subject to the federal Food and Drug Administration's (FDA) March 2 emergency use authorization.^[4] Because the PHS Act grants manufacturers immunity from both federal and state law products liability claims arising from or relating to use of their "covered countermeasures" while an emergency declaration is in effect, this provision offers an incentive to produce certain respiratory protective devices by alleviating a significant burden of risk for such manufacturers.

Clarification Regarding Recent Changes to Medicare Telehealth Coverage

As noted in our previous alert, the *Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020* recently authorized the Centers for Medicare & Medicaid Services (CMS) to expand Medicare coverage for telehealth services rendered by "qualified providers," defined to include only practitioners who had furnished to the same patient, within the last three years, an item or service for which Medicare

payment was made (and any other practitioners rendering services under the same tax ID number). Now, the Act has clarified that “qualified providers” includes practitioners who have furnished to the same patient within the last three years any item or service that *could have been* billed to Medicare, regardless of whether or not Medicare reimbursement was actually sought or received. Further, CMS has announced a policy of enforcement discretion with respect to the requirement that a practitioner have an established relationship with a Medicare patient in order to provide him or her with services via telehealth, affirmatively stating that “HHS will not conduct audits to ensure that... a prior relationship existed for claims submitted during this public health emergency.”[5] Practically, therefore, it appears that Medicare providers may treat even new patients via telehealth.

If you have questions about the *Families First Coronavirus Response Act* or the *Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020* and its impact on your organization, please contact Jolie Havens, Liam Gruz, Matt Albers, Jonathan Ishee, Nita Garg, Mairi Mull, or your regular Vorys attorney.

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Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We are taking significant steps to ensure we remain proactive during this extremely fluid environment. The business and legal challenges our clients are facing are changing each day.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.

[1] The designated categories of HCPCS evaluation and management codes are: office and other outpatient services; hospital observation services; emergency department services; nursing facility services; domiciliary, rest home, or custodial care services; home services; and online digital evaluation and management services.

[2] We will provide an update when additional information about the required modifier becomes available.

[3] Medicare Advantage plans are likewise prohibited from imposing prior authorization or other utilization management requirements with respect to the required coronavirus testing coverage.

[4] The emergency use authorization, including the current list of NIOSH-approved respirators, is available here: <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/emergency-use-authorizations#coronavirus2019>.

[5] <https://www.cms.gov/files/document/medicare-telehealth-frequently-asked-questions-faqs-31720.pdf>.