COVID-19 Financial Relief: What Providers Should Know About Required Certifications, Attestations, and Terms and Conditions

By Ian Hennessey, J.D.

Since the onset of the COVID-19 pandemic in the United States, the federal government has implemented several waves of unprecedented financial stimulus to shore up the economy. For healthcare providers, the primary sources of federal assistance to date have come by way of two programs: (1) the Paycheck Protection Program ("PPP"), which is administered by the U.S. Small Business Association ("SBA"), and (2) the Provider Relief Fund ("PRF"), which is administered by the U.S. Department of Health and Human Services ("HHS"). We have written several articles addressing the various requirements of both programs, as guidance from SBA and HHS has been released. In this article, we will focus on the certification and attestation requirements under both programs, their

significance, and how to avoid potential pitfalls.

Paycheck Protection Program

The PPP loan program, originally passed as part of the *Coronavirus Aid, Relief, and Economic Security* Act ("CARES Act"), has been subsequently modified by the Paycheck Protection Program and Health Care Enhancement Act and the Paycheck Protection Program Flexibility Act. Since early April, SBA has regularly updated both its formal and informal regulatory guidance regarding the PPP loan program.

Generally, an eligible borrower can receive PPP loan proceeds up to a maximum of two and a half times its 2019 average monthly payroll. PPP loan proceeds may be used for payroll costs and certain non-payroll costs through December 31, 2020. Subject to certain conditions, expenses paid or incurred during the 24-week period (or eight-week period, at the borrower's election) following disbursement of the loan proceeds are eligible for forgiveness up to the entire amount of the PPP loan plus interest.

The PPP loan program is designed to provide financial relief to eligible small businesses in order to keep their workers employed during the COVID-19 pandemic. So, where is the catch? Here's what you should know:

Required certifications. The CARES Act, as well as its accompanying regulations, require borrowers to make certain certifications as part of their PPP loan application as well as their application for PPP loan forgiveness. These certifications are not simply boxes to "check" on the way to obtaining financial relief. Instead, just as with submitting claims to government payors, healthcare providers should be aware that these certifications could expose borrowers to liability under the False Claims Act. The United States Justice Department has already reported numerous cases charging individuals with making false and/or fraudulent statements on PPP loan applications in an attempt to wrongfully obtain PPP loans. All indications are that the Justice Department will continue to investigate and prosecute whatever it considers to be "fraud" related to the PPP loan program. As healthcare providers are no doubt aware, what the federal government considers to be "fraud" may not necessarily be clear, so potential liability can often stem from a good faith difference of interpretation. The False Claims Act broadly defines the term "knowingly" to include actions taken with "deliberate ignorance" or "reckless disregard" of the truth of a claim. Accordingly, you must understand, and document thoroughly, the basis for the certifications made as part of your PPP loan application and your PPP loan forgiveness application.

For instance, on your loan application, you were required to certify to the following (among others):

- current economic uncertainty makes this loan request necessary to support your ongoing operations;
- you will use the funds to retain workers and maintain payroll or make mortgage

interest payments, lease payments, and utility payments, as specified under the PPP loan program regulations;
- your understanding that, if you “knowingly” use PPP funds for unauthorized purposes, the federal government may hold you legally liable --“such as for charges of fraud;”
- you will provide your lender with documentation verifying the number of full-time equivalent employees on your payroll as well as the dollar amounts of payroll costs, eligible mortgage interest payments, rent payments, and utilities for the applicable “covered period” for purposes of loan forgiveness, as well as your understanding that not more than 40% of the forgiven amount may be used for non-payroll costs;
- during the period beginning on February 15, 2020, and ending on December 31, 2020, you have not and will not receive another PPP loan;
- the information provided in your PPP loan application and the information provided in all supporting documents and forms is true and accurate in all material respects; and
- the individual signing the form understands that “knowingly” making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including imprisonment of up to 30 years and fines up $1,000,000.

For a full copy of the certifications on the loan application, review your PPP loan documentation and/or click here to review the most recent version of the form. In addition to these (and other) specific certifications related to the PPP loan, you must also make a broad range of other certifications, such as certifying that you are “not engaged in any activity that is illegal under federal, state or local law,” you (to the best of your knowledge) comply with OSHA and will remain in compliance during the life of the loan, and you do not “discriminate in any business practice, including employment practices and services to the public” under applicable federal laws and regulations.

Similarly, on the PPP loan forgiveness application forms issued by SBA, you are required to certify to the following (among others):

- you used the dollar amount of the requested forgiveness only for eligible expenses, at least 60% of which was used for payroll costs and subject to applicable owner-employee compensation caps;
- you understand that if the funds were “knowingly” used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges;
- you did not reduce salaries or hourly wages by more than 25% for any employee during the applicable covered period when compared to the period between January 1, 2020 and March 31, 2020;
- you accurately verified the payments for the eligible payroll and nonpayroll costs for which you are requesting forgiveness;
- you have submitted to your lender the required documentation verifying payroll costs, the existence of obligations and service (as applicable) prior to February 15, 2020, and eligible non-payroll expenses;

- the information provided in the loan forgiveness application and the information provided in all supporting documents and forms is true and correct in all material respects; and
- the individual signing the form understands that "knowingly" making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including imprisonment of up to 30 years and fines up $1,000,000.

In addition, you must certify to one of the following two items:

- you did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the applicable covered period for PPP loan forgiveness (other than any reductions that meet an exception); or
- you were unable to operate between February 15, 2020, and the end of the applicable covered period at the same level of business activity as before February 15, 2020, due to compliance with governmental requirements related to COVID-19.

For a full copy of the certifications on the loan forgiveness application, review your PPP loan forgiveness application from your lender and/or click here and here to review the most recent versions of the form as of the initial publication date of this article.

Due to the high volume of PPP loans made during the course of the COVID-19 pandemic, some borrowers may feel tempted to cut corners or otherwise "fudge" documentation in order to maximize their PPP loan and/or loan forgiveness amount. Do not be mistaken or misled about the seriousness of these certifications or the government's interest in combatting fraud related to this program. As with many other areas of your healthcare practice, the mantra of "Document! Document! Document!" is the best advice for ensuring compliance with this program.

Potential for recourse against unauthorized use of PPP funds. In addition to potential liability under the False Claims Act, the language of the CARES Act makes clear that the scope of potential liability may extend beyond the business entity applying for a PPP loan. Unlike other SBA loan programs, PPP loans are set up to be non-recourse loans (meaning that SBA does not have recourse against the owners of a borrower entity in the event of a default). In other words, there is no requirement for personal guarantees or collateral to obtain a PPP loan. However, a borrower who knowingly uses the funds for unauthorized purposes may be charged with fraud. In addition, if one or more of a borrower's shareholders, members, or partners uses loan funds for unauthorized purposes, SBA may have recourse against such individuals for the unauthorized use.

Public backlash may lead to additional scrutiny. The CARES Act was passed on March 27, 2020, and SBA authorized lenders to originate loans the following week as the federal government rushed to inject financial relief into an economy just beginning to shut down. A few weeks later, the initial allocation of PPP funds was exhausted before many businesses were able to receive the much-needed funding. Public backlash soon followed, especially when the media reported stories about some national restaurant chains and other well-

positioned companies obtaining PPP loans. While Congress acted quickly to allocate additional funding, SBA set its sights on borrowers through updated regulations. Following negative reporting about the program, SBA declared that, although the CARES Act had suspended the usual SBA requirement that borrowers be unable to obtain credit elsewhere, borrowers still had to certify that they needed the PPP funds. So, PPP borrowers were required to take into account their current business activity and their ability to access "other sources of liquidity" before certifying that the "current economic uncertainty" made their PPP loan request necessary to support their ongoing operations. This SBA guidance was cause for concern for many healthcare providers that, while feeling the economic impact of COVID-19 and related shutdowns, might have other sources of liquidity (e.g., lines of credit, shareholder loans, etc.) which may have made it inappropriate for them to seek a PPP loan. SBA later created a safe harbor for borrowers receiving PPP loans of less than $2 million, i.e., SBA would deem those borrowers to have made their necessity certification in good faith. Although many independent healthcare providers met this safe harbor, the federal government demonstrated that public criticism of the PPP loan program would prompt retroactive action to tamp down participation in the program for borrowers who were perceived not to have needed the funds, even if they had complied with program requirements. On July 6, 2020, SBA released its "Round 2" report on the PPP loan program with a downloadable database of loan recipients' names, addresses, and PPP loan amount range. Do not be surprised if additional reporting about PPP loan recipients results in further retrospective scrutiny of the PPP loan program.

HHS Provider Relief Fund

The PRF was also established pursuant to the CARES Act. On April 10, 2020, HHS issued a press release announcing the first round of funding ($30 billion) based on a provider's share of 2019 Medicare fee-for-service reimbursements. Direct deposits into healthcare provider accounts followed promptly. Following the initial distribution, HHS made available additional PRF funding for providers as well as hospitals, skilled nursing facilities, and clinics in a variety of settings. The additional PRF funds available to providers included an additional $20 billion for "general distribution" and $15 billion for providers that participate in Medicaid/CHIP. To obtain these additional funds, however, eligible providers had to submit an application to HHS.

The PRF payments are not loans to healthcare providers and, per HHS, do not need to be repaid. In fact, CMS Administrator Verma Seema announced at the Coronavirus Task Force Briefing on April 7, 2020, that CMS was issuing $30 billion in "grants," stating "there are no strings attached, so, the health care providers that are receiving these dollars can essentially spend that in any way they see fit." Unfortunately, Ms. Seema's pronouncement has not stood the test of time.

Whether you received PRF funds through the initial distribution or through the application

process, you are required to make certain attestations to HHS in order to receive (or, in the case of the initial distribution, retain) your payment. Generally, the attestation portal (hosted through the HHS website) requires PRF recipients to (1) confirm they received a payment and the specific payment amount that was received; and (2) agree to the applicable "Terms and Conditions." Copies of the Terms and Conditions for the initial $30 billion general distribution may be found here, for the $20 billion general distribution here, and for the $15 billion Medicaid/CHIP distribution here. The several PRF Terms and Conditions are all fairly similar, and each requires the applicant to make certain certifications, including the following:

- *You provided diagnoses, testing, or care for individuals with possible or actual cases of COVID-19 after January 31, 2020*. Note: HHS interprets this certification broadly to include providers actively treating patients as well as providers who have been shuttered and are not currently treating patients. In addition, HHS made it clear that you do not have to be a "front line" provider to retain the funds "so long as you provided diagnoses, testing, or care for individuals with possible or actual cases of COVID-19." Since HHS views every patient as a possible case of COVID-19, the care provided does not have to actually treat COVID-19.

- *Monies received may not be used to "pay the salary of an individual at a rate in excess of Executive Level II."* Note: The current Executive Level II pay-scale rate is $197,300, so providers may not use PRF monies to pay physicians or other highly compensated individuals more than that amount.

- *You will only use the payment to prevent, prepare for, and respond to coronavirus, and to reimburse your practice for healthcare-related expenses or lost revenues that are attributable to coronavirus*. HHS interprets "attributable to coronavirus" broadly to cover a range of items and services purchased to prevent, prepare for, and respond to coronavirus, including:
  - supplies used to provide healthcare services for possible or actual COVID-19 patients;
  - equipment used to provide healthcare services for possible or actual COVID-19 patients;
  - workforce training; developing and staffing emergency operation centers;
  - reporting COVID-19 test results to federal, state, or local governments;
  - building or constructing temporary structures to expand capacity for COVID-19 patient care or to provide healthcare services to non-COVID-19 patients in a separate area from where COVID-19 patients are being treated; and
  - acquiring additional resources, including facilities, equipment, supplies, healthcare practices, staffing, and technology to expand or preserve care delivery.

  Providers may have incurred eligible healthcare-related expenses attributable to coronavirus prior to the date on which they received their payment. Still, providers may use their PRF payment for such expenses incurred on any date,

so long as those expenses were attributable to coronavirus and were used to prevent, prepare for, and respond to coronavirus. However, HHS noted that it would be "highly unusual" for providers to have incurred eligible expenses prior to January 1, 2020.

The term "lost revenues that are attributable to coronavirus" means any revenue that you as a healthcare provider lost due to coronavirus, including losses associated with fewer outpatient visits, canceled elective procedures or services, or increased uncompensated care. HHS advised that you may use any reasonable method of estimating your lost revenue. For example, if you have a budget prepared without taking into account the impact of COVID-19, the estimated lost revenue could be the difference between your budgeted revenue and actual revenue.

Providers may use PRF payments to cover any cost that the lost revenue otherwise would have covered, so long as that cost prevents, prepares for, or responds to coronavirus. HHS "encourages" the use of funds to cover lost revenue so that providers can respond to the coronavirus public health emergency by maintaining healthcare delivery capacity, such as using PRF payments to cover employee or contractor payroll; employee health insurance; rent or mortgage payments; equipment lease payments; and electronic health record licensing fees.

- *You will not use the payment to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse* (for example, PPP loan funds). Note: there is no direct ban under the CARES Act on accepting a PRF payment and other sources, so long as the PRF payment is used only for permissible purposes and the recipient complies with the applicable Terms and Conditions. If you received both PPP loan funds and PRF payments, it is very important that you make sure you are accurately tracking amounts spent from each to ensure that you do not spend PRF monies on costs you have used PPP loan funds to pay.

- *You will submit reports to the HHS Secretary needed to ensure compliance with conditions that are imposed on this Payment, and in such form as specified by the Secretary*. HHS will require documentation sufficient to establish "the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the terms and conditions of the Federal award." It cannot be overly stressed: you must carefully track and document how you use all monies received, whether under the CARES Act, the Coronavirus Preparedness and Response Supplemental Appropriations Act, the Families First Coronavirus Response Act, or any other law primarily making appropriations for the coronavirus response and related activities.

- *For all care for a possible or actual case of COVID-19, you will not seek to collect from the patient out-of-pocket expenses in an amount greater than what the patient would have otherwise been required to pay if the care had been provided by an in-network recipient*

. This requirement applies only to “presumptive or actual cases” of COVID-19, not the broader term of “possible” COVID-19 cases that helps determine eligibility to receive payment. In contrast, a “presumptive” case of COVID-19 is a case where a patient’s medical record supports a diagnosis of COVID-19, even if the patient does not have a positive diagnostic test result.

HHS regularly updates its FAQ guidance related to the PRF, which can be found here .

As with the PPP loan program, thorough documentation is vital for compliance. HHS will conduct significant anti-fraud monitoring of the funds distributed, and the OIG will provide oversight as required in the CARES Act to ensure that federal dollars are used appropriately. Providers are required to demonstrate that lost revenues and increased expenses attributable to COVID-19 exceed total payments from the PRF, and submit documents to substantiate that (1) these funds were used for increased healthcare-related expenses or lost revenue attributable to coronavirus, and (2) those expenses or losses were not reimbursed from other sources and other sources were not obligated to reimburse them.

Although HHS has stated that it “does not intend to recoup funds as long as a provider’s lost revenue and increased expenses exceed the amount of Provider Relief funding a provider has received,” HHS reserves the right to audit PRF recipients in the future and collect any Relief Fund amounts that were made in error or exceed a recipient’s lost revenue or increased expenses due to COVID-19. But, take note: If, “at the conclusion of the pandemic” (whenever that may be), you have leftover PRF funds that you could not expend on permissible expenses or losses, HHS expects you to return those funds. That means that you have an affirmative obligation, whether or not audited, to return any funds that you are unable to use in accordance with the Terms and Conditions. HHS will provide directions in the future about how to return those unused funds.

Note that HHS has posted a public list of providers and their payments once they attest to receiving the money and agree to the applicable Terms and Conditions. All providers that received a payment from the PRF and retain that payment for at least 90 days without rejecting the funds are deemed to have accepted the applicable Terms and Conditions.

Bostock v Clayton County, Georgia: What the U.S. Supreme Court Decision on LBGT Employee Rights Means For Your Practice

By Scott Hickman, J.D.

On June 15, 2020, the United States Supreme Court issued its opinion on a trio of consolidated cases regarding discrimination against LBGT employees in the workplace. In *Bostock v. Clayton County, Georgia,* the Court held in a 6-3 decision that Title VII, the federal law that generally prohibits discrimination in the workplace based on sex (among other characteristics), bans discrimination against gay, lesbian and transgender employees.

The Court did not address, except to note that these issues were not present in the cases before them, the effect of its decision on the application of Title VII to religious

organizations, or how Title VII is to be applied to workplace dress codes, locker rooms and bathrooms. Without doubt, these important and sometimes difficult issues will be addressed in subsequent litigation and regulations, but we now know an "employer who fires an individual merely for being gay or transgender defies the law."

The cases came to the Court based on three different fact patterns. In two of the cases, a skydiving instructor and a child-welfare-services coordinator sued their former employers alleging that they were fired because they were gay. The third case involved a lawsuit brought by the United States Equal Employment Opportunity Commission against a Michigan employer after it terminated the employment of a transgender funeral director and embalmer who announced that she would begin living as a woman. Justice Gorsuch, who authored the majority opinion, framed the issue as follows: "Today, we must decide whether an employer can fire someone simply for being homosexual or transgender." On behalf of the Court, Justice Gorsuch concluded that when an employer takes an adverse employment action against an employee "for being homosexual or transgender," that employer "fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Bostock has rightly been given significant media attention and is a landmark case for the LBGT community, which has long argued that it was entitled to protection under Title VII against discriminatory employment actions based on their identity. But what does the decision mean for employers, and what do you need to do as an employer to remain in compliance with the law? The answer may be "less than you might think." I believe this is the case for two, related reasons. First, the Court's opinion is consistent with the position that has been taken by the EEOC for years: that LBGT employees are protected by Title VII. Several federal courts agreed with this position, and LBGT employees were also protected under state law in some jurisdictions. The EEOC already had in place regulations protecting LBGT employees, and, as noted above, it brought the case on behalf of the transgender employee that was addressed in *Bostock* and argued on behalf of the employees in all three cases. Second, because this has been the EEOC's position for some time (and because they thought it was the right thing to do for their business and their employees), most employers have already amended their policies to offer protection to LBGT employees, especially as to sexual orientation.

In light of the *Bostock* decision, I will be encouraging my clients to review their formal EEO policies to insure that – if they did not already – their policies explicitly prohibit discrimination for being gay, lesbian and/or transgender. Employers should then take steps to apply those policies appropriately across a range of situations that may implicate discrimination based on sex, including:

- Hiring, promotion, compensation, performance evaluation and discipline;
- Sexual harassment;
- Pregnancy discrimination;
- Making employment decisions based on stereotypes about how men or women

should appear or act;
- Terminating an employee because they are transgender or plan to transition from presenting as one sex to presenting as another sex;
- Treating an employee married to a same-sex spouse differently than an employee married to a different-sex spouse; and
- Discrimination in employment benefits, such as healthcare coverage, based on LBGT status or the sex of an employee's spouse.

Then, with respect in particular to transgender employees, employers should be aware of the behaviors that have already been identified by the EEOC as inconsistent with Title VII. These include:

- Taking an adverse employment action against a transgender individual because the person is transgender or because the person expresses an intention to transition from one sex to another sex;
- Offering a job to an applicant who initially presents as one sex but rescinding the offer when the employer learns that the applicant plans to or transitions to the other sex;
- Hostility to transgender or gender-nonconforming individuals because they do not look or act like the employer thinks a man or woman should act;
- Refusing to allow a transgender individual to wear the clothing associated with the gender the individual identifies with;
- Refusing to allow a transgender individual to use the restroom appropriate for the gender the individual identifies with; and
- Failing or refusing to use a transgender employee's correct name and pronoun if such conduct is sufficiently severe or pervasive to create a hostile work environment.

Finally, it should be noted that nothing contained in *Bostock* or in the existing EEOC guidance changes the employment-at-will doctrine or prevents an employer from making workplace decisions for any legitimate and non-discriminatory reason. For example, dress codes remain enforceable if they promote legitimate business purposes such as the safety of employees or others (and employers are already wisely moving away from having sex-specific dress codes in favor of policies that simply comply with general concepts of professionalism). All employees are still subject to discipline and discharge for failure to comply with an employer's legitimate job performance expectations. Employers can – and should – however, use *Bostock* as a reminder that all policies and workplace decisions should be implemented on a non-discriminatory basis and without reference to an employee's identity or characteristics. And as always, should you have any issues that arise as you deal with employment issues for LBGT employees or others, you should obtain and follow legal advice from an attorney experienced in employment matters.

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