

COVID-19 PERSONNEL AND SAFETY ISSUES

PREPARED FOR AAHOMECARE
BY
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Introduction

It is an understatement to see that what the country is experiencing is unprecedented—there is no playbook on how to respond. The law is frantically trying to catch up with events unfolding on the ground. Everything we can say herein is the best information we had as of this morning—it will change and may have already changed. Be sure to continue to monitor developments and seek additional information.

This white paper will present information and ideas designed to help DME suppliers navigate the COVID-19 crisis. The motivation for suppliers to successfully navigate this crisis are obvious but worth restating: (i) the supplier wants to take care of its patients; (ii) the supplier wants to take care of its employees; (iii) the supplier wants to keep its doors open; and (iv) sadly, but predictably, plaintiffs' attorneys will likely come out of the woodwork six months from now and will contemplate suing suppliers for negligence; the attorneys will attempt to argue that the suppliers did not take all reasonable steps to protect patients and employees; by following the steps set out in this white paper, suppliers can argue that they took reasonable steps to protect patients and employees.

What to Do If an Employee is Exhibiting COVID-19 Symptoms

There is no requirement to close the facility if an employee is exhibiting symptoms or tests positive for COVID-19. Instead, the employee should self-quarantine for 14 days or until he/she tests negative for COVID-19. It will be a best practice to notify employees immediately if an employee tests positive for COVID-19 or if he/she is exhibiting symptoms consistent with COVID-19.

However, this notification should be reasonably limited. We suggest that notification to those working closely with the individual should include more information than an announcement to those who may have had distant contact. Further, for larger or multi-location suppliers there may be no need to notify those who had no contact. A supplier should perform enhanced cleaning and disinfection after an employee is suspected/confirmed to have COVID-19 and continue to routinely clean and sanitize all frequently touched surfaces in the facility, such as workstations, keyboards, telephones, countertops, restrooms, shared spaces, doorknobs, etc. The supplier should have a sufficient stock of soap, hand sanitizer, and other supplies for employees to regularly sterilize throughout the day.

A supplier should prepare now for a scenario in which a key employee is quarantined. Specifically, the supplier should identify alternate key employee(s) to run essential business functions and maintain critical operations. The supplier should ensure that the employee is familiar and understands the supplier's policies and procedures, especially with respect to COVID-19 issues. The employee (i) will need to monitor ongoing public health recommendations and make sure the supplier's policies and practices are consistent with the recommendations; (ii) should stay in contact (*via* video or telephone conference) with the key employee to keep him/her updated on

operations; and (iii) will need to educate employees about how they can reduce the spread of COVID-19.

How do I handle a patient that exhibits symptoms or that may have a positive diagnosis?

The supplier should establish a standard protocol to minimize contact with the patient but ensures that he/she still receives necessary treatment.

A supplier may adopt a protocol that states that when a patient has symptoms but no diagnosis; then: (i) if the patient is high risk (e.g., elderly), the supplier will advise the patient to be tested as soon as possible; (ii) the supplier will encourage the patient to minimize contact with others; and (iii) the supplier will provide education to the patient on prevention/mitigation measures (e.g., frequent handwashing, social distancing); and (iv) the supplier will isolate the patient from other patients.

A supplier should develop a protocol for patients who have tested positive for COVID-19. This policy may include: (i) minimizing interaction with the patient; (ii) establishing a protocol for interacting with the patient to minimize risk of exposure (e.g., gloves, no contact, sanitizing areas after interaction); (iii) encouraging the patient to minimize contact with others; (iv) providing education to the patient on prevention/mitigation measures (e.g., frequent handwashing, social distancing); and (v) isolating the patient from other patients.

A supplier should develop a protocol for symptomatic patients who enter the facility. This policy may include: (i) isolate the patient to minimize his/her interaction with others by calmly approaching the patient and asking to speak with him/her privately (employee should use protocols to minimize exposure such as wearing gloves and mask); (ii) escort the patient to an area without others to determine the patient's needs; (iii) have the patient wait separately for his/her service; (iv) sanitize any areas the patient came into contact with upon his/her departure; (v) advise the patient to be tested; and (vi) provide the patient with education on minimizing exposure of others.

Asking a symptomatic or positive diagnosed patient to leave the facility without providing services raises legal issues and should generally be avoided. Where, however, a patient becomes hostile/violent in response to a supplier's reasonable protocol, it is acceptable to ask the patient to leave to mitigate harm to staff and other patrons. If the patient threatens violence or attempts to harm anyone, the supplier should call the police.

Obviously, the above only begins to demonstrate the depth of issues facing suppliers in these uncertain times. Best practice demands the adoption of a solid policy and the use of common sense and empathy – empathy for patients, staff and others. The supplier should act with good reason and common sense and should document everything.

Federal Employment Law Addressing the COVID-19 Crisis

Below is a brief summary of recent employee leave laws including the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. Both were passed as part of the Families First Coronavirus Response Act and become effective on April 2, 2020.

Emergency Paid Sick Leave Act - All employees are eligible regardless of their length of service, but the Department of Labor (“DOL”) may exclude certain health care suppliers and emergency responders. Employers with fewer than 500 employees must provide paid sick leave, but the DOL may exclude certain small businesses with fewer than 50 employees if providing paid sick leave would jeopardize the business as a going concern. For full-time employees, 80 hours of sick leave is available. For part-time employees, the average number of hours the employee works in a two-week period of sick leave is available. For example, if a part-time employee regularly works 25 hours per week, he/she would be eligible for 50 hours of paid sick leave. Sick leave must be made available immediately. Employers cannot require waiting periods and cannot require employees to use other available PTO or sick time first.

The following are the circumstances in which the Emergency Paid Sick Leave Act allows an employee to use emergency sick leave:

1. The employee is subject to a federal, state, or local quarantine or isolation order concerning COVID-19.
2. The employee has been advised by a health care supplier to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis.
4. The employee is caring for someone subject to an order of quarantine or isolation or someone who has been advised by a health care supplier to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for his/her minor child whose daycare or school has been closed or whose childcare supplier is unavailable due to COVID-19.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Employers must only provide paid sick leave to employees who are unable to work or telework due to one of the covered reasons above. For items 1 – 3 above, employers must pay the greater of the minimum wage *or* the employee’s regular rate of pay up to a cap of \$511 per day or a total of \$5,110. Most employers will pay the employee’s regular rate of pay. The minimum wage provision was likely included for tipped employees like waiters who are paid less than minimum wage. For reasons 4 – 6 above, employers must pay 2/3 of an employee’s regular rate of pay up to a cap of \$200 per day or \$2,000 total.

Emergency Family and Medical Leave Expansion Act - All employees are eligible who have been employed for at least 30 days, but the DOL may exclude certain health care suppliers and emergency responders. Employers with fewer than 500 employees must provide expanded FMLA leave, but the DOL may exclude certain small businesses with fewer than 50 employees if providing paid sick leave would jeopardize the business as a going concern. 12 weeks of FMLA

leave is available, which is the same as traditional FMLA leave. An employee can use expanded FMLA when he/she is unable to work (or telework) due to a need to care for his/her minor child whose school or daycare has been closed due to a public health emergency declared by a federal, state, or local authority related to COVID-19. The first 10 days may be unpaid under this Act, but note that employees are entitled to two weeks (10 workdays) of emergency paid sick leave under the prior Act. The next 10 weeks of leave are paid at 2/3 of an employee's regular rate of pay, up to a cap of \$200 per day or \$10,000 total.

The law protects employees if a child is home due to a school or daycare closure, but not necessarily if the employee's child is sick. The law on its face does not protect the employee if he/she is sick or if a member of the employee's family is sick. It is important that a supplier factor in the employee's other available leave after the 10 days and consider concessions made previously for other employees. Suppliers may also furlough and consider Unpaid Leave of Absence for sick employees. Flexibility and open communication are vital.

Initial Guidance from the U.S. Department of Labor (“DOL”)

Set out below is initial guidance from the DOL pertaining to the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act. Such guidance is in the form of FAQs found on the DOL's website.¹ Selected sections that we find particularly applicable to AAHomecare members are highlighted below. These FAQs are not legally enforceable and do not carry the weight of regulations. However, they are instructive and do provide a good roadmap for decision-making.

4. If providing child care related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.

9. May I take 80 hours of paid sick leave for my self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?

No. You may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which you receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

¹ <https://www.dol.gov/agencies/whd/pandemic/ffera-questions>

10. If I am home with my child because his or her school or place of care is closed, or child care supplier is unavailable, do I get paid sick leave, expanded family and medical leave, or both—how do they interact?

You may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. You may take both paid sick leave and expanded family and medical leave to care for your child whose school or place of care is closed, or child care supplier is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless you elect to use existing vacation, personal, or medical or sick leave under your employer's policy. After the first ten workdays have elapsed, you will receive 2/3 of your [regular rate of pay](#) for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Please note that you can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for your child whose school or place of care is closed, or child care supplier is unavailable, due to COVID-19 related reasons.

38. Assuming I am a covered employer, which of my employees are eligible for paid sick leave and expanded family and medical leave?

Both of these new provisions use the [employee definition](#) as provided by the Fair Labor Standards Act, thus all of your U.S. (including Territorial) employees who meet this definition are eligible including full-time and part-time employees, and “joint employees” working on your site temporarily and/or through a temp agency. However, if you employ a health care supplier or an emergency responder you are not required to pay such employee paid sick leave or expanded family and medical leave on a case-by-case basis. And certain small businesses may exempt employees if the leave would jeopardize the company's viability as a going concern. See [Question 58](#) below.

There is one difference regarding an employee's eligibility for paid sick leave versus expanded family and medical leave. While your employee is eligible for paid sick leave regardless of length of employment, your employee must have been employed for 30 calendar days in order to qualify for expanded family and medical leave. For example, if your employee requests expanded family and medical leave on April 10, 2020, he or she must have been your employee since March 11, 2020.

56. Who is a “health care supplier” who may be excluded by their employer from paid sick leave and/or expanded family and medical leave?

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a health care supplier is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care supplier, any facility that performs

laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care supplier necessary for that state's or territory's or the District of Columbia's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care suppliers from the provisions of the FFCRA.

58. When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care supplier unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care supplier unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity.
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

59. If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;
- leave is requested because the child’s school or place of care is closed, or child care supplier is unavailable, due to COVID-19 related reasons; and
- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

Tax Credits - The government is helping offset the cost of the above programs. Employers are permitted a tax credit in an amount equal to 100% of the qualified sick leave wages and qualified family leave wages paid per calendar quarter, up to the applicable caps. The supplier may want to create separate pay codes for emergency paid sick leave wages and expanded family leave wages in order to track expenditures accurately².

Telehealth

With Covid-19 rapidly changing the landscape of health care, there is a push for the use of telehealth to protect patients and suppliers and attempt to “flatten the curve.” Historically, telehealth encounters were only reimbursed by Medicare (i) if the person receiving the service was in a designated rural area, (ii) if the person traveled to a medical facility to receive the telehealth services, and (iii) if the telehealth encounter was both visual and audio.

On March 13, 2020, the Trump Administration expanded Medicare’s telehealth coverage, and accordingly, CMS broadened access to telehealth services under the § 1135 waiver authority. Some of the key changes are (i) relaxing the rural requirement, (ii) allowing the patient to remain at home for the telehealth visit, and (iii) relaxing the existing relationship requirements. On the evening of March 30, 2020, CMS released a list of codes temporarily approved for telehealth during this crisis.

Non-physician health care professionals can also bill for E-visits, which are non-face-to-face, patient-initiated communication through a patient portal, regardless of the location of the patient. There are still many unanswered questions regarding the use of E-visits, but it is important to note that they must be patient-initiated and may only be conducted with a patient who has already had an in-person evaluation. The codes for non-physician health care professionals to bill Medicare for E-visits are G2061, G2062, and G2063. These E-visits are intended to allow patients to check in with their suppliers and ask questions. E-visits do not amount to a full visit but cover the time a

² While we note the importance of this credit, we also acknowledge that pharmacies may opt out of the new paid leave requirements contained herein. In that case, some of this analysis will not be relevant. It is provided, however, because it is important to consider all options when making decisions such as whether to allow employee leave. We encourage readers to consult with their attorneys before making any decision on whether to opt out of the requirements of the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

non-physician health care professional spends creating a management plan, ordering tests, and digitally communicating with the patient.

The new codes eligible for telehealth visits can be performed in all settings. For example, patients can remain in their homes. To the extent that these services require an existing patient relationship, it is our understanding that CMS will not perform audits to determine the existence of a prior relationship.

A large historical barrier to telehealth has been technology requirements. As part of the COVID-19 regulations, the Office for Civil Rights has announced that it will exercise enforcement discretion and waive penalties for HIPAA violations against providers that provide telehealth in good faith during this time. This means that services like FaceTime, Skype and Zoom can be used to provide telehealth. When billing for telehealth services, report place of service as 02 (Telehealth). Use of the 95 modifier is not required.

All hope is not lost for telehealth, however, as some state Medicaid programs and commercial payors currently allow non-physician health care professionals to provide telehealth services. Other state Medicaid programs and commercial payors have or will likely soon expand policies to allow for reimbursable telehealth encounters in the wake of the COVID-19 pandemic. It is important that suppliers billing Medicaid verify their state's most recent position and continue to re-visit this topic as rapid change is occurring.

The position of commercial payors on telehealth will vary by plan as reimbursement is governed by contract. It is important for suppliers to contact each commercial payor to see if it will reimburse telehealth services under the contract. If a payor indicates it will cover telehealth services, suppliers should (i) verify what specific code the commercial payor will accept and (ii) ensure understanding of the extent of the payor's coverage policy and any specific documentation required for telehealth reimbursement.

With CMS, state Medicaid programs, and commercial payors, the rules regarding telehealth are likely to remain moving targets. After initially verifying reimbursement eligibility with the payors, suppliers should continue to regularly check for policy change announcements regarding telehealth reimbursement.

How to Handle a Decline in Business

Employers have several options if there is not enough work for employees. These include:

- Temporary lay offs
 - Employees are eligible for unemployment compensation.
 - These employees would be “off the books,” and not eligible for continuing benefits.
- Temporary furloughs
 - Furloughs should be for a stated period of time.
 - The employee remains on the books (and should still be eligible for health insurance).

- Employees may also be eligible for unemployment compensation, depending on state laws.
- Reduced Work Hours
 - Non-exempt, hourly employees need only be paid for hours actually worked.
 - Exempt employees must be paid their full weekly salary for every week in which they perform any work.
 - Consider one week on, one week off schedules for exempt employees.

Leadership and Documentation

Patients, employees, and the general public are scared. Calm and confident leadership and demeanor can go a long way. The supplier needs to document all of its efforts in order to explain decisions that may be questioned in the future.

Emergency Declarations

All 50 states and the District of Columbia have declared a State of Emergency for COVID-19. Many of these declarations have effects on DME suppliers. Changes include relaxed standards on licensure (e.g., allowing a clinician to work in a facility who is not licensed in the state, but is licensed out of state; allowing a licensed clinician to provide services that are technically outside of the clinician’s licensure parameters). States continue to add/modify to their state of emergency declarations which may affect rehab suppliers. Suppliers should check their Department of Public Health websites daily for up-to-date information.

Infection Control Procedures

Social Distancing of Patients

If patients are allowed to enter the facility, then the supplier should create procedures to ensure proper “social distancing” of the patients.

Alternate Staffing Models

Many suppliers are running two separate shifts rather than overlapping shifts throughout the day. For example, Shift A may operate the facility from 7am to 2pm and Shift B will operate the facility from 2pm to 9pm. Both shifts are responsible for a complete cleaning of work surfaces at both the beginning and end of each shift to avoid contamination issues.

Communications

The supplier should update its phone recording in order to inform patients of the supplier’s COVID-19 procedures. The supplier should ask patients to like the supplier’s Facebook page to receive updates. The supplier should also frequently update its website in order to inform patients.

Role of Personal Protective Equipment (“PPE”)

The first line of defense for every business includes hand washing, alcohol-based hand rub, visual signs and alerts, and physical barriers between personnel and patients. If possible, supplier employees should wear gloves; the better practice would be to also wear face masks. Environmental decontamination (i.e., cleaning) is vital. If PPE is available, then it should be given to (i) staff and (ii) patients suspected of infection. If PPE is not available, the supplier should document attempts to obtain it.

THIS ARTICLE DOES NOT CONSTITUTE LEGAL ADVICE. THIS ARTICLE WAS PREPARED ON A SPECIFIC DATE. THE LAW MAY HAVE CHANGED SINCE THIS ARTICLE WAS WRITTEN. BEFORE ACTING ON THE ISSUES DISCUSSED IN THIS ARTICLE, IT IS IMPORTANT THAT THE READER OBTAIN ADVICE FROM A HEALTH CARE ATTORNEY.

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