

Acceptable Use of CARES Act Provider Relief Funds – Salary Limitation Update

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In a [previous post](#), we discussed the appropriate use of the Provider Relief Funds authorized and appropriated by Congress under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, Public Health and Social Services Emergency Fund (“Relief Fund”) for healthcare providers and facilities. Within that post, we specifically discussed the limitation imposed on use of the Relief Funds for payment of salaries, a topic of great interest to many recipients. Under the Terms and Conditions, recipients are prohibited from using the funds for salaries in excess of the Senior Executive Service Executive Level II amount – an annual salary of \$197,300 – or \$16,441 a month. We noted that, although the Department of Health and Human Services (“HHS”) had not spoken to this requirement with respect to the Provider Relief Funds, HHS permits other HHS grant Recipients to pay individuals’ salaries in excess of the \$197,300 limit with non-federal funds.^[1] Also, HHS’ federal contract regulations similarly limit use of federal contract funds for salary costs to the Executive Level II amount, but allow for amounts in excess of that limit to be paid with non-federal funds.^[2]

On Friday, May 29, 2020, HHS confirmed that this same approach applies to Recipients’ use of Provider Relief Funds. HHS communicated this through release of a [Frequently Asked Question](#) on HHS’ definition of Executive Level II pay level.

What is the definition of Executive Level II pay level, as referenced in the Terms and Conditions? (Added 5/29/2020)

The Terms and Conditions state that none of the funds appropriated in this title shall be used to pay the salary of an individual, through a grant or other mechanism, at a rate in excess of Executive Level II. The salary limitation is based upon the Executive Level II of the Federal Executive Pay Scale. Effective January 5, 2020, the Executive Level II salary is \$197,300. For the purposes of the salary limitation, the direct salary is exclusive of fringe benefits and indirect costs. The limitation only applies to the rate of pay charged to Provider Relief Fund payments and other HHS awards. An organization receiving Provider Relief Funds may pay an individual’s salary amount in excess of the salary cap with non-federal funds.

Accordingly, Recipients may use Relief Funds to pay salaries of those earning in excess of \$197,300, though amounts over \$197,300 must be paid from non-federal funds.

As stated in our prior posts, we encourage Recipients to develop specific mechanisms for tracking and documenting their use of Provider Relief Funds, particularly in light of HHS' and the HHS Office of the Inspector General's ("OIG") statements regarding their intent to audit providers on their compliance with the Terms and Conditions applicable to the use of such funds.^[3] Recipients must be mindful that HHS guidance in this area continues to evolve, with HHS issuing new and revised information. Epstein Becker & Green continues to monitor HHS' actions for any changes that may affect our clients.

[1] See Health Resources & Services Administration ("HRSA") External Grants Policy Bulletin 2020-03E, February 7, 2020.

[2] See 48 C.F.R. §§331.101-70 and 352.231-70.

[3] See, e.g., [HHS Announces Additional Allocations of CARES Act Provider Relief Fund](#), HHS Press Release, April 22, 2020; [HHS General Relief Fund Distribution FAQs – Intent to Recoup Relief Fund Payments not Tied to Specific Claims for Reimbursement](#), Added May 6, 2020; [Audit of CARES Act Provider Relief Funds-Distribution of \\$50 Billion to Health Care Providers](#), OIG Workplan (accessed June 2, 2020).

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