

# Who is a Manager or Supervisor Excluded from California's Healthcare Worker Retention Payment Program?

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In a recent [blog post](#), we described general registration and application considerations for employers seeking to enroll in California's new [Hospital and Skilled Nursing Facility COVID-19 Retention Payment Program](#) (the "WRP") on behalf of their employees, including details on eligibility, qualifying periods, and defined legal terms. Readers have asked how to analyze whether physicians and other employees who perform at least some "management" or "supervisory" duties qualify for the WRP, which we address here.

Before we dive in, as a reminder, employers must [register](#) for the WRP with California's Department of Health Care Services ("DHCS") by December 21, 2022 and submit complete applications by December 30, 2022. Readers should refer to DHCS' [FAQ Page](#) and [application guidance](#) that includes templates for employee submission data. DHCS is holding its last [informational webinar](#) on December 19th at 1:00p PST.

## Which Healthcare Workers Are "Managers" and "Supervisors" Excluded from WRP?

The term "[manager](#)" and "[supervisor](#)" is used in the WRP statute's definition of who is an "[eligible full-time employee](#)" and "[eligible part-time employee](#)." Specifically, employees who serve in a managerial or supervisory role are ineligible to receive WRP payments. To fall into that prohibited category where a person is ineligible for a WRP payment, DHCS' FAQs state that an employee must meet all of the following six (6) elements in performing his/her duties and responsibilities for the employer who is applying to WRP:

1. Manages the overall enterprise or one of its departments or sub-divisions (the "[Workplace](#)");
2. Customarily and regularly directs the work of at least two other employees in the Workplace;

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3. Hires/fires, or makes recommendations that are given particular weight as to hiring, firing, advancement, promotion, or other status changes for employees in the Workplace;
  4. Customarily and regularly exercises discretion and independent judgment;
  5. Primarily engages in work that meets the “duties test” for exempt employee status;
  6. Primarily engages in work that meets the “duties test” for exempt employee status; and
  7. Receives a monthly salary that is equal to or greater than twice the California minimum wage for full-time employment.

Even if an employee has a title or is referred to as a manager or supervisor within the organization, if he/she does not satisfy all of the six elements above (e.g., he/she is not-exempt for overtime purposes), then the employee would be eligible for WRP, assuming that he/she has otherwise satisfied the minimum number of qualifying hours and qualifying periods necessary for participation in the program.

## **How Do the Terms “Manager” and “Supervisor” Apply to Physicians for WRP Purposes?**

### ***First, Determine Which Legal Entity Should Include the Physician on its WRP Application:***

The first step that we recommend healthcare entities take in preparing their WRP registrations and applications is to identify the legal entity responsible for applying to WRP for specific groups of employees. Employers applying for WRP must submit accurate information to DHCS and, under penalty of perjury, affirm that they are applying for appropriate payments from the program on behalf of eligible employees. Healthcare entities often have high degrees of clinical and operational integration, but remember that physicians may be employed only by entities authorized to perform professional services under California law (e.g., a professional medical corporation), with limited exceptions (i.e., including the specific exception for certain entities to employ physicians under Cal. Bus. & Professions Code 2401).

So, for a physician who is not a solo practitioner/self-employed, the physician’s employing entity should apply on his/her behalf for WRP. For example, in a relationship where a medical group is contracted to provide services at a hospital or non-profit foundation exempt from licensure under Cal. Health and Safety Code 1206(l), (i) the medical group should apply to WRP as a “Physician Group Entity” for its employed physicians and, if applicable, employed mid-level providers (e.g., nurse practitioners, physician assistants, etc.), and (ii) the hospital or foundation would apply for their own eligible employees as a “Covered Entity.”

Once a legal entity clarifies how it qualifies for WRP, and which employees are eligible based on their location, scope of services, and satisfaction of the WRP qualifying time periods and hours commitments, the employer can determine which employees meet all of the qualifications to be a “manager” or “supervisor” at the employing entity and should be excluded from the application.

### ***Second, Take Note of DHCS’ Commentary on Physician Eligibility for WRP:***

The terms “manager” and “supervisor” are used under the WRP statute only to define eligibility for

full-time and part-time employees and are not used in the definition of “eligible physicians.” However, DHCS’ FAQs and comments during public informational calls on the WRP indicate that DHCS is applying the “manager” and “supervisor” exclusion to “eligible physicians” as well as “eligible employees.” We have sought clarification from DHCS with respect to their interpretation of that element of the statute. At this point, in light of DHCS’ public position on the statute, for purposes of submitting WRP applications, we recommend determining whether a physician falls within that category based on the six-factor test above before submitting a WRP application.

*Third, Apply the “Manager” and “Supervisor” Test to Physicians:*

As exempt employees (i.e., based on duties and salary) who exercise discretion and independent judgment in the course of performing professional services and supervise other healthcare providers, the analysis for most physicians under the six-factor test will turn on the specific impact of their role in the workplace. For example, if a physician is providing full-time, clinical services for a “Physician Group Entity” but is either (i) not employed in a role at that legal entity in which he/she manages that entity or any sub-division of it (e.g., a specialty department such as pediatrics or orthopedics), or (ii) not in a position where he/she hires or fires or makes recommendations that are given particular weight as to hiring, firing, advancement, promotion, or other status changes for employees, then he/she likely would not qualify as a “manager” or “supervisor” and therefore would be eligible for a WRP payment.

By contrast, if a physician is employed in an administrative or clinical leadership role within the Physician Group Entity (i.e., President, Medical Director, CMO), or serves on its Board of Directors, then based on how DHCS is interpreting the WRP statute, he/she would likely be considered a “manager” or “supervisor.” Given public comments about how DHCS reads the WRP statute, the most conservative approach would be to exclude that physician from the entity’s WRP application, even if he/she otherwise satisfies the definition of an “eligible physician.” If we are able to get clarity from DHCS on its interpretation of the statute as excluding “eligible physicians” from WRP to the extent they also meet the definition of a “manager” or “supervisor”, we will make that information available in a future post.

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National Law Review, Volume XII, Number 350

Source URL: <https://natlawreview.com/article/who-manager-or-supervisor-excluded-california-s-healthcare-worker-retention-payment>