

Significant Employment-Related CARES Act Provider Relief Fund Terms and Conditions

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We previously issued an [alert](#) on the [Terms and Conditions](#) associated with the receipt, retention, and use of funds by health care providers (individuals or entities) from the CARES Act Provider Relief Fund. These funds were distributed on April 10, 2020, from the Public Health and Social Services Emergency Fund (“Relief Fund”) by the U.S. Department of Health and Human Services (“HHS”) to health care providers across the country.

This alert specifically highlights certain provisions in the Terms and Conditions that implicate Relief Fund recipients’ relationships with employees. The employment-related Terms and Conditions address caps on executive and individual compensation, confidentiality agreements, and non-disclosure agreements.

Compensation Caps

According to the Terms and Conditions, recipients of the Relief Funds are prohibited from using Relief Funds to pay the salary of an individual at a rate in excess of Executive Level II, as defined by the U.S. Office of Personnel Management. Effective January 2020, the Executive Level II Rate is \$197,300. This amount excludes fringe benefits. Fringe benefits are allowances and services provided by employers to their employees as compensation in addition to regular salaries and wages, including, but not limited to, the costs of leave and employee insurance. The Terms and Conditions do not indicate that the compensation cap restricts the salary that a recipient may pay an individual, but rather limits the portion of that salary that may be paid with the amounts from the Relief Fund. In general, the propriety of the total compensation payable to employees of recipients of HHS awards is covered under separate regulations.

Confidentiality Agreements

In addition, the Terms and Conditions make clear that any amount from the Relief Fund may not be made available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors to sign internal confidentiality agreements prohibiting or otherwise restricting such individuals from reporting waste, fraud, or abuse to the appropriate authorities.

Any recipient who receives funding from the Relief Fund should ensure that such amounts are not used to contract with any entity that imposes such restrictive confidentiality covenants on its employees or contractors, or includes such restrictions in the underlying contract.

Non-Disclosure Agreements

With respect to non-disclosure agreements, the Terms and Conditions make clear that a recipient of funding from the Relief Fund who uses such funds to implement or enter into any non-disclosure agreement, policy, or form with its employees or subcontractors must include the following provisions in such agreement, policy, or form, pursuant to P.L. 116-93, Sec. 743(a):

“These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”

Any non-disclosure agreement or policy must make clear that it does not bar disclosures that are essential to reporting a substantial violation of law to Congress, an authorized official of an executive agency, or the Department of Justice. A non-disclosure agreement in effect prior to the receipt of funding from the Relief Fund may continue to be implemented and enforced if it complies with the requirements for such agreement that were in effect when the agreement was entered into by the parties. For example, a non-disclosure agreement that was entered into by a recipient and an employee on January 1, 2016, may remain in effect if the agreement complies with the requirements that were in effect as of that date.

Implications

While the Relief Fund presents a source of aid to the health care industry, recipients of this aid should be aware of the restrictions and take steps to ensure compliance.

- Recipients should review any employee and contractor agreements entered into after the receipt of such funds to ensure that the non-disclosure provisions comply with this law.
- Recipients should ensure that funds are not used for any contract, grant, or cooperative agreement with an entity that requires employees or contractors to be bound by confidentiality agreements without the appropriate whistleblower protections.
- Recipients should maintain records and documentation on how they allocate funds for employee salaries and aggregate compensation.
- Recipients should continue to monitor any further release of guidance from HHS to remain aware of their obligations and to ensure compliance with the Relief Fund Terms and Conditions.
- Recipients should note that the Relief Fund Terms and Conditions and applicable federal regulations do not limit or restrict applicable regulations or restrictions prescribed by state laws.

For any questions regarding specific employment-related Terms and Conditions relating to the CARES Act Provider Relief Fund payments, please contact Scott Landau (slandau@winston.com) or your Winston relationship attorney. View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

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