



ASHA COVID-19 Legislative/Regulatory Update – May 2020

ASHA Lobbies for HHS funding

ASHA along with our partner Argentum continues to advocate for a slice of funding in the HHS \$175 billion “Provider Fund” to help defray the costs incurred by senior living providers to address the preparation and ongoing response to the COVID-19 public health crisis. ASHA has been seeking a \$20 billion allocation from the fund and seeking support from the hill and the Administration to secure this financial relief. To date, HHS disseminated approximately \$70,400,000 of the available funds to Medicare providers including hospitals and other health care providers, rural health care, “hot spot” hospitals, Indian health, Skilled nursing facilities, dentists, and Medicaid providers.

- HHS has published a list of [frequently asked questions](#) pertaining to the \$50 billion general allocation of the COVID-19 provider relief fund. In addition, providers receiving funds must agree to a set of [terms and conditions](#), including reporting and documentation requirements, charging only in-network rates for COVID-19 care, and certifying that the funds will only be used to prevent, prepare for, and respond to the outbreak. Those that do not agree must contact HHS within 30 days to remit the payment.
- HRSA launched a separate [portal](#) allowing providers who have conducted COVID-19 testing or provided treatment for uninsured COVID-19 individuals on or after February 4, 2020 to request reimbursement.

Senior living has not yet been prioritized for an allocation of money. In letters to the [White House](#), [HHS](#) and [Congressional leaders](#), ASHA and Argentum continue to make the case for the much-needed financial support. We highlight the work of senior living providers and staff that are serving on the front lines of this pandemic to protect the almost 2 million seniors and their staff from COVID-19. We continue our outreach to not only secure assistance from the existing fund but also seek to be prioritized in future stimulus packages for testing capabilities and Personal Protective Equipment (PPE).

ASHA and Argentum Meet (Virtually) with HHS Deputy Secretary Hargan

On May 4, 2020, ASHA and Argentum staff and members had the opportunity to formally present our request with Deputy Secretary Hargan and key HHS staff. It was a positive exchange and clear that senior living was on the agency’s radar and communications will continue with staff to work out issues of dissemination methodology to assure that any allocation of funds is made in a legitimate and accountable manner. We are cautiously optimistic that senior living will be recognized in a future funding announcement but will continue our outreach efforts on the hill and in the agency and administration to reinforce our message.

Phase 4 COVID-19 Relief Bill Taking Shape: ASHA Lobbying Efforts Ongoing

ASHA and Argentum lobbying staff and members continue to reach out to hill contacts to 1) educate them on our request for “provider funding”, and 2) seek prioritization of PPE and test kits for the industry. Absent an express allocation to the industry of a meaningful amount from the existing fund (at least \$20 billion), ASHA and Argentum are seeking a provision in the next stimulus package to create a senior living provider fund to restore financial stability to the industry. In an industry letter to House and Senate [leaders](#), we lay out our policy priorities for financial relief, amend the Paycheck Protection Program (PPP) to allow greater participation for senior living who employ less than 500 employees per location, and consideration of federal compensation assistance for front line workers during the COVID-19 outbreak. We also stress the continued need for adequate supplies of PPE and test kits for every senior living community. Senior living should be given the same priority status as the nursing home industry for the distribution of these items. In a recent speech, VP Pence [announced](#) that nursing homes would be prioritized for PPE but not assisted living citing that SNFs offered medical support to seniors while assisted living was personal care. The Trump Administration affirmed that action by directing FEMA to deliver PPE to all 15,000 nursing homes in the country by July 1st. ASHA and Argentum [responded](#) to the announcement suggesting any plan to exclude Assisted Living from PPE shipments is a mistake.

ASHA will be encouraging members this week to reach out to the hill and seek support for these stimulus provisions.

Congress Requests COVID-19 Data from Senior Living Providers

Several ASHA member companies received a [letter](#) from Congress requesting responses to eighteen COVID related questions. The letters are signed by Representative Carolyn Maloney (D-NY), Chair of the House Oversight Committee, Senator Elizabeth Warren (D-MA) and Senator Ed Markey (D-MA). Specifically, they seek *“information on the extent of novel coronavirus 2019 (COVID-19) outbreak at assisted living facilities you own and operate, and the methods you are using to prevent and mitigate when they do occur.”*

The policymakers express concern that a “parallel crisis (to the nursing home crisis) is playing out with far less scrutiny in another setting housing vulnerable seniors: assisted living.”

The Members of Congress are seeking the following data: the number of COVID-19 positive cases in each community, hospitalizations, staff infections and fatalities. They want to know the level and frequency of resident testing, the actions taken when residents test positive, reporting protocol, the use of PPE, visitor access and whether CDC guidance is followed. Finally, they seek information about staff training, paid sick leave, family and medical leave, and hazard pay.

It is unclear how this information will be used but we are confident that our members have risen to the challenge presented by this health crisis- keeping their residents safe, engaged and informed, and staff well trained, compensated and acknowledged for their heroic work and compassion.

House Democrats Weigh in with HHS Sec Azar on Prioritizing Tests to Long Term Care Settings

On May 4th, 88 Democratic Members of the House of Representatives wrote to Health and Human Services (HHS) Secretary Azar and Centers for Medicare and Medicaid Services (CMS) Administrator Verma requesting a portion of the emergency funding from the Paycheck Protection Program be allocated to states specifically for the development, purchase, administration, or provision of COVID-19 testing and for long-term care facilities. The letter urges Secretary Azar and Administrator Verma to direct States to prioritize long-term care facilities in any guidance they may offer as they distribute this funding and to stringently assess whether each state has adequately prioritized “senior and other congregate living settings” within their plan.

Legal Liability Protection for Senior Living Industry

Efforts to secure legal liability protection for the industry are occurring on several fronts.

State:

- The industry is working to ensure that Executive Orders by state governors granting immunity for health care industry workers includes senior living.

Federal:

- *PREP Act*: ASHA and Argentum are seeking liability protection be afforded under the HHS “Declaration Under the Public Readiness and Emergency Preparedness Act (the PREP Act). Under the PREP Act, a “covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration . . . has been issued with respect to such countermeasure.” The United States Department of Health and Human Services (HHS) triggered the liability protections for covered persons under the PREP Act when it published the “Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19” (the Declaration) and the Amendment to the Declaration (the Amendment). The two organizations are urging HHS to confirm that senior living meets the definition of a “covered person” under the Act.
- *Other federal efforts*: Additional efforts are underway to secure liability protection in a broader context in the next stimulus legislation. Senior living provider organizations and other health care industry partners are advocating a policy position to ensure that frontline health care workers and institutions are not be held liable for the spread of COVID-19 or care directly impacted by the crisis, unless due to reckless misconduct or flagrant indifference. We are supporting legislative language that provides protection to all senior care facilities, including skilled nursing and rehabilitation centers, assisted living and dementia care facilities, and home health care agencies. This issue is setting up to be a controversial negotiating point in the upcoming legislation. While the House Democrats have made state and local government funding a priority in any moving legislation, the Senate Republicans are demanding federal liability protection for

businesses that reopen to guard against what he termed an “avalanche” of lawsuits. The liability protection could be a major sticking point in a funding bill. In another development the Senate Judiciary committee announced a hearing on May 12, 2020, titled Examining Liability During the COVID-19 Pandemic. A committee hearing notice and witness list has not yet been released.

Congress is Back and CARES 2.0 is on Deck

On Monday, May 4th the Senate returned to session to resume legislative business, but the House will remain out until at least next week. As the floor and Committee schedules for coming days and weeks take shape, leadership officials stated that Congress is likely to consider another round of COVID-19 legislation as they look to stem emerging and existing issues pertaining to the outbreak. For now, the Senate is expected to primarily focus on clearing judicial nominees and presidential nominations.

Meanwhile, House Democratic leadership stated last week that members will return to Washington once a vote has been scheduled on the “CARES 2.0” legislation. Democrats are using Speaker Nancy Pelosi's (D-CA) counteroffer to Senate Majority Leader Mitch McConnell's (R-KY) original CARES Act as a starting point for developing their forthcoming bill, prioritizing funding for state and local governments, election assistance, workforce protections, and reforms to the Paycheck Protection Program (PPP), among other things. Bill text could be released by House Democrats as soon as this week, with a vote occurring the following week of May 11. However, it's entirely possible that the vote could slip into late May or early June should lawmakers need more time to clinch a broader agreement.

As the COVID-19 pandemic ensues, lawmakers are continuing to mull over policy items for another round of economic stimulus relief. Below is a list and summaries of the major priorities that have been discussed:

Payroll Tax During a virtual town hall meeting on May 3rd, President Donald Trump stated that he will not support another COVID-19 relief bill without a provision that provides payroll tax relief.

Infrastructure President Trump reiterated his call for robust infrastructure provisions in the Phase IV bill during Sunday's town hall. He specifically highlighted surface transportation and broadband infrastructure as areas he'd like to see addressed.

- Despite support for infrastructure from Speaker Pelosi and President Trump, it remains to be seen whether both parties can strike an agreement on big-ticket legislative items such as infrastructure. Congressional Republicans have remained opposed to tacking on non-COVID related items to future relief packages.

State and Local Governments House Ways and Means Chairman Richard Neal (D-MA) stated yesterday that House Democrats will soon detail plans to provide additional financial assistance to state and local governments. In addition to a set amount of money that will likely fall within the \$250-\$500 billion range, the plan will include provisions that seek to boost private activity bonds.

- A bipartisan group of House lawmakers have [introduced](#) legislation that would allocate \$250 billion in direct funding for local governments of all sizes. The [measure](#) would also allow governments to offset lost revenue due to the pandemic.

Liability Leader McConnell emphasized that he will "insist" Congress limit the liabilities of health care workers, business owners, and employees from lawsuits pertaining to the COVID-19 outbreak, making it contingent in order for the Senate to consider key Democratic priorities. Democrats have dismissed this proposal, arguing that it would water down federal consumer protection efforts.

Merger Ban Several Democratic lawmakers have coalesced behind a plan sponsored by Sen. Elizabeth Warren (D-MA) and Alexandria Ocasio-Cortez (D-NY) that would place a ban on company mergers during the outbreak. However, Democratic leadership appears lukewarm on this suggestion as of now, and it is unlikely to gain traction in the GOP-controlled Senate.

Surprise Billing Energy and Commerce Ranking Member Greg Walden (R-OR) expects another push for action on surprise billing in the next round of relief. During the Phase III negotiations, Chairman Frank Pallone (D-NJ) and Senate Health, Education, Labor, and Pensions (HELP) Chairman Lamar Alexander (R-TN) were actively trying to tack their surprise billing legislation onto the package.

Appropriations Appropriations leaders are delaying the start of their fiscal year (FY) 2021 funding work amid the uncertainty surrounding the COVID-19 outbreak. Senate Appropriations Chairman Richard Shelby (R-AL) stated that he expects to hold markups ahead of the Jul. 4 district work period.

Remote Voting Members of the remote voting working group met last week to discuss how to conduct Committee business remotely with virtual hearings and markups. House Majority Leader Steny Hoyer (D-MD) emphasized the need to resume Committee business remotely in order to queue up legislation for when it's safe for lawmakers to return.

Agency Updates

FEMA The Federal Emergency Management Agency (FEMA) published a [fact sheet](#) on how the agency will coordinate and distribute two shipments of PPE to 15,000 nursing homes across the country.

FDA The Food and Drug Administration (FDA) issued an [emergency use authorization](#) for the antiviral remdesivir.

- FDA issued [guidance](#) outlining an exemption and exclusion from certain requirements of the Drug Supply Chain Security Act during the public health emergency.
- FDA issued [guidance](#) that will temporarily allow hospitals to compound certain sedatives used for COVID-19 patients during the public health emergency. Additional details on this policy from the FDA can be read [here](#).

- FDA has [authorized](#) the first at-home COVID-19 testing kit that will allow patients to self-collect samples.
- FDA issued an [update](#) on steps the agency is taking to help mitigate supply interruptions of food and medical products.
- FDA [announced](#) actions to increase U.S. supplies to support COVID-19 response efforts by providing [instructions](#) to manufacturers importing personal protective equipment (PPE) and other devices.

SBA The Small Business Administration (SBA) is temporarily [restricting](#) incoming applications for Paycheck Protection program (PPP) loans to only those submitted by the country's smallest lenders.

- SBA issued [guidance](#) on how to calculate PPP loans by business type.
- Following the enactment of the COVID Phase 3.5 legislation, the Small Business Administration's (SBA) Paycheck Protection Program (PPP) [resumed](#) lending on April 27th.
- SBA published a [list](#) of all lenders participating in the PPP.
- SBA and Treasury Department updated their list of [frequently asked questions](#) on the PPP.

Treasury The Treasury Department has released a list of [frequently asked questions](#) pertaining to the Employee Retention Credit.

NIH The National Institutes of Health issued its first [guidance](#) on COVID-19 treatment options that are currently under review.

- NIH and the Foundation for the NIH (FNIH) [announced](#) that they will launch a new public-private partnership with more than a dozen biopharmaceutical companies aimed at speeding COVID-19 vaccine and treatment options.

Testing The Trump administration released a [blueprint](#) that seeks to bolster state testing plans and rapid response programs.