

# THREE KEY THINGS IN HEALTH CARE

HUNTON  
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- **Overall financial impact to hospitals from COVID-19 through second quarter appears less than predicted, and health systems still have unused relief funds, but impacts vary between for-profit and non-profit systems.**
  - Second quarter financial reports published by the large for-profit and non-profit health systems have revealed that the overall financial impact of COVID-19 through June 30, 2020 may have been much less than the \$202.6 billion initially predicted by the American Hospital Association (“AHA”) back in May, and several for-profit systems actually reported *improved* profit margins after accounting for the receipt of CARES Act provider relief funds.
  - The most significant difference from the AHA estimate appears related to lost revenues, where hospital volumes rebounded more quickly than projected with the easing of restrictions on non-emergent procedures across the states.
  - **Lost revenue**, as a percentage of prior year revenue for the six months ending June 30, appears relatively similar across for-profit and non-profit sectors averaging around 8-9%, but there are more double-digit outliers in the non-profit sector.
    - These outliers may reflect systems concentrated in states that were harder hit or applied more restrictive measures.
  - Unlike lost revenues, COVID-19’s impact on **operating expenses**, as a percentage of revenue, was significantly different in the for-profit and non-profit sectors. Non-profit systems reported an overall *increase* in operating expenses of around 4% that aligns with the AHA projections, while for-profit systems reported an overall *decrease* of 4%, driven most significantly through reductions in supply costs.
  - The for-profit and non-profit sectors received relatively similar **provider relief fund payments**, averaging around 7-9% of revenue for the six months ending June 30, 2020, with the only notable exceptions being those systems located in hard hit states such as New York and Michigan.
  - The combination of these relief funds and expense reductions offset more than 100% of lost revenues for the for-profit systems. In contrast, the combination of relief funds and increased operating expenses resulted in a net offset of less than 40% of lost revenues for non-profit systems.
  - Another notable point from these second quarter financial reports is that most for-profit and non-profit systems only treated a portion of relief funds as being “earned” and included within net income, which accounted for 67% of total relief funds received by for-profits and around 74% of total relief funds received by non-profits. The methodology for determining the amount of earned relief funds presumably ties to the CMS Terms & Conditions for these funds but is not spelled out in any financial reports, so it is unclear whether any portion of these funds might remain unused if hospital finances continue to improve.
  - **Key takeaway:** Second quarter financial reports indicate that the large for-profit and non-profit hospital systems, as a whole, appear to be weathering the COVID-19 pandemic better than hoped and actually had unused provider relief funds going into July. However, these reports show there can be significant variability across individual

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systems and regions, and that non-profit systems across the board are much less adept in adjusting to reduced expenses during periods of lower volumes.

- **A comprehensive, enterprise-wide information technology (“IT”) asset inventory can bolster HIPAA Security Rule compliance and better position covered entities and business associates to identify, assess and manage risk to electronic protected health information (“ePHI”).**
  - In the wake of two recent settlements announced by the U.S. Department of Health and Human Services Office of Civil Rights (“OCR”) involving potential violations of the HIPAA Security Rule (discussed in a prior issue), and as more covered entities report breaches stemming from the [May 2020 ransomware attack on Blackbaud](#), OCR is recommending that covered entities and business associates create and maintain IT asset inventories.
  - Under the HIPAA Security Rule, covered entities and business associates must ensure the confidentiality, integrity, and availability of ePHI that they create, receive, maintain, or transmit. As part of this obligation, covered entities and business associates are required to conduct a risk analysis consisting of an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of the ePHI they hold.
  - Despite being “fundamental to identifying and implementing safeguards that comply with and carry out the Security Rule standards and implementation specifications,” OCR reports in its [August 25 Cybersecurity Newsletter](#) that its “investigations frequently find that organizations lack sufficient understanding of where all of the ePHI entrusted to their care is located.”
  - Although not required by the HIPAA Security Rule, OCR is now recommending as a best practice, that covered entities and business associates create and maintain up-to-date, comprehensive IT asset inventories, observing, they “could be a useful tool in assisting in the development of a comprehensive, enterprise-wide risk analysis, to help organizations understand all of the places that ePHI may be stored within their environment, and improve their HIPAA Security Rule compliance.”
  - While covered entities and business associates initially may be inclined to limit their inventories to IT assets that store or process ePHI, OCR notes that taking into consideration other IT assets (i.e., those that do not store or process ePHI) also can be beneficial to HIPAA Security Rule compliance. OCR provides, as an example, devices used to monitor and control a heating, ventilation, and air conditioning (“HVAC”) system—seemingly entirely unrelated to the storage and processing of ePHI—which can provide a foothold for an intruder to gain access to a covered entity or business associate’s IT network and, in turn, its ePHI.
  - **Key Takeaway:** To the extent they are not already doing so, covered entities and business associates should create and maintain up-to-date IT asset inventories to bolster HIPAA Security Rule compliance and mitigate risks to the confidentiality, integrity, and availability of ePHI.
- **As an increasing number of employees shift from teleworking back to office work environments, the U.S. Equal Employment Opportunity Commission (the “EEOC”) warns employers that workplace anti-discrimination laws must not be placed on the back**

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burner, and offers ways in which such laws can align with COVID-19 guidance from public health authorities.

- On September 8, 2020, the EEOC released an updated version of its Technical Assistance Questions and Answers, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws" (the "QAs"), identifying strategies employers can use to navigate the impact of COVID-19 in the workplace, while complying with guidance from the Centers for Disease Control and Prevention (the "CDC") and workplace anti-discrimination laws such as the Americans with Disabilities Act (the "ADA"), the Rehabilitation Act, and the Genetic Information Nondiscrimination Act, among others.
- In the QAs, the EEOC provides valuable guidance for employers who are now facing the complexities of employees returning to work – all while the pandemic continues. In the QAs, the EEOC answers the following questions, among others:
  - May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace? *Generally yes (see **Question A.6**).*
  - May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if he/she has COVID-19, or require that this employee alone have his or her temperature taken or undergo other screening or testing? *Generally yes, if the employer has a reasonable belief based on objective evidence that the person might have COVID-19 (see **Question A.9**).*
  - **An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor?** *No (see **Question B.6**).*
  - Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *No, the employer is entitled to make an individual-specific disability determination (see **Question D.15**).*
- In addition to questions related to returning to the workplace, the confidentiality of medical information, and reasonable accommodations, the EEOC tackles other coronavirus-related issues, such as pandemic-related harassment due to national origin, race, or other protected characteristics, age discrimination, and furloughs and layoffs. Throughout the QAs, the EEOC emphasizes the importance of workplace anti-discrimination laws and illustrates the ways in which respecting such laws and maintaining a safe work environment work hand in hand.
- **Key Takeaway:** The pandemic has normalized teleworking, and employers are now facing the difficulties of bringing employees back into the office safely. Although it is easy to get lost among the flurry of evolving guidance, bulletins, and Frequently Asked

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Questions from public health authorities and government agencies, workplace anti-discrimination laws must remain at the front of employers' minds as novel workplace issues continue to arise.

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