

July 28, 2022

State of California Retention Payment Program

Note (7/28/2022): *Currently, the Department of Health Care Services (DHCS) has not issued guidance on the Retention Payment Program. As this FAQ is an interim review of the statute, it is likely to change, potentially significantly, when DHCS issues official guidance. CHA cautions members not to solely rely on this FAQ for implementation of the Retention Payment Program.*

CHA continues to work with the Department and other stakeholders to clarify the implementation of the language and answer questions. These FAQs will be updated as additional information and guidance become available. Future guidance will be posted on the [DHCS website](#).

General Questions

Q: What is the Retention Payment Program?

A: This is an optional, state program in which hospitals, skilled-nursing facilities, and other qualified health care facilities or health care employers serve as conduits for retention payments from the state to specified individuals.

Q: How was the Retention Payment Program created and funded?

A: The Retention Payment Program was created as a part of the 2022 budget process in budget trailer bill [Senate Bill 184](#). The program is funded through the state budget, and nearly \$1.1 billion was allocated for retention payments.

Q: Who administers the Retention Payment Program?

A: The Retention Payment Program is administered by DHCS, which will receive the applications for retention payment funds, determine retention payment amounts, and disburse the retention payments to hospitals, qualified health care employers, and in some cases directly to physicians.

Scope of the Retention Payment Program

Q: Which are the qualified facilities covered by the Retention Payment Program?

A: For the purposes of the Retention Payment Program, a qualified facility is all the following:

- 1) *A general acute care hospital (Section 1250(a) of the Health and Safety Code)*

- 2) *An acute psychiatric hospital (Section 1250(b) of the Health and Safety Code)*
- 3) *A skilled-nursing facility (Section 1250(c) of the Health and Safety Code)*
- 4) *A clinic that is affiliated, owned, or controlled by a general acute care hospital and conducts medical research and health education and provides health care to its patients through a group of 40 or more physicians and surgeons, as specified (Section 1206 (l) of the Health and Safety Code)*
- 5) *A rural health clinic or federally qualified health care center (FQHC) that is affiliated, owned, or controlled by a general acute care hospital (Section 1206(b) of the Health and Safety Code).*
- 6) *A clinic that is affiliated, owned, or controlled by a general acute care hospital and exclusively to provide health care services and health education services within the Los Angeles County Service Planning Area 6, as specified (Section 1206(r) of the Health and Safety Code).*
- 7) *A clinic that is affiliated, owned, or controlled by a general acute care hospital and operated or maintained as outpatient departments of hospitals (Section 1206(d) of the Health and Safety Code).*
- 8) *A physician organization that is part of a fully integrated delivery system that includes a physician organization, health facility or health system, and a nonprofit health care service plan, as specified.*
- 9) *A designated public hospital system that is comprised of a designated public hospital, as defined in subdivision (f) of Section 14184.10 of the Welfare and Institutions Code, including nonhospital settings.*

Q: Who can apply for the Retention Payment Program?

A: A person or entity that owns or operates a qualified facility, a covered services employer, or a physician entity. Employees should not apply on their own for the program.

Q: What is a covered services employer?

A: For the purposes of the program, “covered services employers” are any individuals or entities that:

- Directly employ or exercise control over wages, hours, and working conditions
- Provide onsite services such as clerical, dietary, environmental services, laundry, security, engineering, facilities management, administrative, or billing staff through a contract with a qualifying facility
- Provide nurse practitioners or physician assistants at a qualifying facility through a professional corporation where the professional corporation is the employer

Q: What is a physician entity?

A: Any legal entity that contracts with a qualifying facility to provide physician services, including, but not limited, to professional medical corporations and sole proprietorships.

Q: Who applies for retention payments on behalf of physicians?

A: The law provides that a qualifying facility or a physician entity shall submit specified information for each eligible physician employed by, or otherwise affiliated with, a qualifying facility or physician entity. As written, this could require both a hospital and a professional medical corporation or sole proprietorship to submit the relevant information. We expect DHCS to clarify who must submit the required information for eligible physicians.

Who Qualifies for Retention Pay?

Q: Are all employees eligible for retention payments?

A: No. Employees classified as managers or supervisors are not eligible for retention payments. The test is the same as the Executive Exemption under Wage Orders 4 and 5, Section 1.

Q: Which full-time employees can receive retention payments?

A: To qualify, an eligible full-time employee needs to be employed by a covered entity or covered services employer as of the date of record and have been compensated for 400 or more in-person hours at the site of the qualifying facility during the qualifying work period, or the eligible full-time employee is considered to be a full-time employee on the site of a qualifying facility by the covered entity or covered services employer as of the date of record.

Q: Which part-time employees can receive retention payments?

A: To qualify, an eligible part-time employee needs to be employed by a covered entity or covered services employer as of the date of record and have been compensated for less than 400 in-person hours at the site of the qualifying facility during the qualifying work period, or is considered to be a part-time employee by the covered entity or covered services employer, and the eligible part-time employee is not considered to be a full-time employee on the site of a qualifying facility by the covered entity or covered services employer as of the date of record.

Q: Are physicians eligible for retention payments?

A: Yes. The following physicians are eligible to receive retention payments if they worked during the qualifying work period and on the date of record at a qualifying facility:

- Physicians who primarily provide in-person patient care work in a clinical or medical department or as a member of a patient care team on the site of a qualifying facility
- Physicians who are employees under Section 2401 of the Business and Professions Code of a covered entity or physician entity working primarily inperson on the site of a qualifying facility

Q: How much money can workers expect in retention payments?

A: As of now, eligible employees and eligible physicians will receive the following amounts:

- Eligible full-time employees shall receive up to \$1,000 as a base payment and may receive an additional \$500 (up to \$1,500 from the state) as a state match if the employer claims a qualifying matching retention payment.
- Eligible part-time employees shall receive up to \$750 as a base payment and may receive an additional \$500 (up to \$1,250 from the state) as a state match if the employer claims a qualifying matching retention payment.
- Eligible physicians shall receive up to \$1,000 in retention payments.

However, the law allows DHCS to *reduce* these amounts on a pro-rata basis to reflect the total amount of funding appropriated and the total number of eligible employees and physicians.

Q: Is providing a qualifying matching retention payment for the state match mandatory?

A: No. The Retention Payment Program does not require a covered entity, covered services employer, or physician entity to make a match. Instead, a covered entity, covered services employer, or physician entity can

apply for just the base payment. If the covered entity, covered services employer, or physician entity provided a qualifying payment that was less than \$500, they can request a match for that amount from DHCS.

Q: What type of compensation counts as a qualifying payment to draw down a state match?

A: Under the Retention Payment Program, there are three types of compensation that count toward a state retention payment match:

- 1) Hazard or bonus pay as a result of the COVID-19 pandemic
- 2) A bonus based on performance or financial targets or a payout resulting from performance sharing programs
- 3) Compensation in response to operational needs of the covered entity or covered services employer, including, but not limited to, staffing shortages or recruitment needs

To qualify, the compensation needs to be paid, or have been paid, between December 1, 2021, and December 31, 2022.

Q: Does a covered entity need to match the base payment, as well as provide a \$500 bonus, to qualify for the state retention payment match?

A: No. A covered entity does not need to match the retention base payment. To qualify for the state retention payment match, the covered entity must provide a specified payment, and the state will match the payment up to \$500.

Retention Payment Program Application

Q: What information needs to be in the application for the Retention Payment Program?

A: While DHCS will likely require additional information through implementation guidance, the statute requires the following for the application from a covered entity, covered services employer, or physician entity:

- Name of the eligible full-time employee, eligible part-time employee, or, if applicable, eligible physician
- Mailing address of the eligible full-time employee, eligible part-time employee, or, if applicable, eligible physician
- The total amount of matching retention payments that the covered entity or covered services employer paid or will pay to the eligible full-time employee or eligible part-time employee
- Number of hours for which the covered entity or covered services employer compensated the eligible full-time employee or eligible part-time employee during the qualifying work period
- If a covered entity, a list of eligible physicians who are employed by the covered entity, contracted with, or employed by a physician entity under contract with the covered entity (in addition to the information required above)
- If a covered services employer, a list of covered entities that the covered services employer contracts with for specified services staff (in addition to the information required above)
- Any other information as required by DHCS for purposes of implementing this part

Q: What is the timeline for determining if an employee is eligible for the Retention Payment Program?

A: The qualifying period will begin on July 30, 2022, and run until October 28, 2022.

Q: When is the date of record?

A: The date of record has not been determined yet by DHCS. DHCS will set the date of record in future guidance.

Q: When is the application for retention payments due to DHCS?

A: The due date for the Retention Payment Program application has not been determined yet by DHCS. DHCS will set the date of record in future guidance.

Q: What if an employee leaves our organization after the qualifying period?

A: An individual must be employed as of the date of record to be an eligible employee or physician. DHCS will set the date of record no later than 45 days after the end of the qualifying work period. At this point, it is unclear whether the individual must also be employed as of the date the covered entity receives the payment from the state. Future DHCS guidance will address this issue.

Q: Does DHCS send the money to the covered entity or to the eligible employee?

A: DHCS will allocate and send retention payment funds (including any matching payments) for all eligible employees to the covered entity. The covered entity must then send the appropriate amount to each individual employee.

Q: What happens if I leave an eligible employee off my application or incorrectly calculate their eligibility?

A: All eligible employees must be listed in an application. If an eligible employee is excluded from the application, or if the employee's retention payment is inaccurately calculated, the hospital will need to provide retention payments from their own funds.

Q: What is the specific application process for the Retention Payment Program?

A: The specific process for applying for the Retention Payment Program, including timelines, will be determined through guidance issued by DHCS. CHA will update these FAQs as guidance is issued by DHCS.

Liability and Dispute Resolution

Q: What if an employee disputes the retention payment they received?

A: If an employee disputes the retention payment they received, including disputing the fact that they did not receive a retention payment and should have received a retention payment, SB 184 lays out the following process:

- The worker notifies the covered entity of a potential dispute. The covered entity has 30 days to investigate the potential dispute and cure the dispute.
- If the covered entity does not cure the dispute within 30 days, the employee may take their dispute to the Labor Commissioner's Office. If the Labor Commissioner finds that the covered entity failed to appropriately pay the full retention amount, the Labor Commissioner must require the full payment of the retention payment, plus interest.

- If the failure to pay the full retention payment amount is willful, then the covered entity must pay the unpaid retention payment amount, plus interest, **and** liquidated damages in the amount of the unpaid retention payment amount.
- If the amount in dispute is *greater* than \$500, the employee may file a civil action to recover the deficiency.

Q: Do retention payments count as wages? Do they fall under the Private Attorneys General Act (PAGA)?

A: No. Retention payments are explicitly defined to not be wages and are explicitly exempted from PAGA.

Q: Are the retention payments subject to employee withholding or state/federal employer share of employment taxes such as Social Security, Medicare, or unemployment insurance?

A: The retention payments are not exempted from either federal or state taxation laws and requirements. Future guidance will likely address this question in more detail.

Q: Will covered entities face a state private right of action for minor or ministerial errors?

A: No. SB 184 only permits the option of a private right of action for disputes more than \$500. This excludes disputes such as an eligible full-time employee being accidentally categorized as an eligible part-time employee.

Q: Will covered entities face punitive state penalties for retention payment program disputes?

A: No. Outside of the willful penalties described above, covered entities are exempted from punitive penalties, as they are a conduit of the state.

Q: Will covered entities face potential liability under federal law?

A: Due to the Supremacy Clause in the United States Constitution, a state law cannot change federal law. Therefore, the protections in SB 184 against punitive penalties and private rights of action apply only to state law, not federal law. However, there is significant alignment between state and federal law on the payment of wages. We believe that the liability protections are robust, and we encourage all covered facilities to work with their labor and tax counsel to participate.

Contact:

Gideon Baum

gbaum@calhospital.org

(916) 552-7621