

House Bill 169: Use of Funds for SNFs and ICFs

Introduction. House Bill (HB) 169 provided significant relief funding to a variety of health care providers, but for SNFs and ICFs/IID, the funding came with strings attached. These strings are causing concern for providers who received the payments.

This document spells out the restrictions on use of the funds as stated in the legislation and in Department of Medicaid (ODM) emergency rules implementing the legislation and discusses multiple gray areas that the government has not addressed.

OHCA recommendation: Given the lack of authoritative guidance, write your own policies on how you are using the money from HB 169, including the topics covered below. Keep records of expenditures that conform to your policies in case anyone checks in the future.

Direct care staff. The statute provides that both SNFs and ICFs must use HB 169 payments exclusively for direct care staff compensation, but it does not define who are considered direct care staff. In this case, the ODM emergency rules for SNFs and ICFs help. They both define direct care staff as all facility staff except for those specifically excluded by statute.

The statute defines the excluded staff by specifying that none of the HB 169 money may be paid to contract workers, staff supplied through or by staffing agencies, facility administrators, facility executive staff, or facility owners. Neither the statute nor the rules define any of these personnel categories, most of which could be subject to different interpretations.

OHCA recommendation: Adopt a written definition of direct care staff that tracks the statute and rule. Specify in your policy which personnel you include in each of the categories listed in the statute. In the absence of definitions in the statute or rule, any reasonable definition of these personnel categories should be acceptable. One area to consider is whether you wish to include corporate personnel as facility staff.

Compensation. The statute gives examples of compensation, prefaced by the words “which may include.” The examples are staff retention bonus payments, overtime pay, shift differential payments, staff recruitment costs, and new hire incentive payments.

The question is whether HB 169 funds must be spent only on the listed expenses or if they also can be spent on, for example, regular wages. The rules do not further define compensation beyond the statutory language. The words “which may include” in the statute indicate that the listed types of compensation are examples and are not all-inclusive. Thus, anything else that reasonably could be considered compensation would qualify. The statute even gives recruitment costs as an example of compensation, so the legislature apparently had a broad understanding of compensation for HB 169 purposes.

OHCA recommendation: List in your policy everything that you wish to consider compensation (within reason), including all items listed in the statute and regular wages and benefits.

Timing of expenditures. Neither the statute nor the rules set a timeframe within which the HB 169 money must be spent or clarify whether it can be attributed to expenditures that occurred before the provider received the money.

OHCA recommendation: Specify in your policy that you began spending the money upon receipt. It should not be necessary to go back in time to justify use of the HB 169 funds because all compensation paid to a wide range of staff can be counted, which should use up the available funds within a few months after receipt.

Reporting, auditing, and recovery. The statute allows (but does not require) the Medicaid Director to recover any funds that a provider uses for any purpose other than as specified in the statute (that is, direct care staff compensation).

There are no provisions in the statute that require providers to report how they use the HB 169 funds or that speak to state audits of the expenditures. The statute authorizes (but does not require) ODM to adopt rules to define terms and to establish procedures and other provisions to implement the statute. In writing the rules, though, ODM chose only to define direct care staff, as discussed above. The rules do not prescribe any other definitions or establish any provider reporting requirements or state auditing or recovery procedures.

At the present time, ODM apparently has no intention to require reporting or to conduct audits. The expenditures funded by HB 169 money will be reported in the normal cost-reporting process, but they will be mixed with other expenditures. At present, the cost report does not include a schedule for separately identifying HB 169-qualifying expenses.

OHCA recommendation: Maintain documentation of expenditures that under your policies you consider to be covered by the HB 169 money in the event ODM later decides to require reporting or to audit use of the funds.

Sale business or bed licenses. Note: this section does not apply to ICFs, only to SNFs.

The statute requires any SNF that receives HB 169 funds and then sells any of its business or bed licenses on or before June 30, 2023, to reimburse the state, from the proceeds of the sale, for the funds distributed under HB 169. It says nothing else about the subject.

The ODM emergency rule does not address this section of statute. As a result, there are no provisions for reporting sales or creating state recovery procedures when a repayment obligation is triggered. The statute does not place any direct requirement on the state to recover the funds. The obligation is on the seller to pay back the money.

The statute does not clearly define the transactions that give rise to the repayment requirement. Ohio providers are familiar with the term “change of operator” or “CHOP,” but HB 169 does not use this term. Instead, it uses the words, “sells any of its business or bed licenses.”

The statute could be interpreted as covering (or not covering) any number of different types of transactions involving beds or entire facilities, including transactions involving operating companies, property companies, and corporate stock.

However, the plain wording of the statute does not include surrendering beds to the state or changing lessees because neither of those transactions remotely could be characterized as a sale of business or bed licenses.

If a transaction does trigger a repayment obligation, the statute is unclear on how much the seller must repay. The law could be read as requiring repayment of all HB 169 money received up to the amount of the sale proceeds.

OHCA recommendation: Consult legal counsel experienced in SNF transactions for advice on applicability of the repayment obligation to any arrangement you may be considering.

Resources.

[House Bill 169](#)

[ODM emergency rule - SNFs](#)

[ODM emergency rule – ICFs/IID](#)