

New Proposal to Remove Disincentives to Living Organ Donation

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On December 20, 2019, the Department of Health and Human Services (“DHHS”) issued a notice of proposed rulemaking (the “Proposal”) that removes financial barriers to organ donation by expanding the scope of reimbursable expenses paid through the Health Resources and Services Administration’s Reimbursement of Travel and Subsistence Expenses Incurred toward Living Organ Donation program (the “Program”). Specifically, the Proposal would allow living organ donors to be reimbursed for donation-related lost wages, child-care expenses, and elder-care expenses through the Program. With the Proposal, DHHS is hoping to increase the number of living organ transplants and improve the overall quality and outcome of organ donations.

Generally, federal law prohibits any person from knowingly acquiring, receiving, or otherwise transferring any human organ for valuable consideration for use in human transplantation. 42 U.S.C. § 274e. However, valuable consideration does not include “the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ *or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.*” *Id.* (emphasis added). Therefore, organ donors can be reimbursed for their donation-related expenses under certain circumstances.

Primarily to aid low-income organ donors in such reimbursement, 42 U.S.C. § 274f describes the Program, which funds the National Living Donor Assistance Center (the “NLDAC”), to reimburse an eligible organ donor’s qualified expenses. Nevertheless, the Program’s current guidelines specifically limit NLDAC qualifying expenses to only those incurred by the donor and/or his/her accompanying person(s) as part of: (1) donor evaluation and/or (2) hospitalization for the living donor surgical procedure, and/or (3)

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medical or surgical follow-up, clinic visits, or hospitalization within two calendar years following the living donation procedure. As such, the Program (through the NLDAC), does not currently reimburse organ donation-related expenses such as lost wages, child-care, or elder-care. Rather, reimbursement for such expenses can only be received from sources such as state compensation programs, insurance policies, or the recipient of the organ. This reduces the reimbursement options available, which may be especially significant to the low-income organ donors utilizing the Program.

To address this, the Proposal sets out to amend the Organ Procurement and Transplantation Network Final Rule by adding Section 121.14(a), stating:

The following incidental nonmedical expenses incurred by donating individuals toward making living donations of their organs may be reimbursed:

- (1) Lost wages;
- (2) Child-care expenses; and
- (3) Elder-care expenses.

The Proposal fulfills the President's mandate under Executive Order 13879: Advancing American Kidney Health that DHHS propose a regulation to allow living organ donors to be reimbursed for donation-related lost wages, child-care expenses, and elder-care expenses through the Program. Therefore, some form of the Proposal is likely to become final, and DHHS is accepting comments on the Proposal until February 18, 2020. If you would like to submit comments or have any questions, one of the authors or your regular Dorsey attorney would be happy to assist you.