



MEMORANDUM

June 8, 2020

To: Governors' Offices
From: National Governors Association
Re: Overview of Section 1135 and Section 1115 Waivers

Updates in Italics

Last Updated June 8, 2020

On March 13, President Trump issued an emergency declaration under both the *National Emergencies Act* and the *Robert T. Stafford Act* concerning the Novel Coronavirus and COVID-19. Department of Health and Human Services (HHS) Secretary Azar had declared a public health emergency under Section 319 of the Public Health Services Act on January 31.

The president's declaration empowers the HHS secretary to authorize the Centers for Medicare & Medicaid Services (CMS) to take proactive steps to address key health system needs through Section 1135 waivers and Section 1115 demonstrations for disaster response. The purpose of the waiver authority is to allow a temporary relaxation of certain regulatory requirements so that CMS and states can ensure that sufficient health care services are available to meet the needs of individuals when and where an emergency is experienced. In determining what action may be needed, below are considerations for governors on the flexibilities available to states through section 1135 waivers and section 1115 demonstrations.

Section 1135 Waivers

Under section 1135 of the Social Security Act, the secretary may temporarily waive or modify certain Medicare, Medicaid, and Children's Health Insurance Program (CHIP) requirements. Some changes made under Section 1135 are considered "blanket" changes, which would be applicable nationally or to a large group of providers (e.g., waivers related to Medicare coverage of telemedicine services). Under Section 1135, CMS also has the authority to waive requirements on a case-by-case basis, after receiving a request from states or from other health care providers. In the past, 1135 waivers have been used on a case-by-case basis such as to offer relief to areas impacted by hurricanes in 2017 and by Superstorm Sandy in 2012. Waivers typically last 60 days after approval up to the duration of the emergency period.

On March 22, 2020, CMS released a [template](#) for 1135 waivers for states to use to apply for frequently-requested flexibilities. States and territories are encouraged to assess their needs and use the template tool as well the CMS Medicaid and CHIP Disaster Response [Toolkit](#) as resources to request these available flexibilities.

Medicaid and CHIP COVID-19 Related Waivers

As of June 8, 2020, 53 states and territories and the District of Columbia have received approval for at least one Section 1135 waiver related to COVID-19; *29 of these states have received*



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approval for a second 1135 waiver. Examples of flexibilities that have been approved by CMS include the following:

- **Out-of-state providers:** States can reimburse out-of-state providers through Medicaid and CHIP when those out-of-state-providers provide care to Medicaid and CHIP beneficiaries (though state laws regulating the practice of medicine may still apply). (*For COVID-19, because the secretary has granted a blanket waiver for out-of-state providers in Medicare and Medicaid programs, states need not request this flexibility for Medicaid separately.*)
- **Provider Enrollment:** States can temporarily suspend certain provider enrollment and revalidation requirements to allow more providers to treat Medicaid and CHIP beneficiaries and promote access to care.
- **Alternative Care Settings:** States can reimburse providers that provide care in alternative treatment settings including unlicensed facilities.
- **Prior Authorization:** States can waive any prior authorization or medical necessity requirements on benefits included in a Medicaid state plan.
- **Home and Community-Based Services (HCBS):** States can reimburse for HCBS services in additional settings, waive certain HCBS consent and conflict of interest requirements, and modify evaluation and assessment timelines.
- **Screening Requirements:** States can temporarily suspend certain pre-admission and annual screening requirements for long term care facilities such as nursing homes.
- **Hearing and Appeals Processes:** States can extend or modify state fair hearing and appeals processes for Medicaid and CHIP beneficiaries enrolled in both fee-for-service and managed care arrangements.
- **Personal Care Services:** States can reimburse legally responsible individuals, including family caregivers for providing personal care services

For a more detailed description of approved state 1135 waivers, please see [Appendix A](#).

“Blanket” COVID-19 Related Medicare Waivers

Since the president’s declaration of a national emergency on March 13, CMS has identified a number of “blanket” waivers of Medicare law and regulations that would be made available to providers across the country in relation to COVID-19. Examples of available “blanket” Medicare waivers include:

- **Telemedicine services:** *Waiver of rural area restrictions around telemedicine services. Medicare can now pay for office, hospital, and other visits furnished via telehealth across the country and including in patient’s places of residence. (Note this waiver applies to reimbursement, so state laws and regulations addressing the practice of medicine would need to be navigated.)*



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- **Out-of-State Providers:** Temporary waiver of the requirement that out-of-state providers be licensed in the state where they provide services when they are licensed in another state. This temporary waiver applies to Medicare and Medicaid reimbursement requirements but not to CHIP or state licensing requirements.
- **Provider Enrollment:** Establishment of a toll-free hotline for non-certified Part B suppliers, physicians and non-physician practitioners to enroll and receive temporary Medicare billing privileges. Waiver of the application fee, finger-based criminal background checks and site visit typically part of the screening requirements. Postponement of all revalidation actions. Ability for licensed providers to render services outside of their state of enrollment and expedited handling of any pending or new applications from providers.
- **Skilled Nursing Facilities (SNFs):** Waiver of the three-day prior hospitalization requirement for coverage of a SNF stay. Beneficiaries may be transferred because of the emergency without a prior qualifying hospital stay, and certain beneficiaries' SNF coverage, once benefits are exhausted, may be renewed. CMS also waived the timeframe requirements for Minimum Data Set assessments and transmissions.
- **Critical Access Hospitals (CAHs):** Waiver of the 25-bed limit requirement for CAHs and waiver of 96-hour limit on length of stays.
- **Temporary or Alternative Sites of Care:** Waiver to allow providers to repurpose existing sites of care or stand up new sites to be used for patient care and quarantine sites, provided that the location is approved by the state (ensuring that safety and comfort for patients and staff are sufficiently addressed to allow for increased capacity and promotes appropriate cohorting of COVID-19 patients).
- **Physician Services:** Waiver of the requirement that Medicare patients be under the care of a physician (including for anesthesia services) to allow hospitals to use other practitioners to the fullest extent possible.
- **Medical Staff:** Waiver of requirements to allow for physicians whose privileges will expire to continue practicing at a hospital and for new physicians to be able to practice before full medical staff or governing body review and approval to address workforce concerns related to COVID-19
- **Housing Acute Care Patients in Excluded Distinct Part Units:** Waiver to allow acute care hospitals to house acute care inpatients in excluded distinct part units. The hospital is instructed to annotate in the medical record that the patient is an acute care inpatient being housed in the excluded unit because of capacity issues related to the emergency.
- **Care for Excluded Inpatient Psychiatric Unit Patients in the Acute Care Unit of a Hospital:** Ability for acute care hospitals to relocate inpatients from excluded distinct part psychiatric units to acute care beds and units if necessary. The affected hospital is instructed to annotate the medical record to indicate the patient is a psychiatric inpatient being cared for in an acute care bed because of capacity or exigent circumstances related to the emergency.



- **Care for Excluded Inpatient Rehabilitation Unit Patients in the Acute Care Unit of a Hospital:** Ability for acute care hospitals to relocate inpatients from excluded distinct part rehabilitation units to acute care beds and units if necessary. The affected hospital is instructed to annotate the medical record to indicate the patient is a rehabilitation inpatient being cared for in an acute care bed because of capacity or exigent circumstances related to the emergency.
- **Supporting Care for Patients in Long-Term Care Acute Hospitals (LTCHs):** Ability for LTCHs to exclude patient stays where an LTCH admits or discharges patients in order to meet the demands of the emergency from the 25-day average length of stay requirement otherwise applicable to LTCHs.
- **Physician Self-Referral:** Waiver of the Stark Law to allow physicians to refer Medicare patients to entities where a physician may have a direct or indirect financial relationship for COVID-19 purposes.

To see the full list of Medicare flexibilities provided under “blanket” 1135 waivers, please see CMS’ list of [COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers](#).

Section 1115 Demonstrations for Disaster Response

Under Section 1115 of the Social Security Act, the secretary has broad authority to approve state or territory requests to waive compliance with certain provisions of federal Medicaid law and authorize expenditures not otherwise permitted by law. A waiver may be granted for an “experimental, pilot or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of the Medicaid program.”

In the event of a disaster or an emergency such as COVID-19, a state may request a new section 1115 demonstration, or amend or extend its current section 1115 demonstration to address the impact of the public emergency on its program. States that have a federally declared disaster are deemed to meet budget neutrality and would not need to further satisfy that requirement. States may also be exempt from the normal public notice process in emergent situations expediting the waiver application and approval process. Disaster-related demonstrations can be retroactive to the date the Secretary declared a public health emergency.

During past emergencies, using section 1115 flexibilities, states have been able to increase Medicaid eligibility and provide additional benefits to individuals specifically impacted by the disaster, streamline application and eligibility verification processes, waive cost sharing for beneficiaries, and address needs in specific geographic areas of a state.

State requests for Medicaid Section 1115 demonstrations can be made verbally or in writing to the state’s CMS section 1115 Project Officer and/or the Associate Regional Administrator for the Division of Medicaid and Children’s Health. On March 22, 2020, CMS released a [State Medicaid Director Letter](#) which includes a checklist to simplify the waiver application process and a new waiver opportunity for states to streamline enrollment into long term care and home and community-based services during the COVID-19 public health emergency.

As of June 2, 2020, CMS has approved one COVID-19-related Medicaid Section 1115 demonstration. Washington State’s [demonstration](#) was approved on April 21, 2020, to extend through the end of the public health emergency. Under the demonstration, Washington may:



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- Receive federal Medicaid reimbursement for providing long term services and supports (LTSS) even if they are not timely, updated in the plan of care, or delivered in otherwise-allowable settings;
- Allow for self-attestation for verification of eligibility and level of care to qualify for LTSS;
- Pay higher rates for home and community-based services; and
- Make retainer payments to certain providers.

In the approval letter, CMS indicated that they are still considering approval of a COVID-related Disaster Relief Fund, broader authority to make retainer payments to providers, and additional flexibilities around non-emergency medical transportation. CMS also indicated that they are not approving Washington's request to create an eligibility category for individuals with incomes at or below 200 percent FPL and for whom the state would subsidize the cost of new or existing Qualified Health Plan coverage in the marketplace.

Examples of past uses of section 1115 demonstrations for disaster response include:

Michigan

In 2016, Michigan expanded Medicaid and CHIP eligibility for pregnant women affected by the Flint water crisis, waived premiums and cost sharing, and expanded targeted case management and community support services.

New York

Following September 11, 2001, New York used disaster relief Medicaid authority to cover 350,000 people for four months following the attacks. The state used an expedited application process, expanded income eligibility, and adjusted eligibility rules related to immigration.

Texas

In 2017, Texas used a section 1115 demonstration to allow individuals in services areas affected by Hurricane Harvey to receive services beyond their renewal period and suspended some eligibility verification and cost sharing requirements.

Hurricane Katrina Waivers

After Hurricane Katrina, HHS allowed states to provide temporary coverage to certain groups of evacuees. Through the waivers, states could request expedited approval processes to provide up to 5 months of Medicaid coverage and request to set up an uncompensated care pool to reimburse providers for the cost of services for uninsured evacuees.

Note: We anticipate that additional states will seek and receive approval of Section 1135 and Section 1115 demonstrations. Please see NGA's COVID webpage for updates.

For questions related to the contents of this memo, please contact NGA staff:

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MEMORANDUM

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APPENDIX A

Section 1135 Medicaid Waiver Approvals by State

Approved State 1135 Waivers for Medicaid

State	Medicaid Provisions Waived Through 1135 Waiver										
	Waive Provider Enrollment Requirements	Lift Prior Authorization Requirements	Forgo review and screenings for long-term services and supports	Extend Fair Hearing and Appeals Timelines	Allow Reimbursement in Alternative Care Settings	Modify public comment, tribal consultation, and submission timelines for state plan amendments	Allow for home and community-based services in additional settings	Waive consent requirements for home and community-based services	Modify timelines for home and community-based service evaluation, assessment, or face-to-face encounters	Allow entities that provide case management to provide home and community-based services	Reimburse legally responsible individuals, including family caregivers for personal care services
Alabama	✓	✓	✓					✓			
Alaska	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Arizona	✓	✓	✓					✓	✓	✓	
Arkansas	✓		✓	✓		✓					
California	✓	✓		✓	✓		✓	✓			
Colorado	✓	✓	✓	✓	✓	✓					
CNMI	✓	✓		✓	✓						
Connecticut	✓	✓		✓	✓	✓	✓				



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Delaware	✓	✓	✓	✓							
District of Columbia	✓	✓	✓	✓	✓	✓	✓	✓	✓		
Florida	✓	✓	✓	✓	✓						
Georgia	✓	✓	✓	✓	✓						✓
Hawaii	✓	✓	✓	✓	✓	✓					
Idaho	✓	✓	✓		✓						
Illinois	✓	✓	✓	✓	✓						
Indiana	✓	✓	✓	✓	✓		✓				
Iowa	✓		✓		✓			✓			
Kansas	✓	✓	✓	✓							
Kentucky	✓	✓	✓	✓	✓						
Louisiana	✓	✓	✓	✓	✓			✓			✓
Maine	✓	✓	✓	✓	✓	✓	✓	✓			
Maryland	✓	✓	✓	✓	✓	✓	✓	✓			✓
Massachusetts	✓	✓	✓	✓	✓	✓	✓				
Michigan	✓	✓			✓	✓					
Minnesota	✓	✓		✓	✓	✓	✓	✓		✓	



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<i>Mississippi</i>	✓	✓	✓	✓	✓			✓			
Missouri	✓	✓	✓	✓	✓	✓	✓	✓			
Montana	✓	✓	✓	✓	✓						
Nebraska	✓	✓	✓	✓	✓	✓					
Nevada	✓	✓	✓	✓	✓	✓					
<i>New Hampshire</i>	✓	✓	✓	✓	✓		✓				✓
New Jersey	✓	✓	✓	✓	✓						
New Mexico	✓	✓	✓	✓							
New York	✓	✓	✓	✓	✓		✓	✓			
North Carolina	✓	✓	✓	✓	✓						
<i>North Dakota</i>	✓	✓	✓	✓		✓		✓			✓
<i>Ohio</i>	✓	✓	✓		✓	✓	✓	✓	✓		
<i>Oklahoma</i>	✓	✓	✓	✓	✓	✓					
Oregon	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Pennsylvania	✓	✓	✓	✓	✓						
Puerto Rico	✓			✓							
Rhode Island	✓	✓	✓	✓	✓		✓				



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South Carolina	✓	✓	✓	✓	✓	✓					
South Dakota	✓		✓	✓	✓						
Tennessee	✓		✓		✓						
<i>Texas</i>	✓	✓	✓	✓	✓	✓		✓	✓		
U.S. Virgin Islands	✓	✓		✓							
Utah	✓	✓	✓	✓	✓	✓					
<i>Vermont</i>	✓	✓	✓	✓	✓	✓	✓	✓			✓
Virginia	✓	✓	✓	✓	✓	✓					
Washington	✓	✓	✓	✓	✓	✓	✓	✓		✓	
West Virginia	✓	✓	✓	✓	✓	✓					
<i>Wisconsin</i>	✓	✓	✓		✓	✓	✓	✓			
Wyoming	✓	✓	✓	✓	✓						

