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## MEMORANDUM

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*March 30, 2020*

*To:* Governors' Offices  
*From:* Bill McBride, Executive Director  
*Re:* Overview of Section 1135 and Section 1115 Waivers

***Updated March 30, 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.

#### *"Blanket" COVID-19 Related Medicare Waivers*

Since the president's declaration of a national emergency on March 13, CMS identified the following "blanket" Section 1135 waivers of Medicare law and regulations that would be made available to providers across the country in relation to COVID-19:

- **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*



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*reimbursement, so state laws and regulations addressing the practice of medicine would need to be navigated.)*

- **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.
- **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.
- **Durable Medical Equipment Prosthetics Orthotics and Supplies (DMEPOS):** Authorization for contractors to waive the face-to-face visit, new physician's order or medical necessity requirements for replacement of DMEPOS when the DMEPOS is lost, destroyed, irreparably damaged, or otherwise rendered unusable or unavailable as a result of the emergency.
- **Part B Prescription Refills:** Medicare payment may be permitted for replacement prescription fills (for a quantity up to the amount originally dispensed) of covered Part B drugs in circumstances where dispensed medication has been lost or otherwise rendered unusable or unavailable due 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.
- **Home Health Agencies (HHAs):** Relief to HHAs regarding the timeframes related to transmission of Medicare's Outcome and Assessment Information Set and allowing Medicare Administrative Contractors to extend the auto-cancellation date of Requests for Anticipated Payment during emergencies (note that this is an extension of time and not a waiver of completion).
- **Medicare Appeals in Fee-for-Service, Medicare Advantage and Part D:** Extension of time to file an appeal and waiver of timeliness for requests for additional information to adjudicate the appeal. Requests for appeal that do not meet the required elements will be processed using information that is available. All flexibilities available will be used in the appeal process as if good cause requirements are satisfied.

#### *Medicaid and CHIP COVID-19 Related Waivers*

During the period of the emergency, states may seek approval from CMS for section 1135 waivers of certain Medicaid and CHIP requirements. Examples of flexibilities available to states under section 1135 waivers include:

- **Out-of-state providers:** CMS can allow states to 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:** CMS 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:** CMS can allow states to reimburse providers that provide care in alternative treatment settings including unlicensed facilities.
- **Prior Authorization:** CMS can allow states to waive any prior authorization or medical necessity requirements on benefits included in a Medicaid state plan.
- **Screening Requirements:** CMS can allow states to temporarily suspend certain pre-admission and annual screening requirements for long term care facilities such as nursing homes.



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- **Hearing and Appeals Processes:** CMS can allow states to extend or modify state fair hearing and appeals processes for Medicaid and CHIP beneficiaries enrolled in both fee-for-service and managed care arrangements.

On March 22, 2020, CMS released a [template](#) for 1135 waivers for states to use to apply for frequently-requested flexibilities, including the flexibilities listed above. 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.

*Case-by-Case Provider Waivers*

In addition to state governments, health care providers can also request case-by-case waivers of federal requirements and section 1135. Examples of case-by-case waivers that have been previously requested by providers include:

- Waiver of Stark Laws related to physician referrals.
- Waiver of Emergency Medical Treatment and Labor Act (EMTALA) requirements related to the relocation of an individual to another location to receive medical screening pursuant to a state emergency preparedness plan, or for transfer of an individual who has not been stabilized, if the transfer is necessitated by the circumstances of the declared public health emergency.
- Time-limited waiver of penalties to hospitals related to the provisions of the HIPAA privacy regulations that pertain to (1) the requirements to obtain a patient’s agreement to speak with family members or friends (2) the requirement to distribute a notice of privacy practices; and (3) the patient’s right to request privacy restrictions or confidential communications.

**Approved State COVID-19 Related 1135 Waivers**

CMS has approved 34 states for Section 1135 waivers related to COVID-19 and several other states have submitted applications.

| 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 |
| Alabama                                  | ✓  |                                       | ✓   |   |  |  |
| Arizona                                  | ✓  | ✓                                     | ✓   |   |  |  |
| California                               | ✓  | ✓                                     |   | ✓   | ✓  |  |
| Colorado                                 | ✓  | ✓                                     | ✓   | ✓   | ✓  | ✓  |



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| 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 |
| Connecticut    | ✓  | ✓                                     |   | ✓   | ✓  | ✓  |
| Delaware       | ✓  | ✓                                     | ✓   | ✓   |  |  |
| Florida        | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| Hawaii         | ✓  | ✓                                     | ✓   | ✓   | ✓  | ✓  |
| Idaho          | ✓  | ✓                                     | ✓   |   | ✓  |  |
| Illinois       | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| Indiana        | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| Iowa           |  |                                       | ✓   |   |  |  |
| Kansas         | ✓  | ✓                                     | ✓   | ✓   |  |  |
| Kentucky       | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| Louisiana      | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| Maryland       | ✓  | ✓                                     | ✓   | ✓   | ✓  | ✓  |
| Massachusetts  | ✓  | ✓                                     | ✓   | ✓   | ✓  | ✓  |
| Minnesota      | ✓  | ✓                                     |   | ✓   | ✓  | ✓  |
| Mississippi    | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| Missouri       | ✓  | ✓                                     | ✓   | ✓   | ✓  | ✓  |
| New Hampshire  | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| New Jersey     | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| New Mexico     | ✓  | ✓                                     | ✓   | ✓   |  |  |
| New York       | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| North Carolina | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| North Dakota   | ✓  | ✓                                     | ✓   | ✓   |  | ✓  |
| Oklahoma       | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| Oregon         | ✓  | ✓                                     | ✓   | ✓   | ✓  | ✓  |
| Pennsylvania   | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |
| Rhode Island   | ✓  | ✓                                     | ✓   | ✓   |  |  |
| South Dakota   | ✓  |                                       | ✓   | ✓   | ✓  |  |
| Virginia       |  | ✓                                     |   | ✓   |  |  |
| Washington     | ✓  | ✓                                     | ✓   | ✓   | ✓  | ✓  |
| Wyoming        | ✓  | ✓                                     | ✓   | ✓   | ✓  |  |



### **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.

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.



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*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.*

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