

State Medicaid Waivers Provide Flexibility to Out-of-State Providers Treating COVID-19



ALERT | March 26, 2020

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Upon a presidential declaration of an emergency or disaster, or a declaration of a public health emergency by the Secretary of the Department of Health and Human Services (HHS), section 1135 of the Social Security Act (42 U.S.C. § 1320b-5) authorizes HHS to temporarily waive or modify Medicare, Medicaid and Children's Health Program requirements to ensure that health care providers who deliver services in good faith during the state of emergency can be reimbursed and exempted from sanctions (absent any determination of fraud or abuse). Since President Trump declared a national emergency on March 13, with respect to the coronavirus disease 19 (COVID-19) caused by the virus SARS-CoV-2 (CMS Press Release) (available at: <https://www.cms.gov/newsroom/press-releases/cms-takes-action-nationwide-aggressively-respond-coronavirus-nation->

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al-emergency), all states, the District of Columbia, Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the United States Virgin Islands have received 1135 waivers. The only Medicaid agencies that have not been granted an 1135 waiver related to COVID-19 are Guam and American Samoa.

HHS's Centers for Medicare and Medicaid Services (CMS) granted the initial section 1135 waivers on March 16 and March 19 to Florida and Washington state (Florida Waiver (available at: <https://www.medicaid.gov/state-resource-center/downloads/fl-section-1135-appvl.pdf>); Washington Waiver (available at: <https://www.medicaid.gov/state-resource-center/downloads/wa-section-1135-appvl.pdf>)), allowing these Medicaid agencies flexibility to reimburse out-of-state providers treating eligible recipients impacted by COVID-19.

Each section 1135 waiver includes at least one of seven common elements. Six elements pertain to each Medicaid agency's currently enrolled providers and, when granted, permit a Medicaid agency to:

- temporarily suspend Medicaid fee-for-service prior authorization requirements
- extend previously granted prior authorizations through the end of the public health emergency
- suspend pre-admission screening and annual resident review (PASRR) Level I and Level II assessments for 30 days
- relax state fair hearing request and appeal timelines
- reimburse the provision of services in alternative settings
- Amend the state Medicaid plan on a relaxed timeframe and without public notice or tribal consultation.

To increase recipients' access to Medicaid services, a sixth and frequent element allows Medicaid agencies to:

- expand flexibility for provider participation.

Only the Alabama, Iowa and Virginia waivers do not address provider participation.

The following chart shows a breakdown of the waiver elements by state.

	Temporarily suspend Medicaid fee-for-service prior authorization requirements	Extend pre-existing authorizations for which a beneficiary has previously received prior authorization through the end of the public health emergency	Suspend Pre-Admission Screening and Annual Resident Review (PASRR) Level I and Level II Assessments for 30 days	Expand Flexibility in Provider Participation	Relax State Fair Hearing Requests and Appeal Timelines	Provision of Services in Alternative Settings	State Plan Amendment Flexibilities
Alabama			◇				
Alaska	◇	◇	◇	◇	◇	◇	◇
Arizona	◇	◇	◇	◇			
Arkansas			◇	◇	◇		◇
California	◇	◇		◇	◇	◇	
Colorado	◇	◇	◇	◇	◇	◇	◇
Connecticut	◇	◇		◇	◇	◇	◇
Delaware	◇	◇	◇	◇	◇		
District of Columbia	◇	◇	◇	◇		◇	◇
Florida	◇		◇	◇	◇	◇	
Georgia	◇	◇	◇	◇	◇	◇	
Hawaii	◇		◇	◇	◇	◇	◇
Idaho	◇	◇	◇	◇		◇	
Illinois	◇	◇	◇	◇	◇	◇	
Indiana	◇	◇	◇	◇	◇	◇	
Iowa			◇				
Kansas	◇	◇	◇	◇	◇		
Kentucky	◇		◇	◇	◇	◇	
Louisiana			◇	◇	◇	◇	
Maine	◇	◇	◇	◇	◇	◇	◇
Maryland	◇	◇	◇	◇	◇	◇	◇
Massachusetts	◇	◇	◇	◇	◇	◇	◇
Michigan	◇	◇		◇		◇	◇
Minnesota	◇			◇	◇	◇	◇

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Mississippi	◇	◇	◇	◇	◇	◇	
Missouri	◇	◇	◇	◇	◇	◇	◇
Montana	◇	◇	◇	◇	◇	◇	
Nebraska	◇		◇	◇	◇	◇	◇
Nevada		◇	◇	◇	◇	◇	◇
New Hampshire	◇	◇	◇	◇	◇	◇	
New Jersey	◇	◇	◇	◇	◇	◇	
New Mexico	◇	◇	◇	◇	◇		
New York	◇	◇	◇	◇	◇	◇	
North Carolina	◇		◇	◇	◇	◇	
North Dakota	◇	◇	◇	◇	◇		◇
Northern Mariana Islands	◇	◇		◇	◇	◇	
Ohio	◇			◇		◇	◇
Oklahoma	◇		◇	◇	◇	◇	
Oregon	◇	◇	◇	◇	◇	◇	◇
Pennsylvania	◇	◇	◇	◇	◇	◇	
Puerto Rico				◇	◇		
Rhode Island	◇	◇		◇	◇		
South Carolina		◇	◇	◇	◇	◇	◇

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South Dakota			◇	◇	◇	◇	
Tennessee			◇	◇		◇	
Texas	◇		◇	◇	◇		◇
Utah	◇		◇	◇	◇	◇	◇
Vermont	◇	◇	◇	◇	◇	◇	
Virgin Islands (US)	◇	◇		◇	◇		
Virginia	◇	◇			◇		
Washington	◇		◇	◇	◇		◇
West Virginia	◇	◇	◇	◇	◇	◇	◇
Wisconsin	◇	◇	◇	◇		◇	◇
Wyoming	◇		◇	◇	◇	◇	

The other Medicaid agencies may be granted similar flexibility under section 1135 should they request a waiver. CMS has been approving waiver requests within days of receipt and is expected to move quickly to process future requests. CMS has published a request form for Medicaid agencies to use when requesting a waiver to expedite the waiver process, so future section 1135 grants are likely to contain similar elements. However, the waivers are not identical, and providers will need to understand each Medicaid agency's requirements for providing services to its recipients.

Of particular importance is the waiver element related to provider participation, which has the potential to allow out-of-state providers to supplement Medicaid resources and increase access to Medicaid services. The waivers relax CMS policy by allowing non-enrolled, out-of-state providers to treat an unlimited number of Medicaid recipients for

COVID-19. Under previously adopted policy, Medicaid agencies are permitted to reimburse otherwise qualified claims from out-of-state providers not enrolled in such Medicaid programs so long as the following criteria are met:

1. the institutional, individual or pharmacy provider must be located out of state
2. the claim must include the provider's National Provider Identifier
3. the provider must be enrolled in another state's Medicaid program
4. the claim must represent the services furnished
5. the claims must represent either (a) single instance of care furnished over a 180-day period or (b) multiple instances of care furnished to a single participant over a 180-day period.

The waiver element related to provider participation excuses the fifth requirement listed above and, thereby, enables out-of-state providers to receive reimbursement for care provided to an unlimited number of Medicaid patients so long as the provider meets the other four criteria.¹ As these other requirements allow reimbursement only for services provided at out-of-state practice locations, mobile facilities or individual practitioners that physically relocate to the reimbursing state to provide services would not be eligible for reimbursement under this waiver element.

Despite the common section 1135 waiver elements, Medicaid agencies may not implement the waivers identically, and the process for receiving payment is likely to vary. For example, Florida has indicated that it will use the waiver authority related to provider participation, but that providers should enroll after providing services to receive payment.² Florida Medicaid may intend to be flexible and lenient with these provisional enrollments, and the statement on its website is likely intended to encourage providers to begin treatment quickly. Nonetheless, providers should note that providing services to Florida Medicaid patients without being enrolled inherently increases the risk of nonpayment.

Most other Medicaid agencies have not issued guidance for out-of-state providers wishing to enroll, and it is not clear whether these Medicaid agencies require providers to enroll before delivering goods or services. The provider participation waiver element makes

payment possible, but not all of the Medicaid agencies that were granted this element requested it. It is not clear whether these agencies intend to utilize the authority granted in the waiver to reimburse nonenrolled providers. Providers whose ability to deliver goods or services is contingent upon some assurance of receiving payment may wish to enroll before delivering goods or services.

In addition, blanket waivers (available at: <https://www.cms.gov/files/document/covid19-emergency-declaration-health-care-providers-fact-sheet.pdf>) previously granted to all Medicaid agencies by CMS on March 13 excused the requirement that out-of-state providers be licensed in the state where the patient is located when the provider is licensed in another state. Notably, this excuses licensing requirements imposed by Medicaid agencies, but state licensing board requirements may still be applicable. Providers without appropriate state licensure run the risk of enforcement by state licensing authorities. However, some states have relaxed licensing requirements for out-of-state providers during the emergency or are considering doing so.³ Other states have waived license requirements for certain providers licensed in another jurisdiction under certain conditions.⁴ Out-of-state providers intending to take advantage of the provider participation waiver should follow the processes of the applicable licensing authority or understand the risk of enforcement for providing services without appropriate state licensure.

As other Medicaid agencies receive section 1135 waivers, Pepper Hamilton will continue to monitor developments and provide appropriate updates. Interested providers can check the CMS website (available at: <https://www.cms.gov/About-CMS/Agency-Information/EPRO/Current-Emergencies/Current-Emergencies-page>) and Medicaid website (available at: <https://www.medicaid.gov/state-resource-center/disaster-response-toolkit/federal-disaster-resources/index.html>) to check on the status of any additional waivers.

Endnotes

- 1 Pursuant to the waivers, for providers not enrolled in another state Medicaid program, CMS is not requiring Medicaid agencies to collect application fees, conduct background checks, perform site visits, and/or require in-state licensure.
- 2 Florida's Medicaid agency (AHCA) published guidance on March 16 (AHCA Guidance) (available at: https://ahca.myflorida.com/Medicaid/pdf/files/provider_alerts/2020_03/Medicaid_Coverage_During_SOE_COVID-19_20200316.pdf) indicating that providers not already enrolled in Florida Medicaid must submit a provisional

(temporary) enrollment application (Provisional Enrollment) (available at: http://portal.flmmis.com/flpublic/Provider_ProviderServices/Provider_Enrollment/Provider_Enrollment_NewMedicaidProviders/tabid/158/Default.aspx) to receive reimbursement. Florida's website indicates that provisional enrollment should be utilized by providers who have already provided services to Florida Medicaid recipients impacted by COVID-19 and are requesting payment.

- 3 Arizona pharmacy regulations, for example, allow pharmacists licensed in another state to dispense medications to Arizona patients during a declared state emergency (Ariz. Admin. Code § R4-23-413). According to an update (available at: https://www.azmd.gov/MinutesUploads/Press/MD_202003201829_bea21e44641e451eb3e3fd-4d2e93e0cd.pdf) from the Arizona Board of Medicine, a process is being approved to allow out-of-state licensed physicians to provide services in Arizona.
- 4 Under the authority of the governor, and per Proclamation (available at: <https://idf-pr.com/News/2020/2020%2003%2023%20Health%20Care%20Professionals%20Press%20Release.pdf>), the Illinois Department of Financial and Professional Regulation has waived the license requirements for physicians, nurses, physician assistants, pharmacists, and respiratory care therapists licensed and in good standing in another jurisdiction, but only for certain practice settings and after filing appropriate forms. The Proclamation contains links to the appropriate forms for out-of-state providers.