COVID-19: Washington Becomes the Second State Approved For 1135 Medicaid Waiver – Key Takeaways

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On March 13, 2020, the President declared the Novel Coronavirus (COVID-19) outbreak in the U.S. a national emergency. The President’s declaration, coupled with Section 1135 (of the Social Security Act) waivers issued by the Secretary of the Department Health and Human Services (HHS) on the same day, empowered the Centers for Medicare and Medicaid Services (CMS) to waive certain requirements in Medicare, Medicaid, and CHIP under Section 1135 of the Social Security Act. Specifically, as it relates to state Medicaid programs, CMS was given the authority to issue waivers under Section 1135 to states requesting such waivers for the purposes of removing administrative burdens and expanding access to care. The purpose of such waivers is to ensure that sufficient health care items and services are available to meet the needs of beneficiaries and to ensure that health care providers that furnish such items and services in good faith, but are unable to comply with one or more federal Medicaid program requirements as a result of the COVID-19 pandemic, may still be reimbursed for such items and services and exempted from sanctions for such noncompliance, absent any determination of fraud or abuse.

On March 19, 2020, Washington, one of states hit hardest by COVID-19, became the
second state to be approved for an 1135 Medicaid waiver. Washington submitted its request on March 15th and within days CMS approved a variety of Medicaid flexibilities designed to support Washington’s efforts to respond to COVID-19. The modifications and flexibilities in Washington’s 1135 Medicaid waiver are similar to those flexibilities granted last week for Florida. In approving the request, CMS Administrator Seema Verma stated “I recognize that Governor Inslee and his team are working around the clock to respond to the escalating crisis in in Washington State . . . . [CMS] is committed to stripping away any red tape that gets in the way of states or providers effectively managing this public health emergency.”

To that end, CMS activated the following 1135 Medicaid waivers, providing Washington greater flexibilities to combat COVID-19:

1. Waived or Expedited Provider Enrollment. Washington may issue temporary provisional enrollments to providers not currently enrolled with Medicare or any state Medicaid program without requiring: (i) payment of the application fee; (ii) criminal background checks; (iii) site visits; and (iv) in state/territory licensure requirements. To enroll these providers on an expedited basis, however, Washington must, at a minimum, collect the following: (i) minimum data requirements to file and process claims, including NPI; and (2) Social Security Number, Employer Identification Number, and Taxpayer Identification Number (SSN/EIN/TIN) to ensure the provider holds a valid, unrestricted license and is not on the OIG exclusion list. Temporary provisional enrollments have a retroactive effective date of no earlier than March 1, 2020.

Washington is permitted to issue temporary provisional enrollments only during the national emergency. Once that emergency designation is lifted, Washington must refrain from issuing any such enrollments and cease payments to providers who are temporarily enrolled within six months from the date the emergency designation is lifted, unless the provider submitted an application that meets all requirements for Medicaid participation.

Washington may also temporarily cease revalidations of existing provider enrollments, a requirement that was added by the Affordable Care Act.

Lastly, enrollment is not necessary for out-of-state providers from whom Washington Medicaid participants seek care if the following criteria are met: (i) the item or service is furnished by a practitioner, provider, or pharmacy at an out-of-state/territory practice location; (ii) the furnishing provider’s NPI is on the claim; (iii) the furnishing provider is enrolled in Medicare or another state Medicaid plan; (iv) the claim represents the services provided and (v) the claim includes all instances of care furnished over a 180-day period. This last requirement is waived if the Medicaid participant is enrolled with the Medicaid program. While the waiver does not specify which Medicaid program, it is likely this requirement is limited to a participant’s enrollment in the Washington Medicaid program.

2. Prior Authorization Requirements Waived. Washington can waive or modify prior authorization processes set forth in its Medicaid state plan (as approved by CMS) with respect to fee-for-service delivery systems to permit services provided on or after March 1, 2020 through the termination of the emergency declaration, subject to a limited extension of up to 180 days without prior authorization.
3. Suspension of Pre-Admission Screening and Annual Resident Review Assessments for 30-days. Washington can waive pre-admission screening and annual resident review (PASRR) assessments for Level 1 (preliminary assessment to determine whether an individual has a serious mental illness and/or intellectual disability) and Level 2 (a secondary, in-depth evaluation conducted only if an individual tests positive at the Level 1 screen) at Medicaid nursing facilities for 30 days. The Level 1 and Level 2 screenings are used to ensure individuals are properly placed at nursing homes for long term care. After 30 days, all new admissions with mental illnesses or intellectual disability should receive a PASRR as soon as resources become available. Level 1 and Level 2 screens are not required for residents transferring between nursing facilities.

4. Waiver to Allow Evacuating Facilities to Provide Services in Alternate Settings, Including Unlicensed Facilities. Washington may fully reimburse a facility for services furnished during an emergency evacuation to an unlicensed facility. Included facilities include nursing facilities, intermediate care facilities for individuals with intellectual and developmental disabilities, psychiatric residential treatment facilities, and hospital nursing facilities. The evacuating facility would be responsible for determining how to reimburse the unlicensed facility. This is only a temporary arrangement, and is only effective for the duration of the section 1135 waiver. After the initial 30 days, CMS would require the unlicensed facility to seek licensure or the evacuating facility would need to seek new placement for individuals.

5. Requested Relief from Drug Enforcement Agency (DEA) Requirements Around Medications. In authorizing the above evacuation request, CMS commented that it lacks authority to waive DEA requirements and it would consult with DEA to determine whether those requirements can be waived during the public health emergency. On March 20th, the DEA announced it would permit DEA-registered practitioners to issue prescriptions for controlled substances to patients without first conducting an in-person medical evaluation, subject to certain conditions, for the duration of the emergency designation. However, such prescribing must also comply with applicable state law.

6. Temporary Delay of State Fair Hearing Requests and Appeal Timelines. Washington may temporarily delay scheduling Medicaid Fair Hearings and issuing Fair Hearing Decisions during the Emergency Period. Also, Washington can modify the timeframe for managed care entities to resolve appeals and for enrollees to request fair hearings to zero days and extend the length of time that beneficiaries have to file appeals to 120 days depending on the appeal type, for those beneficiaries whose appeal deadline falls between March 1, 2020 and June 29, 2020.

6. Waiver of Public Notice and Tribal Consultation. Washington does not need to provide public notice for temporary state plan amendments (SPA) with specified sunset dates that only provide or increase beneficiary access to items and services related to COVID-19 (such as cost sharing waivers, payment rate increases, or amendments to Alternative Benefit Plans adding services or providers) and would not be a restriction or limitation on payment or services or otherwise burden beneficiaries and providers. However, CMS encourages Washington to make all
relevant information available to the public so they are aware of such changes. Similarly, Washington was granted flexibility in modifying tribal consultation timeframes, including shortening the number of days before submission or conducting consultation after the submission of an SPA.

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