Insights

1135 Waiver Response TO COVID-19

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With Secretary Azar's Public Health Emergency declaration and President Trump's National Emergency declaration, CMS is authorized to grant Social Security Act §1135 waivers of Medicare, Medicaid or SCHIP requirements ("1135 Waivers") with respect to COVID-19. Such Waivers may be granted as (A) blanket waivers; and/or (B) provider specific waivers.

A. Blanket Waivers

For purposes of COVID-19, CMS has granted the blank waivers described in a March 13, 2020 fact sheet, which include a number of broad waivers including, but not limited to:

- Skilled Nursing Facilities (SNF): Waivers requirement for a 3-day prior hospitalization prior to a SNF stay;
- Hospital Inpatient: Creates new flexibility to utilize excluded units for inpatient acute care and/or to utilize acute care units to house patients from excluded units, as necessary;
- Providers: Reduces administrative burden and expedites provider enrollment process, as well as temporarily allows licensed providers to provide services out of state.

These various waivers loosen certain regulatory requirements and apply to skilled nursing facilities, critical access hospitals, acute care hospitals, home health agencies and other providers that may be impacted by the emergency. Unlike provider-specific waivers, once a blanket waiver is issued, providers do not have to apply to CMS for the waiver. Rather, blanket authority is allowed and applies to all applicable providers in the emergency area. However, 1135 Waiver guidance suggests that providers should still notify the State Survey Agency and CMS Regional Office if a provider is operating under these waivers/modifications to ensure proper payments.

B. Provider-Specific Waivers

Separate from any blanket waiver, providers (hospitals, nursing facilities, physicians, etc.) in the emergency area have an opportunity to request additional waivers or modifications of specific requirements as they relate to the provider, which CMS will then grant on a case-by-case basis. The following are the categories of provider-specific waivers that under §1135 CMS can waive or modify reimbursement requirements related to:

- **Conditions of Participation and Preapproval**—Conditions of participation or other certification requirements, program participation and similar requirements for providers, and preapproval requirements for service providers and items.

- **Licensure Requirements**—Reimbursement requirements that physicians and other healthcare professionals be licensed in the state in which they are providing services are waived if they have a license from another state and have not been barred from practice in that state or any state in the emergency area. This does not affect state licensure requirements.
- **EMTALA**—Sanctions under the Emergency Medical Treatment and Active Labor Act (EMTALA) for transfer of an individual who has not been stabilized if the transfer arises out of an emergency or redirection to another location to receive a medical screening exam under a state emergency preparedness or pandemic plan. A waiver of EMTALA sanctions is effective only if actions under the waiver do not discriminate as to source of payment or ability to pay.
- **Physician Self-Referral**—Sanctions related to self-referral prohibitions, which could apply when a physician refers a patient for services to a provider in which the physician has a financial interest.
- **Time for Performance**—Deadlines and timetables for performance of required activities to be modified but not waived.
- **Out-of-Network Payments**—Limitations on payments to permit Medicare+Choice enrollees to use out-of-network providers in an emergency situation.
- **HIPAA**—Sanctions arising from noncompliance with HIPAA privacy regulations relating to: 1) obtaining a patient's agreement to speak with family or friends or honoring a patient's request to opt out of the facility directory; 2) distributing a notice of privacy practices; or 3) the patient's right to request confidential communications. The waiver is effective only if actions under the waiver do not discriminate as to source of payment or ability to pay.[1]

Once a provider-specific 1135 Waiver is authorized (as has been done for COVID-19), health care providers can submit requests to operate under that authority or for other relief that may be possible outside the authority to the CMS Regional Office with a copy to the State Survey Agency. Request can be made by sending an email to the CMS Regional Office in their service area. The requests generally include a justification for the waiver and expected duration of the modification requested. Providers and suppliers should keep careful records of beneficiaries to whom they provide services, in order to ensure that proper payment may be made. The State Survey Agency and CMS Regional Office will review the provider's request and make appropriate decisions, usually on a case-by-case basis. CMS generally approves specific waivers and modifications only to the extent that the provider in question has been affected by the disaster or emergency. Providers are expected to come into compliance with any waived requirements prior to the end of the emergency period.[2]

Note: a 1135 waiver waives Medicare, Medicaid or SCHIP requirements for reimbursement purposes only and does not waive or preempt state licensing requirements.

For assistance with submitting notification or a provider-specific 1135 Waiver request, please contact Meghan M. Linvill McNab.

[1] https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/PHE-Questions-and-Answers.pdf.

[2] https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/1135-Waivers-At-A-Glance.pdf.