

CMS Enacts Section 1135 Waivers of the Social Security Act in Response to COVID-19

MARCH 23, 2020

On March 13, 2020, the President issued his Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak under the National Emergencies Act. The Secretary of the Department of Health and Human Services (HHS) subsequently declared a Public Health Emergency. As a result, HHS' Centers for Medicare and Medicaid Services (CMS) was empowered to offer health care providers relief through waivers under Section 1135 of the Social Security Act (the Act). These waivers, which apply nationwide, allow health care providers greater flexibility by exempting or waiving certain statutory requirements and regulations promulgated pursuant to the Act. The Waiver or Modification of Requirements Under Section 1135, announced by the Secretary of HHS on March 13, 2020, became effective on March 15, 2020, but has retroactive effect to March 1, 2020.

Blanket Waivers

CMS issued the following blanket waivers under Section 1135 of the Act:

Skilled Nursing Facilities (SNF) – CMS waives the “three-day rule” under Section 1812(f) of the Act, which requires a three-day prior hospitalization for coverage of an SNF. As a result, Medicare beneficiaries who need to be transferred as a result of the effect of the COVID-19 pandemic can have temporary emergency coverage without a qualifying hospital stay. Certain Medicare beneficiaries who have recently exhausted their SNF benefits can receive renewed coverage. Lastly, CMS is waiving certain SNF timeframe requirements for Minimum Data Set assessments and transmission.

Critical Access Hospitals (CAH) – CMS waives the restriction that CAHs limit the number of beds to 25 and limit the length of stay to 96 hours.

Housing Acute Care Patients in Excluded Distinct Part Units – CMS waives certain requirements in order to allow acute care hospitals (ACH) to house acute care inpatients in excluded distinct part units, appropriate for acute care inpatients, and bill the Medicare Inpatient Prospective Payment System. The patient's medical record should be annotated to indicate that the acute care inpatient is being housed in the excluded unit because of capacity issues related to the COVID-19 emergency.

Durable Medical Equipment – Where Durable Medical Equipment Prosthetics, Orthotics, and Supplies (DMEPOS) is rendered unusable (e.g., lost, destroyed, irreparably damaged), CMS contracted suppliers may waive the face-to-face, new physician's order, and new medical necessity documentation requirements that are usually applicable for providing replacements. The suppliers must still document the reason for replacement of DMEPOS, noting that it was rendered unusable or unavailable as a result of the COVID-19 emergency.

Care for Excluded Inpatient Psychiatric Unit Patients in the Acute Care Unit of a Hospital – CMS waives certain requirements in order to allow ACHs with excluded distinct part inpatient psychiatric units to relocate inpatients from those units to an acute care bed and unit if necessitated by the COVID-19 emergency.

Care for Excluded Inpatient Rehabilitation Unit Patients in the Acute Care Unit of a Hospital - CMS waives certain requirements in order to allow ACHs with excluded distinct part inpatient rehabilitation units to relocate inpatients from those units to an acute care bed and unit if necessary as a result of the COVID-19 emergency. CMS is also allowing ACHs certain exclusions from calculations that impact a facility's classification as an Inpatient Rehabilitation Facility (IRF) if an IRF admits a patient solely to respond to the emergency.

Supporting Care for Patients in Long-Term Care Acute Hospitals (LTCH)s – CMS is allowing LTCHs to exclude patient stays from the 25-day average length of stay requirement for payment as an LTCH, if the LTCH admits or discharges patients in order to meet the demands of the COVID-19 emergency.

Home Health Agencies – CMS provides relief to Home Health Agencies on the timeframes related to OASIS Transmission. CMS also allows Medicare Administrative Contractors to extend the auto-cancellation date of Requests for Anticipated Payment during the emergency.

Provider Locations – CMS waives the requirement that out-of-state Medicare and Medicaid providers be licensed in the state where they are providing services if they are licensed in another state.

Provider Enrollment – CMS allows new, non-certified Part B suppliers, physicians, and non-physician practitioners to obtain temporary Medicare billing privileges. CMS is also temporarily waiving the associated application fee, criminal background checks, and site visit requirements. All revalidation actions are postponed and pending or new applications from providers are being expedited.

Medicare appeals in Fee for Service, MA and Part D – With respect to Medicare appeals, CMS is giving providers flexibilities that include an extension for providers to file an appeal and processing requests for appeal with the information that is available even if the appeal does not meet the required elements.

Section 1135 Waiver Requests

Along with blanket waivers, the Secretary is authorized by the proclamation to waive certain other Medicare, Medicaid, and Children's Health Insurance Program (CHIP) authorities under Section 1135 of the Act. In order to obtain waivers outside of the blanket waivers, providers can submit requests to their State Survey Agency and their CMS Regional Office. The requests should be made in consultation with legal counsel and should include information about the facility and the reason for requesting the waiver. The following are some of the flexibilities that providers may seek through a Section 1135 waiver request:

- Flexibility relating to conditions of participation and payments for Medicare and Medicaid claims
- Modifications of activities under Emergency Medical Treatment and Labor Act (EMTALA) in order to allow transfer of un-stabilized patients other than in accordance with EMTALA regulations and directing or relocating patients for medical screenings at an alternative, off-campus location
- Waiver of sanctions for certain Stark Law violations (g., physician staffing without a written agreement)
- Waiver of certain limitations on making direct payments to providers for services to Medicare Advantage enrollees

If you have additional questions or need further assistance, please feel free to reach out to our Health Care & Life Sciences Industry Group or your Winston relationship attorney.

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