



## MEMORANDUM

May 5, 2020

To: Tribal Health Clients

From: Hobbs, Straus, Dean & Walker, LLP

Re: *CMS Broadens Medicare and Medicaid Flexibilities to Address COVID-19*

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On April 30, 2020, the Centers for Medicare & Medicaid Services (CMS) announced another round of Medicare and Medicaid waivers and rule changes in order to expand the ability of providers to address COVID-19. CMS's actions consist of both approvals of section 1135 waivers of certain program requirements due to the public health emergency and an interim final rule with comment period (IFC). Comments on the IFC are due 60 days after the date it is published in the Federal Register, and they can be submitted at [www.regulations.gov](http://www.regulations.gov) and should reference CMS-5531-IFC.

### ***Section 1135 Waivers***

As we have previously reported, Department of Health and Human Services (HHS) Secretary Azar's declaration of a Public Health Emergency effective January 27, 2020 provides CMS with the authority under section 1135 of the Social Security Act to temporarily waive certain Medicare, Medicaid, and CHIP program requirements. Section 1135 waivers can be either "blanket" waivers that apply nationwide without the need for an application or they can be provider/supplier requested waivers. CMS's blanket 1135 waivers have a retroactive effective date of March 1, 2020, and CMS has provided a list of [COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers](#) that it continues to update.

The most recent round of blanket waivers includes numerous expanded flexibilities including, but not limited to:

- *Increased flexibility for Medicare telehealth services*—CMS is expanding the types of providers that can furnish telehealth services to all those eligible to bill Medicare for their professional services. It is also allowing the use of audio-only equipment for certain evaluation and management services and behavioral health counseling and educational services.
- *Waiver of certain physical environment requirements*—CMS is waiving certain Medicare and Medicaid conditions of participation for hospitals, critical access hospitals, inpatient hospitals, skilled nursing facilities/nursing facilities, and intermediate care facilities in order to allow the use of additional spaces not

normally used for patient care.

- *Reduced Medicare requirements for long-term care and skilled nursing facilities*—CMS is narrowing Quality Assurance and Performance Improvement (QAPI) requirements, postponing in-service training requirements, waiving certain discharge planning requirements, and providing extra time to furnish records to residents.
- *Allowing remote treatment for Community Mental Health Centers (CMHCs)*—CMS is waiving Medicare requirements to allow CMHCs to furnish services in clients' homes, including through the use of telecommunications technology.

Additional information about blanket waivers and new flexibilities, including provider-specific fact sheets, can be found at <https://www.cms.gov/about-cms/emergency-preparedness-response-operations/current-emergencies/coronavirus-waivers>.

### ***Interim Final Rule***

CMS's IFC provides additional flexibilities for Medicare and Medicaid programs. Some of these flexibilities include, but are not limited to:

- *Expanded Medicare testing flexibilities*—The IFC amends Medicare policies to cover COVID-19 antibody tests, allowing any health care professional authorized to do so under state law to administer COVID-19 diagnostic tests, and providing for new specimen collection fees for COVID-19 testing under the Physician Fee Schedule and the Outpatient Prospective Payment System.
- *Increased ability to treat patients in temporary expansion locations*—The IFC creates exceptions to current Medicare and Medicaid rules to allow on-campus and off-campus provider-based hospital departments to relocate and to provide services in temporary expansion locations, including a patient's home.
- *Broadened coverage for Medicare remote services*—The IFC increases the Physician Fee Schedule payment for audio-only services authorized under the March 2020 Interim Final Rule so that they can be furnished in lieu of office/outpatient services. It also provides that CMS will make changes to the list of services eligible for Medicare telehealth payments through subregulatory guidance for the duration of the public health emergency.
- *Enhanced flexibility for Medicaid laboratory services*—The IFC allows Medicaid payment for laboratory and diagnostic tests in certain non-office settings, such as parking lots, outdoor locations, or self-collected tests.
- *Changes to Medicare and Medicaid home health certification authority*—Although most of the provisions of the IFC are temporary, it also permanently

revises regulations regarding who can certify the need for Medicaid home health services, now allowing physician assistants, nurse practitioners, and clinical nurse specialists to certify and order such services. The IFC also implements CARES Act changes to Medicare home health services, allowing nurse practitioners, clinical nurse specialists, and physicians assistants to certify need.

The full IFC is available at <https://www.cms.gov/files/document/covid-medicare-and-medicaid-ifc2.pdf>. It has not yet been published in the Federal Register. Please let us know if you would like assistance drafting comments.

### ***Conclusion***

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