

Social Security Act, Section 1135 Waiver Authority in National Emergencies Fact Sheet

Overview

The Social Security Act (SSA) authorizes Medicare, Medicaid, State Children's Health Insurance (SCHIP), and Health and Human Services (HHS) social services programs.¹ [Section 1135 of the SSA](#) authorizes the HHS secretary to temporarily modify or waive certain Medicare, Medicaid, SCHIP, and Health Insurance Portability and Accountability Act (HIPAA) requirements. The purpose of the 1135 waiver authority is to ensure that sufficient healthcare services are available to meet the needs of individuals enrolled in SSA programs when and where an emergency is experienced. Service providers who in good faith are unable to comply with certain requirements are reimbursed for the services they provide during an emergency and are exempted from sanctions for noncompliance absent fraud or abuse.

What the Law Does

Under SSA Section 1135, the secretary can waive or modify specific requirements to match the particular needs of the emergency event and service providers. Section 1135 allows the secretary to waive or modify the following reimbursement requirements:

- **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.

How the Law Works

Prior Emergency Declaration Required

Section 1135 waivers require both a declaration of national emergency or disaster by the president under the [National Emergencies Act](#) or the [Stafford Act](#) **and** a public health emergency determination by the HHS secretary under [Section 319 of the Public Health Service Act \(PHSA\)](#).

Issuing a Section 1135 Waiver

If the required emergency declarations have been satisfied, then the HHS assistant secretary for preparedness and response will coordinate with HHS and Centers for Medicare and Medicaid Services (CMS) offices to determine the need for and scope of the 1135 waiver. The assistant secretary considers requests from governors' offices, individual healthcare providers and associations, and regional and field HHS and CMS offices. While governors can make a formal request for a public health emergency declaration or a Section 1135 waiver, there is no statutory requirement to do so, unlike Stafford Act declarations, which require a formal request for assistance by a state's governor. According to HHS, when state officials believe that a public health emergency determination and Section 1135 waivers are needed, they usually work with their state's HHS regional emergency coordinator and regional CMS officials to discuss the request.²

A state declaration of an emergency has no bearing on the secretary's authority to invoke Section 1135. However, the fact that a

state has declared an emergency or requested federal assistance in response to an emergency may be relevant to the secretary's determination of whether a public health emergency exists or an 1135 waiver should be authorized.³

At least two days before formally exercising Section 1135 waiver authority, the secretary must provide a certification and notice to Congress that describes the specific provision to be waived or modified, the healthcare providers to whom the waiver will apply, the geographic area in which the waiver or modification will apply, the period of time the modification will be in effect, and a statement that the waiver or modification is necessary to achieve the purposes of the SSA.

Obtaining Coverage Under the Waiver

Once the 1135 waiver has been authorized, service providers' requirements are not automatically waived or modified. CMS implements the waiver by determining on a case-by-case basis whether and the extent to which sufficient grounds exist for waiving requirements with respect to a particular provider, a group or class of providers, or a geographic area.³ Providers can submit requests to operate under the waiver authority to regional CMS offices and to CMS for other relief beyond the scope of discretion granted to CMS regional offices and state survey agencies. CMS reviews specific 1135 waiver requests with a cross-regional waiver validation team. Absent a waiver, other SSA provisions and CMS regulations can provide flexibility to providers during emergencies.⁴

Waiver Duration

Section 1135 waivers generally expire when the underlying emergency/disaster declaration terminates. The secretary may make a waiver retroactive to the beginning of the emergency period or any subsequent date thereafter. The secretary may further specify that the waiver terminates 60 days from publication, which may be extended, provided that neither the original 60-day period nor any extension continues beyond termination of the applicable declaration or determination.

Waivers related to the HIPAA privacy rule and non-pandemic-related waivers of EMTALA sanctions are subject to different requirements and are generally limited to a 72-hour period beginning with implementation of a hospital disaster protocol.² However, when a public health emergency involves a pandemic infectious disease, waivers of EMTALA sanctions can extend through the duration of the public health emergency.²

Immunity and Liability Issues

SSA Section 1135 does not provide immunity from liability. Section 1135 provides for waivers and modifications of certain SSA program requirements, which are limited in time and geographic scope during an emergency event declared by the HHS secretary and the president. Section 1135 waivers are intended to temporarily reduce administrative burdens and increase flexibility of service providers during a declared emergency with the goal of promoting greater access to care by individuals affected by the emergency.⁴

How the Law Affects States

Only certain federal requirements relating to Medicare, Medicaid, SCHIP, and HIPAA may be waived or modified under Section 1135. A waiver does not affect state laws or regulations, including those for licensure and conditions of participation.³ The 1135 licensure requirement waiver is only for reimbursement under Medicare, Medicaid, and SCHIP; state law governs whether a non-federal provider is allowed to provide services in the state without licensure in that state.

Section 1135 affects the operation and compliance requirements of healthcare providers in states that are included within the time and location of emergencies as identified in the Section 1135 waiver declaration. States can figure prominently in requesting a waiver—though such request is not required by law—by working with regional HHS and CMS offices to support requests for Section 1135 waivers and supporting healthcare providers' requests to operate under a waiver.

Practice Notes

- Before an event, establish contact with regional HHS and CMS offices and state healthcare survey/regulatory agencies or offices to understand the policies and procedures involved in requesting and operating under a §1135 waiver.
- Determine what flexibilities are permitted to state survey agencies and regional HHS and CMS offices in flexing certain requirements without a §1135 waiver.
- If the state wishes to formally request a §1135 waiver, understand the process for doing so and draft template language in advance that can be customized during an event.
- During an event, use established plans and communication networks to request and implement §1135 waivers.

Sources

¹ Social Security Act, Pub. L. No. 104-321. Codified at 42 U.S.C. § 1320b-5.

² DHHS. Public Health Emergency Declaration Q&As. Available at www.phe.gov/Preparedness/legal/Pages/phe-qa.aspx. Accessed January 31, 2012.

³ Center for Medicare and Medicaid Services. "Medicare Fee-For-Service Emergency and Disaster-Related Policies and Procedures That May Be Implemented Only With a §1135 Waiver." October 3, 2011. Available at www.cms.gov/Emergency/downloads/MedicareFFS-EmergencyQsAs1135Waiver.pdf. Accessed January 31, 2012.

⁴ Center for Medicare and Medicaid Services. "Medicare Fee-For-Service Emergency-Related Policies and Procedures That May Be Implemented Without §1135 Waivers." October 3, 2011. Available at www.cms.gov/Emergency/Downloads/Consolidated_Medicare_FFS_Emergency_QsAs.pdf. Accessed January 31, 2012.

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