

DO SNFS, HHAS AND HOSPICE PROVIDERS NEED INDIVIDUAL SECTION 1135 WAIVERS FOR COVID-19 ACTIVITIES?

On March 13, 2020, Secretary Azar of the Department of Health and Human Services (the "HHS") issued a **letter** titled "Waiver or Modification of Requirements Under Section 1135 of the Social Security Act" (the "Azar Letter") that grants the Centers for Medicare & Medicaid Services (the "CMS") the authority to issue waivers specific to the COVID-19 pandemic.

The Azar Letter provides that the CMS can grant waivers, but "only to the extent necessary" to ensure that sufficient health care items and services are available to meet the needs of individuals enrolled in the Medicare, Medicaid and CHIP programs 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 existing requirements as a result of the COVID-19 pandemic.

The Azar Letter provides that the CMS may grant waivers of the following:

- **Conditions of Participation.** Certain conditions of participation, certification requirements, program participation or similar requirements for individual health care providers or types of health care providers.
- **Emergency Medical Treatment and Labor Act.** Sanctions under the Emergency Medical Treatment and Labor Act for the direction or relocation of an individual to another location to receive medical screening.
- **Professional Licensing.** Requirements that physicians or other health care professionals hold licenses in the state in which they provide services.
- **Stark and Physician Referrals.** Sanctions under the Stark rules relating to limitations on physician referrals, as the CMS determines appropriate.
- **Medicare Advantage.** Limitations on payments for health care items and services furnished to individuals enrolled in a Medicare Advantage plan by health care professionals or facilities not included in the plan's network.
- **HIPAA.** Certain sanctions and penalties arising from noncompliance with the following provisions of the HIPAA privacy regulations. Secretary Azar's exercise of authority for this waiver was effective March 15, 2020.

HHS BULLETIN AND HIPAA SANCTIONS

The HHS issued a **bulletin** that clarified the Azar Letter and offered additional commentary regarding the waiver of sanctions and penalties for certain provisions under HIPAA. The waiver became effective on March 15, 2020.

BLANKET WAIVERS

On March 16, 2020, the CMS issued a **fact sheet** titled "COVID-19 Emergency Declaration Health Care Providers Fact Sheet" that details "blanket" waivers for certain health care providers. This CMS fact sheet is the only "blanket" waiver that exists for skilled nursing, home health agencies, critical access hospitals, durable medical equipment and other providers.

BLANKET WAIVER FOR POST-ACUTE PROVIDERS

Included in the CMS "COVID-19 Emergency Declaration Health Care Providers Fact Sheet" are the following post-acute provider-specific "blanket" waivers:

- **Skilled Nursing Facilities**
 - Waiving the requirement at Section 1812(f) of the Social Security Act for a 3-day prior hospitalization for coverage of a skilled nursing facility stay providing temporary emergency coverage of (skilled nursing facility services without a qualifying hospital stay), for those people who need to be transferred as a result of the effect of a disaster or emergency. In addition, for certain beneficiaries who recently exhausted their skilled nursing facility benefits, it authorizes renewed skilled nursing facility coverage without first

having to start a new benefit period.

- Waiving the requirement at Section 42 CFR Section 483.20 to provide relief to skilled nursing facilities on the timeframe requirements for Minimum Data Set assessments and transmission.

■ **Home Health Agencies**

- Waiving the requirements under 42 CFR Section 484.20(c)(1) to provide relief to Home Health Agencies on the timeframes related to OASIS Transmission (Blanket waiver for all impacted agencies).
- Allowing Medicare Administrative Contractors to extend the auto-cancellation date of Requests for Anticipated Payment to ensure the correct processing of home health emergency related claims.

DO POST-ACUTE PROVIDERS NEED THEIR OWN WAIVER?

It is unknown if the CMS will issue further "blanket" waivers for any provider group.

Post-acute providers need to consider if specific waivers, beyond the "blanket" waivers, are needed for their operations. If a post-acute provider believes that the "blanket" waivers are not enough and they need waivers from additional legal and regulatory requirements to carry out their operations, they need to prepare and submit their own waiver requests.

Possible waiver areas include:

- **Requirements/Conditions of Participation.** Waivers pertaining to Requirements of Participation/Conditions of Participation.
- **Stark Law.** Penalties for physician referrals and staffing in an emergency without a written agreement.
- **Timeframes.** Relief from adhering to specific deadlines and timetables to perform mandated actions.

STATE MEDICAID AGENCY SPECIFIC WAIVERS

State Medicaid agencies in Florida and Washington State recently obtained Section 1135 Waivers that include waiver for Pre-Admission Screening and Annual Resident Review ("PASRR") Level I and Level II Assessments for 30 days.

HOW DO POST-ACUTE PROVIDERS OBTAIN SECTION 1135 WAIVERS?

Post-acute providers must submit **requests** to carry out their operations under Section 1135 authority to:

- Their local State Survey Agency; and
- Their specific CMS Regional Office.

The waiver request should include:

- Provider name/type and address;
- Brief summary of why the waiver is needed; and
- Type of relief being sought.

CONSIDERATIONS FOR SKILLED NURSING SECTION 1135 WAIVER REQUESTS

Skilled nursing providers that believe that the "blanket" waivers are not enough should consider requesting waivers for topics, which could include, but are not limited to:

- Frequency of assessments;
- Pre-admission screening timeframes; and
- Physician visits at required intervals.

CONSIDERATIONS FOR HOME HEALTH AGENCY SECTION 1135 WAIVER REQUESTS

Home health agencies that believe that the "blanket" waivers are not enough should consider requesting waivers for topics, which could

include, but are not limited to:

- Frequency and duration requirements for plans of care;
- Waiver of the home health face-to-face requirement; and
- Waiver of timeframes for nursing supervisory visits.

CONSIDERATIONS FOR HOSPICE PROVIDER SECTION 1135 WAIVER REQUESTS

Hospice providers that believe that the "blanket" waivers are not enough should consider requesting waivers for topics, which could include, but are not limited to::

- Timeframe for update of comprehensive assessment;
- Waiver of requirements regarding the frequency and duration of visits outlined in the Plan of Care;
- Face-to-Face requirement for third and later benefit periods; and
- Core services requirements.

NEXT ACTIONS

We are working with post-acute providers across the care continuum on these issues and are available to assist post-acute care providers to design and submit their Section 1135 waiver requests.

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- Your regular Hall Render attorney.

More information about Hall Render's Post-Acute and Long-Term Care services can be found [here](#).