



## COVID-19 Section 1135 Waivers

On January 31, 2020, as a result of the numerous confirmed cases of the virus SARS-CoV-2, which can cause 2019 Novel Coronavirus Disease or COVID-19 (hereinafter, COVID-19) throughout the United States, the Secretary of Health and Human Services (Secretary) used his authority under Section 319 of the Public Health Service Act to declare a public health emergency for the entire United States, retroactive to January 27, 2020.<sup>1</sup> On March 13, 2020, President Trump, under Sections 201 and 301 of the National Emergencies Act, declared that the COVID-19 outbreak in the United States constitutes a national emergency, retroactive to March 1, 2020.<sup>2</sup> As a result of these declarations, the Secretary is authorized to waive or modify certain Medicare, Medicaid and Children's Health Insurance Program (CHIP) program requirements and conditions of participation under Section 1135 of the Social Security Act.

On March 13, 2020, the Secretary issued a Section 1135 Waiver<sup>3</sup> waiving or modifying, to the extent necessary as determined by the Centers for Medicare & Medicaid Services (CMS), the following requirements of the Social Security Act, retroactive to March 1, 2020.

1. Certain conditions of participation, certification requirements, program participation or similar requirements for various provider categories (as applicable), and pre-approval requirements.
2. Requirements that health care professionals hold licenses in the State in which they provide services if they have an equivalent license from another State.
3. Sanctions under Section 1867 of the Act (EMTALA) relating to the relocation or transfer of an individual who has not been stabilized due to the COVID-19 pandemic.
4. Sanctions under section 1877(g) (relating to limitations on physician self-referral) (otherwise known as the Stark Law), as CMS determines appropriate.
5. Limitations on payments under section 1851(i) of the Act for items and services furnished to Medicare Advantage enrollees by health care professionals or facilities not included in the plan's network.
6. Sanctions and penalties arising from noncompliance with several provisions of the HIPAA privacy regulations (pertaining to speaking with family/friends, opting out of a facility directory, distributing privacy practices, and a patient's right to request privacy restrictions or confidential communications).
7. Deadlines and timetables for the performance of required activities, as determined by CMS.

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<sup>1</sup> The Secretary's declaration of a public health emergency can be found [here](#).

<sup>2</sup> The President's declaration of a national emergency can be found [here](#).

<sup>3</sup> The Section 1135 Waiver can be found [here](#).

The Section 1135 waiver will apply until the termination of the declaration of the public health emergency or sixty (60) days after publication of the waiver (subject to extension by the Secretary), except for the HIPAA waiver (which is limited to a 72-hour period beginning upon implementation of a hospital disaster protocol).<sup>4</sup>

As a result of the Section 1135 Waiver, the Secretary authorized CMS to activate specific and “blanket” waivers under Section 1135 of the Act and take key administrative actions to ease certain requirements for impacted providers. For example, CMS has temporarily suspended all non-emergency survey inspections and has issued a number of blanket waivers. Blanket waivers reflect a determination that all similarly situated providers in the emergency area need such waivers or modifications.

The following is a summary of the blanket waivers currently available to providers:

- **Skilled Nursing Facilities.** CMS is waiving the requirement for a 3-day prior hospitalization for coverage of a skilled nursing facility (SNF) stay. Renewed SNF coverage is also authorized for certain beneficiaries who recently exhausted their SNF benefits without starting a new benefit period. CMS is also providing relief to SNFs on the timeframe requirements for Minimum Data Set assessments and transmission.
- **Critical Access Hospitals.** CMS is waiving the requirements that Critical Access Hospitals limit the number of beds to 25 and that the length of stay be limited to 96 hours.
- **Housing Acute Care Patients in Excluded Distinct Part Units.** CMS is waiving requirements to allow acute care hospitals to house acute care inpatients in excluded distinct part units where the distinct part unit’s beds are appropriate for acute care inpatient.
- **Durable Medical Equipment.** CMS is giving contractors the flexibility to waive certain replacement requirements for destroyed, irreparably damaged, or otherwise rendered unusable DMEPOS.
- **Care for Excluded Inpatient Psychiatric Unit (IPU) Patients in the Acute Care Unit of a Hospital.** CMS is waiving certain requirements to allow acute care hospitals with excluded distinct part IPUs that need to relocate inpatients from the excluded distinct part IPU to an acute care bed and unit, subject to appropriateness and conduciveness to safe care.
- **Care for Excluded Inpatient Rehabilitation Unit (IRU) Patients in the Acute Care Unit of a Hospital.** CMS is waiving requirements to allow acute care hospitals with excluded distinct part IRUs that need to relocate inpatients from the excluded distinct part IRU to an acute care bed and unit. CMS is also allowing inpatient rehabilitation facilities (IRFs) to exclude certain patients from the inpatient population for purposes of calculating the applicable threshold requirements to receive payment as an IRF.
- **Supporting Care for Patients in Long-Term Care Acute Hospitals (LTCHs).** CMS is allowing LTCHs to exclude certain patient stays due to emergency demands from the 25-day average length of stay requirement.
- **Home Health Agencies.** CMS is providing relief to Home Health Agencies on the timeframes related to OASIS Transmission and allowing Medicare Administrative Contractors to extend the auto-cancellation date of Requests for Anticipated Payment.

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<sup>4</sup> Section 1135 waivers of EMTALA requirements are generally limited to a 72-hour period beginning upon implementation of a hospital disaster protocol, similar to HIPAA waivers. However, in the case of a pandemic disease (such as COVID-19), EMTALA waivers apply until the termination of the pandemic-related public health emergency.

- **Provider Locations.** CMS is temporarily waiving requirements that out-of-state providers be licensed in the state where they are providing services if they are licensed in another state.
- **Provider Enrollment.** CMS will (i) establish a toll-free hotline for suppliers and practitioners to enroll and receive temporary Medicare billing privileges, (ii) waive certain screening requirements, (iii) postpone all revalidation actions, and (iv) expedite any pending or new applications from providers.
- **Medicare Appeals in Fee for Service, MA and Part D.** CMS will provide certain appeal extensions, process certain incomplete appeals, and utilize all flexibilities available in the appeal process as if good cause requirements are satisfied.
- **Flexibility and Relief for State Medicaid Agencies.** CMS is authorized to grant state and territorial Medicaid agencies a wider range of flexibilities under Section 1135 waivers upon request by the Medicaid agency.<sup>5</sup>

Other specific waivers may be available to health care providers upon request to CMS on a case-by-case basis, generally through provider email requests directly to CMS Regional Offices or State Survey Agencies.<sup>6</sup> Specific waiver requests generally include justification for the waiver and its proposed duration.<sup>7</sup> Providers and suppliers should keep careful records of Medicare beneficiaries to whom they provide services subject to a requested or approved 1135 waiver.

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We anticipate that CMS will issue additional guidance in response to COVID-19 in the coming days and weeks, which may include additional or modified blanket Section 1135 waivers. Health care providers who are or may be affected by the consequences of the COVID-19 pandemic should monitor additional developments and announcements from the Department of Health and Human Services, CMS, and state licensing/surveying agencies. If you have any questions about the COVID-19 Section 1135 waivers, please contact a member of our [national Healthcare team](#).

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<sup>5</sup> More information regarding the blanket waivers can be found [here](#).  
<sup>6</sup> General information regarding Section 1135 waivers can be found [here](#).  
<sup>7</sup> More information about requesting a specific 1135 waiver can be found [here](#).

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