Rules of Engagement:
Legal Issues in § 1115 Waivers

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  • Poverty & legal aid advocates – 50 states + DC

• Offices: CA, DC, NC

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Agenda

- Section 1115 Authority
- Application and Review Process
- History of 1115 Waivers
- Current and New 1115 Waivers
- Current issues in 1115 Waivers
- Judicial review
- Limits on 1115s
Section 1115 Authority

Under Section 1115 of the Social Security Act, the Secretary of HHS has broad, but not unlimited, authority to approve a state’s requests to waive compliance with certain provisions of federal Medicaid law and authorize expenditures not otherwise permitted by law.

Such authority is allowed in the context of an “experimental, pilot or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives” of the Medicaid program.

By longstanding practice, waivers must be budget neutral to the federal government.

The Secretary may not waive certain statutory provisions including, for example:

- FMAP percentage formula
- FMAP claiming processes
- MAGI counting rules and the prohibition on the asset test
- Cost sharing requirements (limited waiver authority)
- Spousal impoverishment protections

Source: Social Security Act (SSA) § 1115.
States and CMS must ensure meaningful public input and stakeholder engagement

**Waiver Applications and Renewals**

- State-level public input:
  - States must provide at least a 30-day public notice and comment period prior to submission
  - Must include at least two public hearings
  - States must consult with federal tribes and seek advice from Indian health providers and urban Indian organizations
- Federal-level public comment period:
  - Minimum of a 30-day public notice and comment period
(See Appendix for more details)

**Waiver Amendments**

- State-level public input:
  - Provide at least a 30-day public notice and comment period with at least one public hearing

Source: 42 C.F.R. § 431.408; 42 C.F.R. § 431.416; State Medicaid Director Letter #12-001, Revised Review and Approval Process for Section 1115
Required Elements of a Section 1115 Waiver Application

- Description of the proposed health care delivery system, eligibility requirements, benefit coverage, financing or cost sharing changes
- Estimate of expected annual enrollment and expenditures
- Requested waiver and expenditure authorities
- Description of the research hypothesis that the demonstration will test and a plan for evaluating the hypothesis
- Written documentation of state’s compliance with public notice requirements

Source: 42 C.F.R 431.412; Section 1115 Demonstration Program Template available at https://www.medicaid.gov/medicaid−chip−program−information/by−topics/waivers/1115/downloads/fillable−1115−demo−10−12v2.pdf
Process for Obtaining 1115 Waiver Approval

Waivers are approved after a series of negotiations between a state and CMS

- Prior to submitting a formal application, some states discuss waiver ideas with CMS or develop a waiver concept paper.
- Once the waiver application is submitted, the state engages in negotiations until resolution.
- The waiver approval package includes:
  - An award letter (which lists specific sections of the statute and regulations being waived or modified)
  - Special Terms and Conditions
  - Budget neutrality agreement
- Typically, waivers are approved initially for a five-year period and must be renewed to continue

History of Section 1115 Medicaid Waivers

Expansion/managed care waivers: Focused on childless adults or optional eligibility groups; many waivers began as efforts to implement broader managed care systems (e.g., Minnesota, New York, Oregon, Tennessee)

Reform waivers: Initiatives to restructure Medicaid financing/delivery (e.g., Vermont, Florida, Rhode Island) and expand coverage (Massachusetts)

Delivery System Reform Incentive Program (DSRIP) waivers: (e.g., California, Texas, New York, Washington);

Uncompensated Care (UC) Pool waivers (e.g., Florida, New Mexico, Texas)

Health Insurance Flexibility and Accountability (HIFA) waivers: CMS initiative to promote a streamlined approval process; some states used waivers to reduce program costs by setting enrollment caps and reducing benefits (e.g., Colorado, New Jersey, Oregon, Utah)

Emergency waivers: Waivers for 9/11, natural disasters and public health crises (e.g., New York, Louisiana, Michigan)

Alternative Expansion waivers: Alternative approaches for covering ACA expansion adults (e.g., Arkansas, Indiana, Michigan)
Section 1115 Waivers Today

Four Types of Waivers in Recent Years

**Managed Care Waivers:** new populations and new services

**Delivery System Reform Waivers:** often involve substantial federal investment; 12 states have DSRIP type waivers

**Uncompensated Care Pool Waivers:** new policies established by Obama Administration; 9 states have UCC waivers

**Expansion Waivers:** accompanied by new programmatic authorities but only to expansion populations; 7 states have such waivers
# Program Features in States with Alternative Expansions

States use Section 1115 demonstrations to implement alternative Medicaid expansion approaches that require waivers of portions of federal Medicaid law. Only some program features require a waiver.

<table>
<thead>
<tr>
<th>States</th>
<th>Approved 1115 Demonstrations</th>
<th>New or Amended Waiver Proposals</th>
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<tbody>
<tr>
<td>Arizona</td>
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<td>Arkansas</td>
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<td>Indiana</td>
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<td>New Hampshire</td>
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- **Premiums**
  - Arizona: ✓
  - Arkansas: ✓
  - Indiana: ✓
  - Iowa: ✓
  - Michigan: ✓
  - Montana: ✓
  - New Hampshire: ✓

- **Cost Sharing**
  - Arizona: ✓
  - Arkansas: ✓
  - Indiana: ✓
  - Iowa: ✓
  - Michigan: ✓
  - Montana: ✓
  - New Hampshire: ✓

- **Health-Savings Like Accounts**
  - Arizona: ✓
  - Arkansas: ✓
  - Indiana: ✓
  - Iowa: ✓
  - Michigan: ✓
  - Montana: ✓
  - New Hampshire: ✓

- **Healthy Behavior Incentives**
  - Arizona: ✓
  - Arkansas: ✓
  - Indiana: ✓
  - Iowa: ✓
  - Michigan: ✓
  - Montana: ✓
  - New Hampshire: ✓

- **Work Referral**
  - Arizona: ✓
  - Arkansas: ✓
  - Indiana: ✓
  - Iowa: ✓
  - Michigan: ✓
  - Montana: ✓
  - New Hampshire: ✓

- **Benefit/Eligibility Variations**
  - Arizona: ✓
  - Arkansas: ✓
  - Indiana: ✓
  - Iowa: ✓
  - Michigan: ✓
  - Montana: ✓
  - New Hampshire: ✓

- **QHP Premium Assistance**
  - Arizona: ✓
  - Arkansas: ✓
  - Indiana: ✓
  - Iowa: ✓
  - Michigan: ✓
  - Montana: ✓
  - New Hampshire: ✓

- **ESI Premium Assistance/HIPP**
  - Arizona: ✓
  - Arkansas: ✓
  - Indiana: ✓
  - Iowa: ✓
  - Michigan: ✓
  - Montana: ✓
  - New Hampshire: ✓

## Limits Applied by the Obama Administration

<table>
<thead>
<tr>
<th>Policy</th>
<th>“Guardrails”</th>
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| Premiums                     | - No more than 2% of household income  
- Nonpayment cannot result in loss of coverage for those under 100% FPL (can be a debt to state)  
- No lock-out for nonpayment of premiums (beyond Indiana, pending evaluation of Indiana waiver)  
- Exemptions                                                                                   |
| Cost Sharing                  | - Compliance with SSA § 1916(f)  
- Premiums and co-payments may not exceed 5% of aggregate household income                                                                  |
| Work                          | - No waivers of Title XIX granted (no authority to condition eligibility on compliance with work activity)  
- Referrals permitted (no waiver needed)                                                       |
| Benefits & Eligibility        | - Waivers of NEMT and retroactive coverage granted; preconditions established  
- No lockouts for failure to renew eligibility  
- No time limits or (new) enrollment caps  
- Enhanced match for expansion only if coverage extended to 133% FPL                           |
| Premium Assistance for QHPs   | - Beneficiary protections apply (cost sharing/benefits)                                                                                   |
| Premium Assistance for ESI    | - Beneficiary protections apply (cost sharing/benefits)                                                                                   |

New Administration Promises More Waiver Flexibility

- Support “innovative approaches to increase employment and community engagement”
- Alignment of Medicaid and private insurance for non-disabled adults, including:
  - Alternative benefits
  - Cost sharing and enforceable premiums
  - Waiver of NEMT, presumptive eligibility, retroactive coverage

<table>
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<th>Key Features of Waiver Requests from IN, KY, and AZ</th>
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<tr>
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<tr>
<td><strong>Lockouts</strong></td>
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<tr>
<td>• Lockout for 6 months for failure to pay premiums <em>(in current waiver)</em></td>
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<tr>
<td>• Lockout for 6 months for failure to submit redetermination paperwork</td>
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<tr>
<td>• Lockout for 6 months for failure to pay premiums</td>
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<tr>
<td>• Lockout for 6 months for failure to submit redetermination paperwork (individuals can re-enroll early if they complete a financial or health literacy course )</td>
</tr>
<tr>
<td>• Lockout for one year for failure to report change in income</td>
</tr>
<tr>
<td>• Lockout for one year if individual misreports adherence to work requirements</td>
</tr>
<tr>
<td><strong>Higher cost-sharing for non-emergency ER use</strong></td>
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<tr>
<td>• Up to $25 co-payment for non-emergency use of the ER <em>(in current waiver)</em></td>
</tr>
<tr>
<td>• Deduct up to $75 from HSA-like account for each non-emergency ER visit</td>
</tr>
<tr>
<td>• Up to $25 co-payment for non-emergency use of the ER <em>(in current waiver)</em></td>
</tr>
<tr>
<td><strong>Work Requirements</strong></td>
</tr>
<tr>
<td>• Condition eligibility on participation in up to 20 hours/week of employment or community engagement</td>
</tr>
<tr>
<td><strong>Other Waivers</strong></td>
</tr>
<tr>
<td>• Non-emergency medical transportation <em>(in current waiver)</em></td>
</tr>
<tr>
<td>• Retroactive coverage <em>(in current waiver)</em></td>
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<tr>
<td>• Non-emergency medical transportation</td>
</tr>
<tr>
<td>• Retroactive coverage</td>
</tr>
<tr>
<td>• Requests waiver to limit lifetime enrollment in Medicaid to five year</td>
</tr>
</tbody>
</table>

Note: Indiana submitted a waiver extension request to CMS on 1/31/2017; Kentucky submitted a new waiver request to CMS on 8/24/2016; Arizona released a waiver amendment request for public comment through 3/29/2017.
CMS Authority to Issue “Block Grant” Waivers

CMS may grant waivers for capped funding but limitations exist

**CMS has authority to:**

- Set a per capita cap on Medicaid spending, as well as place a global cap on total Medicaid expenditures by a state (e.g., Vermont and Rhode Island)
- Waive many Medicaid programmatic requirements (e.g., what benefits and populations must be covered)
- Provide federal matching dollars for costs that would not otherwise qualify as “medical assistance” under Medicaid law and define how states can use funds below cap

**CMS does not have authority to:**

- Waive the requirement that states match federal expenditures
Block Grant Waiver Questions

To what extent may states obtain block grant waivers?

- Block grant waivers possible but federal payment remains on a claims basis with statutory match
- If total funding is higher than “claims” may states access these funds?

Payments subject to the cap?

- What spending/payments will be subject to the overall cap?

Trend rate?

- RI and VT had waivers with aggregate caps (neither in place today) but caps were set higher than projected spending

Flexibility?

- For example, will states be able to expand coverage, cap enrollment, finance spending not matchable under regular rules?
Thank you!

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Current issues in § 1115 Waivers

- High, mandatory premiums & cost sharing
- Mandatory exclusions
- Life-time limits
- Work requirements
- Drug testing
- Retroactive eligibility
- Non-emergency transportation
Current subject matter

§ 1902(a)(10) Eligibility

§ 1902(a)(8) Reasonable promptness

§ 1902(a)(3) Due Process
42 U.S.C. § 1315

- Experimental, pilot or demonstration project
- Secretary finds:
  - Likely to assist in promoting the objectives of the Medicaid Act
- Secretary may:
  - Waive compliance with requirements of 1396a
  - To extent and for period needed
Standard of Judicial Review

- Administrative Procedure Act, 5 U.S.C. § 706(2)(A)
  - Arbitrary and capricious
  - Abuse of discretion
  - Otherwise not in accordance with law
- Deference to Secretary of HHS, e.g.
  - “clear abuse of discretion”
Limits on § 1115 Waivers

- The need for an experiment
  - Congress
    - “Test out a unique approach”
    - “Detailed research methodology and comprehensive evaluation”
  - Courts
    - “A simple benefit cut, which might save money, but has no research or experimental goal, would not satisfy this requirement.”
Limits on § 1115 Waivers

• Consistent with objectives of Medicaid Act
  • furnish medical assistance to limited income people
  • furnish rehabilitation and other services to help them attain/retain independence or self-care
    • 42 U.S.C. § 1396-1
Limits on § 1115 Waivers

• Provisions of § 1396a
  • *Not* provisions outside § 1396a
  • Congressionally required (though listed in § 1396a), *e.g.*
    • Cost sharing, § 1396o(f)
    • Medicare cost sharing, § 1396d(p)(4)
    • Spousal impoverishment, § 1396r-5(a)(4)(A)
Limits on § 1115 Waivers

- Case example:

  *Newton-Nations v. Betlach*, 660 F.3d 370 (9th Cir. 2011)
  - Experimental purpose
  - Objectives of Medicaid Act
Limits on § 1115 Waivers

• Other statutory protections, e.g.
  • Americans with Disabilities Act/§ 504
  • Title VI of the Civil Rights Act
  • Administrative Procedure Act
• Constitutional protections, e.g.
  • Due Process
Limits on § 1115 Waivers

- Need for public input
  - 42 U.S.C. § 1315(d); 42 C.F.R. § 431.408
- Need for a particularized record
Thank You!

- NHeLP wants to work with you!
- Contact:
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THANK YOU

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Appendix
## Public Transparency Requirements

States and CMS must ensure meaningful public input and stakeholder engagement at both the state and federal level.

### Waiver Application

**State Requirements**
- Prior to submitting a waiver application, states must provide at least a 30-day public notice and comment period.
- Public notice must include:
  - Description, goals and objectives of the waiver.
  - Locations and internet address where copies of the waiver are available.
  - Mail and email addresses where written comments may be sent and reviewed by the public.
  - Location and time of at least two public hearings (telephonic and/or web conference for at least one).
- States must consult with federal tribes and seek advice from Indian health providers and urban Indian organizations.
- Waiver application must memorialize public comments received and the state's responses.

**Federal Requirements**
- Within 15 days of receipt of the application, commence 30-day federal public notice comment period.

### Waiver Renewals and Amendments

**State Requirements**
- Waiver extension requests for applications submitted after April 2012 must comply with the same state and federal public notice requirements as required for a waiver application.
- Waiver amendments and extension requests for applications submitted before April 2012 will meet public transparency requirements if states use a process that:
  - Allows for the opportunity to comment at least 30-days prior to submission.
  - Includes at least one public hearing.
  - Uses a commission or other similar process where meetings are open.
  - Provides for a formal notice and comment period in accordance with state's requirements.
  - Posts in newspapers of general circulation.

**Federal Requirements**
- CMS will post application and written comments received.

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§ 1115(d); 42 C.F.R. 431.408; 42 C.F.R. 431.416; State Medicaid Director Letter #12–001, Revised Review and Approval Process for Section 1115 Demonstrations (April 27, 2012).