



Overview of CMS Guidance: Application of Estate Recovery and Other §1917 Provisions to MAGI Individuals

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On February 21st, 2014, the Centers for Medicare & Medicaid Services (CMS) released a State Medicaid Directors Letter (SMDL) addressing the application of liens, adjustments and recoveries, transfer-of-assets rules, and post-eligibility income rules to individuals eligible for Medicaid under Modified Adjusted Gross Income (MAGI) eligibility rules.¹ MAGI rules apply to the Medicaid adult expansion population, and this much-awaited federal guidance addresses the issue of whether Medicaid estate recovery applies to this group. According to the guidance estate recovery **does** apply to some individuals age 55 and older whose eligibility is determined using MAGI methodologies, including the expansion population. CMS, however, recognizes the law is a potential barrier to enrollment and intends to explore options to eliminate recovery of Medicaid benefits for items or services other than long-term care and related services for MAGI beneficiaries. In the meantime, CMS reminds states that they have the option to limit recovery to what is federally required.

The guidance also finds that most of the other provisions of §1917 apply to MAGI beneficiaries with some limited exceptions. Below are the highlights of the new guidance.

Medicaid Liens Cannot Be Placed on the Real Property of MAGI Individuals

Under §1917 of the Social Security Act, states may place liens on the real property of permanently institutionalized individuals (of any age) who are inpatients in a nursing facility, intermediate care facility for the developmentally disabled, or other medical institutions and who, as a condition of receiving services, apply all but a minimal amount of their income to the cost of their care. Before placing a lien, the state must also determine there is no reasonable expectation the individual will be discharged and return to his/her home.

¹ See CMS, State Medicaid Directors Letter, Re: Application of Liens, Adjustments and Recoveries, Transfer-of-Asset Rules and Post-Eligibility Income Rules to MAGI Individuals (Feb. 21, 2014), SMD #14-001, ACA #29, available at <http://www.medicaid.gov/Federal-Policy-Guidance/Downloads/SMD-14-001.pdf>.

The process for calculating available income for individuals receiving institutional services and home and community-based services (HCBS) is referred to as “post-eligibility treatment of income” (PETI).² CMS clarifies that MAGI eligible individuals are **not** within the categories of individuals subject to PETI rules; therefore, they will **not** be subject to Medicaid liens. For equity purposes CMS is considering future rulemaking to apply PETI rules to MAGI beneficiaries who receive long-term care services and supports (LTSS.) But for now, CMS makes clear that MAGI individuals who receive LTSS coverage may not have this type of Medicaid lien placed on their real property.

Estate Recovery Rules Apply to Some MAGI Beneficiaries Age 55 and Older

CMS finds that estate recovery applies to some MAGI beneficiaries age 55 and older, but emphasizes that estate recovery limitations and exceptions continue to apply. For example, estate recovery can only occur when there is no surviving spouse, or child under age 21, or blind or disabled child of any age.³ There is also an undue hardship exception and specific exemptions that apply to American Indian/Alaska Native populations.

States may place liens, subject to certain exceptions, on the real property of permanently institutionalized individuals (as described above.) States opting to place liens must seek estate recovery when the permanently institutionalized individual passes away or when the real property subject to the lien is sold. CMS clarifies that since MAGI individuals who are permanently institutionalized will not have liens placed on their real property, states may not recover from the estates of MAGI beneficiaries under this authority.

But states **must** continue to seek recovery of medical assistance paid on behalf of individuals age 55 and older receiving nursing facility services (NFS), HCBS, and related hospital and prescription drug services. Reflecting the provisions of the Medicaid Act, states also have the **option** to recover from individuals age 55 and older for non-NFS and non-HCBS. So for individuals 55 and older, including those in the adult expansion population, states have the option to recover up to the total amount spent on an individual’s behalf for medical assistance for any or all other items or services under the state plan. This includes capitation paid on behalf of the beneficiary (except Medicare cost-sharing paid on behalf of Medicare Savings Program beneficiaries on or after January 1, 2010.)⁴

CMS recognizes that this Medicaid estate recovery law may serve as a barrier to enrollment, and intends to explore options to eliminate recovery of Medicaid benefits consisting of items other than LTSS and related services for MAGI beneficiaries. In the meantime, CMS reminds states that they have the option to limit recovery to what is federally required.

² 42 C.F.R § 435.700 et. seq.

³ See Social Security Act §1917(b)(2)(A).

⁴ See Section 115 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), Pub. L. 110-275), available at: <http://www.gpo.gov/fdsys/pkg/PLAW-110publ275/pdf/PLAW-110publ275.pdf>.

Transfer of Assets

CMS indicates that the transfer of assets rules apply to MAGI beneficiaries who meet the definition of “institutionalized individuals” and to “non-institutionalized individuals” in states that have opted to apply transfer rules to those individuals.⁵ This provision only applies to beneficiaries who receive Medicaid LTSS, and the limitations and exceptions to the transfer rules in the statute apply.

Other §1917 Provisions

CMS finds that states should apply several provisions of §1917 to MAGI beneficiaries as well, including:

- Annuities, promissory notes, and life estate interests,
- Trusts, and
- Home Equity Rule.

Conclusion

The CMS guidance confirms that most of the provisions in §1917 apply to MAGI beneficiaries, although there are some exceptions. As to Medicaid estate recovery, CMS recognizes the current policy as a potential barrier to enrollment and will continue to explore options to limit recovery. Regarding Medicaid liens, there may be future rule-making to apply liens to MAGI beneficiaries, but for now, liens do not apply to MAGI individuals.

Advocacy Tips:

- With respect to estate recovery:
 - If your state has limited recovery to what is federally required advocate to keep it that way.
 - If your state has taken the option to recover for more than LTSS services for those age 55 and older consider advocacy to have your state only recover what is federally required. If that is not possible, consider advocating to have your state only recover what is federally required for MAGI individuals.
 - Ensure your state has established a hardship exception process that is clearly available.
- Monitor how your state implements the changes regarding Medicaid liens provided in this CMS guidance.
- Monitor NHeLP’s website for updates regarding CMS guidance on this issue.
- If you have clients who are experiencing problems due to state policies, let us know so that we can share on-the-ground developments.

⁵ See Social Security Act §1917(h)(3) and (4) for definition of “institutionalized” and “non-institutionalized” individual.