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Medicaid Estate Recovery

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Key Resources

Overview of CMS Guidance: Application of Estate Recovery and Other §1917 Provisions to MAGI Individuals, available [here](#).

CMS State Medicaid Directors Letter Re: Applications of Liens, Adjustments and Recoveries, Transfer-of-Asset Rules and Post-Eligibility Income Rules to MAGI Individuals, available [here](#).

Coming in May's Health Advocate:

Special Enrollment and Appeals

As the first open enrollment period for coverage through the Marketplace has come to an end, attention has turned to ensuring individuals eligible for Medicaid know they can apply for and enroll in Medicaid at any time. However, estate recovery rules have been identified by many as a potential barrier to enrollment in Medicaid. Individuals may be hesitant to enroll in Medicaid because they own a home that they want to leave to their adult children when they pass away. For this reason, it is important to understand the federal rules on Medicaid estate recovery and what the federal regulatory agency, the Centers for Medicare & Medicaid Services (CMS), has instructed states in recent guidance on this issue.

What are the federal requirements for Medicaid estate recovery?

Mandatory Recovery: Federal law *requires* states to seek recovery from the estates of certain Medicaid beneficiaries and gives states the *option* of collecting against the estates of other beneficiaries. There are some limitations and exceptions to these requirements. States **must** seek estate recovery for medical assistance paid by Medicaid on behalf of the following beneficiaries:

- Permanently institutionalized individuals in states electing to impose liens

Each state determines whether it will impose 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 institution and who, as a condition of receiving services, apply all but a minimal amount of their income to the cost of their care. The state must determine there is no reasonable expectation the individual will be discharged and return home before placing a lien on such a property. The state may place a lien on the property while the beneficiary is still alive.

States opting to place liens on the real property of permanently institutionalized individuals specify their election in their Medicaid state plan. These states must seek estate recovery when the permanently institutionalized individual passes away or when the real property subject to the lien is sold.

- Individuals age 55 and older for nursing facility services, home and community based services (HCBS), and related services

States must seek recovery of medical assistance paid on behalf of individuals age 55 and older receiving nursing facility services, HCBS, and related hospital and prescription drug services.

Optional Recovery: Apart from mandatory recovery, states have the **option** to recover from individuals age 55 and older for *any* items or services covered under the state's Medicaid plan.

What are the exceptions or limitations to estate recovery?

Medicaid estate recovery occurs only after the Medicaid beneficiary who is subject to recovery passes away (with the exception of permanently institutionalized individuals as described above.) In addition, Medicaid estate recovery cannot occur during the lifetime of a surviving spouse, or when there is a surviving child under age 21, or blind or disabled child of any age. Once the surviving spouse passes away, and there are no children under age 21 or a blind or disabled child, a state *may* recover the cost of the Medicaid expenditures but is not required to do so. Federal law also provides specific exemptions to estate recovery that apply to American Indian/Alaska Native populations, for example, certain income, resources and property are exempt from Medicaid estate recovery.¹

States must establish procedures and standards for waiving estate recovery when it would cause an undue hardship and must describe the policy in their state plan. In addition, Medicaid liens cannot be placed on the home of a permanently institutionalized individual, when any of the following individuals reside in the home: the spouse, child under 21, blind or disabled child of any age, or sibling who has an equity interest in the home. An exception also applies for Medicare cost-sharing payments made on behalf of individuals eligible to have their Medicare cost-sharing paid by Medicaid. Medicare cost-sharing payments are exempt from recovery from an individual's estate under Medicaid law as of January 1, 2010.²

How does Medicaid estate recovery apply to individuals enrolled in managed care?

According to CMS, if states pay managed care organizations (MCOs) a per-member per-month amount (called "capitation") for Medicaid beneficiaries enrolled in an MCO, that amount may be included, in whole or part, in the estate recovery claim against a deceased Medicaid beneficiary's estate.³ With an increase of Medicaid beneficiaries ages 55 and older enrolled in MCOs, this is an area that is becoming more relevant and will have to be monitored closely.

How does Medicaid estate recovery apply to MAGI Medicaid populations?⁴

Since January 1, 2014, new income counting rules, known as Modified Adjusted Gross Income (MAGI), are being used to determine eligibility for most Medicaid applicants and beneficiaries. On February 21, 2014, CMS released a

¹ Department of Health and Human Services (DHHS), Health Care Financing Administration, State Medicaid Manual, Part 3—Eligibility, January 11, 2001, pp. 5-6, available at: <http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/r75sm3.pdf>.

² See CMS, *State Medicaid Directors Letter, Re: Medicare Improvements for Patients and Providers Act of 2008 (MIPPA)* (Feb. 18, 2010), SMD #10-003, available at <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD10003.PDF>.

³ DHHS, *supra* n.1, at 5.

⁴ For additional discussion see NHeLP, *Overview of CMS Guidance: Application of Estate Recovery and Other §1917 Provisions to MAGI Individuals*, available at: <http://www.healthlaw.org/publications/search-publications/CMS-Guidance-Overview-Application-of-Estate-RecoveryOther-1917-Provisi#>.

guidance letter to states that addresses the application of liens, adjustments and recoveries to individuals eligible for Medicaid under these MAGI eligibility rules.⁵ The CMS guidance clarified the following rules:

Medicaid liens cannot be placed on the real property of individuals eligible under MAGI rules

CMS clarifies that individuals found eligible for Medicaid based on MAGI eligibility rules cannot be subject to Medicaid liens. The process for calculating available income for individuals receiving institutional services and HCBS is referred to as “post-eligibility treatment of income” (PETI.) 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.

Estate recovery rules apply to some beneficiaries age 55 and older found eligible based on MAGI

According to the guidance, estate recovery *does* apply to some individuals age 55 and older whose eligibility is determined using MAGI methodologies, including the Medicaid expansion population. This includes institutionalized individuals who received medical assistance at age 55 or older. As explained above, states are required to seek recovery for nursing facility services, HCBS, and related hospital and prescription drug services. States also have the option to seek recovery for any other items or services covered under the state’s Medicaid plan. The same limitations and exceptions outlined above apply to this group.

Medicaid comparability rules do not apply

Federal Medicaid law includes a “comparability requirement” that generally requires all individuals in the same Medicaid eligibility coverage group to receive the same amount, duration and scope of services. CMS has determined that this rule does *not* apply to estate recovery and, therefore, states can have different recovery policies for individuals found eligible based on MAGI versus non-MAGI methodologies. Thus, states have the option to apply broader estate recovery rules to non-MAGI individuals and only recover what is federally required from MAGI individuals.

For the next three years, states will not keep recovered claims for the Medicaid expansion population

When states recover from the estates of former Medicaid beneficiaries, they return to the federal government the portion that represents the federal share of expenditures on an individual's Medicaid covered services.⁶ Since services provided to the Medicaid adult expansion population are 100 percent federally funded for the first three years, and almost fully federally funded thereafter, states will have to return to the federal government the full amount (and, in future years, close to the full amount) collected by the state through estate recovery for this population.

Exploring options

CMS recognizes that Medicaid estate recovery may serve as a barrier to enrollment. According to the guidance, CMS is still exploring the legal options available to eliminate recovery of Medicaid benefits for services other than long-term care services and supports and related services for Medicaid beneficiaries found eligible based on MAGI. In the meantime, CMS has reminded states that they have the option to limit recovery to what is federally required.

⁵ 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>.

⁶ See 42 CFR 433.140(c).

Conclusion

Each state provides a list of the items and services it seeks recovery for in its Medicaid plan. If a state has limited Medicaid estate recovery to what is federally required, state advocates and other stakeholders should advocate to keep it that way. If a state has opted to recover for more than federally required services for individuals age 55 and older, consider advocating to limit estate recovery to what is federally required for *all* Medicaid populations. If this is not possible, then advocate with the state to recover only what is federally required for MAGI individuals. Finally, ensure the state has established a hardship exception process that is clearly available.

NHeLP will continue to post information and updates regarding CMS guidance and state implementation on estate recovery, so please visit our website regularly.

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, educates and litigates at the federal and state level.

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