PUBLICATION

Public Health Emergency Declaration Again Extended; Key Flexibilities Decoupled

Authors: Joseph B. Keillor, Allison M. Cohen
January 18, 2023

On January 11, 2023, Department of Health and Human Services (HHS) Secretary Xavier Becerra again renewed the declaration of a Public Health Emergency (PHE) under the Public Health Service Act, extending the declaration through April 11, 2023.

HHS has repeatedly publicly committed to providing 60 days' notice before the termination or expiration of the PHE. Therefore, if mid-February passes without such notice, it is likely that there will be at least one further renewal beyond April 11, 2023.

Baker Donelson has published a series of articles examining transition matters related to the PHE, including the need for providers to brace for expanded uninsured populations as Medicaid rolls are trimmed by state Medicaid agencies. The Consolidated Appropriations Act (CAA) enacted on December 29, 2022, decoupled the Medicaid continuous enrollment requirement from the end of the PHE, effective March 31, 2023. While CMS guidance has emphasized that state agencies should proceed deliberately with redeterminations of continued eligibility to avoid erroneous disenrollment, Medicaid rolls are likely to be reduced by several million in the coming months. If coverage transition rates for disenrolled individuals are similar to historic trends, it seems probable that the uninsured population may rise significantly.

Specifically, a Medicaid and Chip Payment and Access Commission (MACPAC) review of pre-pandemic data revealed that less than 4 percent of adults who were disenrolled from Medicaid transitioned to Affordable Care Act (ACA) Exchange coverage, while nearly 30 percent returned to Medicaid within a year after a gap in coverage. Although it is not known exactly what proportion of the remaining individuals uninsured post-disenrollment were, the extraordinarily low uptake to ACA Exchange coverage raises serious concerns.

As we previously summarized here, certain telehealth waivers implemented in connection with the PHE had already been legislatively extended for 151 days after the end of the PHE. The CAA further extends legislative flexibilities that have allowed for expanded Medicare telehealth coverage during the COVID-19 pandemic until the later of the end of the COVID-19 PHE or December 31, 2024. The two-year extension will continue Medicare payment for telehealth services provided to Medicare beneficiaries in urban areas and their homes, an extended list of distant site practitioners, and audio-only services when appropriate.

The CAA also delays the in-person requirement before providing telehealth mental health services to beneficiaries in their homes or urban areas. The extension of these flexibilities continues expanded telehealth coverage at least through 2024, which provides greater certainty for health care providers with respect to Medicare telehealth reimbursement.

These twin developments regarding Medicaid and telehealth reflect an acceleration of decoupling of key flexibilities from the end of the PHE, and warrant assessment by providers about how such developments may affect operations, finances, and strategies going forward.

However, certain other flexibilities, such as Physician Self-Referral Law waivers, and certain payment and coverage flexibilities, presently remain tied to the end of the PHE. We will continue to monitor developments related to the end of the PHE and other pandemic-related governmental programs and waivers.

If you have questions about this alert, please contact Joseph Keillor, Allison Cohen, or a member of Baker Donelson's Health Law Group.