Use of Medicaid Retainer Payments during the COVID-19 Pandemic

Since 2000, state Medicaid programs have been permitted to make retainer payments to home-and community-based services (HCBS) providers. These are temporary payments intended to preserve the financial viability of providers during disruptions in care. Unlike most other types of Medicaid payments, retainer payments are not tied to specific services used by a Medicaid enrollee.

During the COVID-19 pandemic, many states have used retainer payment authority as a source of relief for HCBS providers experiencing decreases in utilization, temporary practice closures, or other circumstances that limit their ability to provide covered services to Medicaid beneficiaries. States must request Centers for Medicare & Medicaid Services (CMS) approval to make retainer payments either through an Appendix K submission under 1915(c) authority or 1115 waiver authority. As of April 12, 2021, 40 states have received CMS approval to expand their retainer payment policy during the COVID-19 pandemic (KFF 2021).

This issue brief reviews how states are using retainer payments as a form of provider relief for HCBS providers during the COVID-19 pandemic. It also discusses policy issues based on a review of relevant guidance and interviews with states and other stakeholders.

The brief was originally published in April 2021 and revised in May 2021 in response to new CMS guidance on retainer payment policy during the Public Health Emergency (PHE).

Background

While Medicaid payments must generally be tied to the provision of Medicaid-covered services, there are a few exceptions.[1] For example, states often make bed-hold payments to nursing facilities to maintain a resident's place while the enrollee is unable to receive services for a short-term period of time, such as during a temporary hospitalization. Following the Supreme Court's 2000 decision in *Olmstead v. L.C.* that unjustified institutionalization of individuals with disabilities is a form of discrimination, CMS permitted states to provide retainer payments to HCBS providers. The rationale for this policy is that retainer payments are functionally similar to bed-hold payments, and provide some equity in policies between institutional services and HCBS (CMS 2000).

States can decide whether to make retainer payments and determine which HCBS providers are eligible for these payments.[2] CMS guidance permits the use of retainer payments for personal care, residential habilitation, and community-based habilitation services, including adult day health and vocational supports. However, to be eligible for retainer payments, habilitation services must include at least incidental personal care as a component of the service.

Retainer payment amounts may not exceed the approved rates or average expenditure amounts paid during the previous quarter for the services that would have been provided. States must generally ensure that retainer payments do not duplicate other payments, including other relief payments or costs built into the established payment rate that account for absences (CMS 2020a). Finally, retainer payments may only be made during the time when there is an interruption in service delivery (CMS 2020b). While HCBS services are typically disrupted when patients are hospitalized, retainer payments can also be used in other circumstances, such as a flood or power outrage that disrupts service provision temporarily, or during a public health emergency as discussed below.

Before the COVID-19 pandemic, states could only make retainer payments for the lesser of 30 consecutive days or the number of days for which the state authorizes a payment of bed hold in a nursing facility (CMS 2020b).[3] According to MACPAC's review of state nursing facility payment policies as of July 2019, 37 states had nursing facility bed hold policies less than 30 days (MACPAC 2019).

Because most states cover HCBS services through Section 1915(c) waiver authority, the specifics of each states' retainer payment policies are often described in their 1915(c) waivers.

Retainer Payments During the COVID-19 Pandemic

Like other providers, HCBS providers have experienced declines in revenue from temporary closure or deferral of care and increased costs associated with acquiring personal protective equipment and taking other steps to reduce the risk of COVID-19 infections among patients and staff. However, HCBS providers have also faced several distinct and specific challenges to their financial viability, including:

- operating as small agencies with fewer resources than large health systems;
- providing services of an intimate nature such as supporting clients with eating, bathing, and dressing, which may require in-person contact and cannot be provided via telehealth; and
- serving patients who are frail and elderly and thus at increased risk of death and serious complications from COVID-19 infection.

States that cover HCBS through a Section 1915(c) waiver can submit changes to their retainer payment policies and other HCBS changes related to the pandemic through a standard disaster response template known as Appendix K. Changes approved through the Appendix K template can be applied retroactively but they are time limited and tied specifically to individuals affected by the emergency (CMS 2020c). For states that cover HCBS services through a Section 1115 demonstration waiver or the state plan, states can complete separate standard templates. CMS expedited the processes for making changes through these authorities during the pandemic.

For states that provide HCBS through contracts with plans providing long-term services and supports (LTSS) through managed care arrangements, CMS issued guidance in May 2020 permitting states to direct such plans to make retainer payments to eligible habilitation and personal care providers using the directed payment mechanism authorized under 42 CFR 438.6(c) (CMS 2020d). The Kaiser Family Foundation surveyed states regarding their Medicaid coverage and payment policies, finding that, in 2020,

eight states established directed payments specifically targeting HCBS providers, including six states (Arizona, Florida, Iowa, Kansas, Massachusetts, and Tennessee) which required managed care plans to make retainer payments to HCBS providers using the directed payment mechanism (Gifford et al. 2020).

On June 30, 2020, CMS issued additional guidance to clarify its policies, including allowing multiple episodes of retainer payments beyond 30 days and introducing a series of guardrails intended to ensure program integrity for payments made when specific services are not provided. Specifically, CMS allowed states to exceed the 30-day maximum for retainer payments and to authorize up to three 30-day episodes of retainer payments per beneficiary, independent of the state's policy for nursing facility bed hold days (CMS 2020b). In addition, states seeking multi-episode approval of retainer payments must also:

- limit retainer payments to a reasonable amount and ensure recoupment where appropriate;
- collect an attestation from the provider acknowledging that payments are subject to recoupment if inappropriate billing or duplicate payments for services occurred;
- require that providers commit to not laying off staff off and to maintaining wages at existing levels; and
- require further attestation that the provider has not received any funding from other sources that would exceed their revenue for the last full quarter prior to the public health emergency.

Subsequent CMS guidance issued May 17, 2021 allowed states to offer eligible HCBS providers up to three additional 30-day periods of retainer payments in calendar year 2021 due to the prolonged duration of the COVID-19 PHE. Additional days of retainer payments could be retroactively effective to January 1, 2021 and must abide by the guardrails set forth in previous guidance (CMS 2021).

Use and types of retainer payments

As of April 12, 2021, 40 states have received approval for retainer payments through a Section 1915(c) waiver Appendix K submission and 7 states received approval through a Section 1115 demonstration waiver affecting eligible services provided under state plan authority (KFF 2021).[4] This number may not reflect the number of states that have made retainer payments to HCBS providers, as some states may have received approval to make the payments but did not use the authority.

According to MACPAC's review of retainer payment approvals, state payment methodologies vary widely. With respect to the amount of payment, common state approaches include basing retainer payments on a percentage of the normal service rate or providers' historical claims for eligible services. For example, Delaware caps retainer payments at 75 percent of the regular service rate, while Oklahoma caps retainer payments at 60 percent of the provider's average monthly billing for eligible services. Similarly, Florida calculates retainer payments based on the average payment amount made to the provider over a retrospective three-month period. At least one state has established fixed rate amounts for retainer payments (e.g., $150 per day for agency-provided day and employment supports).[5]

Some states set duration limits that are more restrictive than the CMS limits. For example, Kentucky does not permit retainer payments to exceed 24 consecutive days, and Oklahoma limits retainer payments to a maximum of 6 hours per day and a total of 5 days per week.

States also vary in how they determine when a provider can receive retainer payments. Some states will only make retainer payments to eligible providers when utilization drops below a certain pre-determined percentage of utilization compared to an annual monthly average. Other states will make retainer payments so long as there are documented reductions in use of services attributable to the specified emergency. For example, Delaware permits retainer payments to providers if utilization drops by at least 50 percent for reasons related to COVID-19, while Hawaii permits retainer payments to eligible providers only if an individual is absent from services for more than 21 days. Other states require that the provider be ordered to close by local, state, or federal officials to be considered eligible for retainer payments.

Finally, state policies differ in terms of which providers are eligible for retainer payments. As mentioned above, federal rules dictate that providers delivering personal care services and habilitation services that include personal care as a component of the service are the only services eligible for retainer payments. However, states may further specify within these categories which provider types and circumstances are eligible. The most commonly identified providers targeted for retainer payments during the COVID-19 emergency include those providing personal care, residential support, and day support, such as facility-based day habilitation, community-based day habilitation, supported family or community living, and adult day health, among others (NASDDDS 2020a). Many states are also making those providing prevocational services or training and supported employment eligible for retainer payments.

Policy Issues

In the fall of 2020, MACPAC interviewed state Medicaid officials in five states as well as representatives from national organizations representing HCBS providers to learn more about use of retainer payments, as well as other types of provider relief funding during the COVID-19 pandemic. Stakeholders noted several issues for policymakers to consider, including the relationship between retainer payments and other sources of provider relief, the length of time that retainer payments should be available, and the use of retainer-like payments for other types of providers.

Relationship with other provider relief funding

During the COVID-19 pandemic, Congress has authorized many types of provider relief payments that could be used to support HCBS providers. For example, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, P.L. 116-136) created a provider relief fund to help offset lost revenue and expenses related to COVID-19 and also provided $150 billion in grant funding to states and local governments that can be used for a variety of purposes, including provider relief. In addition, the CARES Act authorized enhanced unemployment assistance for furloughed workers and created the Paycheck Protection Program (PPP), which offered loans that small businesses (including HCBS providers) can use to retain employees. Stakeholders noted that many providers have been confused about the relief options available to them and how to avoid potential duplication of payments.

Some states opted to use other provider relief mechanisms instead of retainer payments. A few state officials we spoke with found the limitations on the use of retainer payments too restrictive. CARES Act grants, which are not subject to Medicaid rules, are a more flexible alternative that were preferred by some states as a provider relief mechanism. In addition, using CARES Act grants does not require state

matching funds, alleviating challenges with financing the non-federal share of Medicaid payments.[6] Although the Families First Coronavirus Response Act (P.L. 116-127) increased the federal matching rate for Medicaid expenditures during the public health emergency, states still need to provide some state matching funds for any Medicaid expenditure.

In addition, states also found it challenging to manage changing CMS policy on retainer payments. Because CMS released new guidance on the guardrails for Medicaid retainer payments after some states had already started making these payments, states faced challenges retrofitting their payment approaches to conform with the guidance. For example, if a provider receiving a retainer payment had laid off staff prior to the guidance, it could not comply with the new requirements prohibiting layoffs.

States using retainer payments reported that these were useful tools to stabilize and support the HCBS workforce during the early stages of the pandemic. In some cases, the number of providers receiving retainer payments was lower than expected because disruptions in utilization were not as bad as initially projected, but states still appreciated having the option to make this type of payment if needed.

Length of time for retainer payments

Prior to CMS guidance in May 2021, payments were limited to three 30-day episodes per emergency. These limits raised concerns for states that exhausted their retainer payment authority early in the pandemic while there were longer-term disruptions in care. Several states formally requested that they be allowed to make retainer payments beyond this limit or even until the end of the public health emergency. At first, CMS allowed states to continue retainer payment authority beyond the first year that it was authorized, but did not allow states to extend the total amount of time that retainer payments can be authorized. The subsequent guidance issued in May 2021 allowed states to use an additional three 30-day episodes of retainer payments through calendar year 2021.

Use of retainer payments for other provider types

The National Association of Medicaid Directors (NAMD), as well as states and other stakeholders, have asked that CMS grant flexibility for a broader set of providers to use retainer payments in response to the pandemic under 1115 waiver authority (NAMD 2020, Rosenbaum and Handley 2020). At least two states, including Rhode Island and Washington, have specifically requested authority under Section 1115 demonstration waivers to make retainer payments to a broader set of providers during the emergency. Other stakeholders have requested CMS allow state-directed retainer payments for certain non-HCBS providers that have been disproportionately affected by the pandemic, such as pediatric providers (AAP 2020). CMS has not approved these requests to date.[7]

Endnotes

[1] States can also make supplemental payments to providers, which are typically made in a lump sum for a fixed period of time. Although supplemental payments to individual providers are not directly tied to use of specific services, the upper

payment limit (UPL) that establishes the maximum amount of supplemental payments that a state can make is based on utilization.

[2] States cannot make retainer payments to other non-HCBS providers because the legal authority derives from the *Olmstead* decision, which specifically pertains to HCBS.

[3] CMS has indicated that the 30 consecutive day limit pauses if there are days that would not typically be billable and therefore a retainer payment is not made. For example, in the case of a day health program that operates 5business days of the week, the two weekend days would not count towards the 30-day maximum, which would allow retainer payments to be made up to the maximum of 30 days in the form of 5 days per week for 6 weeks (CMS 2020b).

[4] All seven states (DE, HI, MA, NC, NH, RI, WA) that requested approval for retainer payments under Section 1115 demonstration waiver authority also used an Appendix K submission for retainer payments (KFF 2021).

[5] Nebraska established fixed rates for retainer payments in an Appendix K submission prior to the COVID-19 emergency.

[6] The CARES Act provided $150 billion in grants to state and local governments to pay for a variety of expenses related to the public health emergency, including costs that are not health related such as small-business relief, education, workforce development, broadband and technology access, and housing assistance, among others.

[7] Vermont is the only state authorized to provide temporary retainer payments to a broader set of Medicaid providers through existing authority to set provider payments under its Section 1115 demonstration waiver (DVHA 2020).

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