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## Health Care Landscape

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# HEALTH CARE LANDSCAPE

October 2018

## POLICY BRIEF: OPTIONS FOR MEDICAID THROUGH SECTION 1115 WAIVERS

In March 2017, the secretary of Health and Human Services (HHS) and the director of the Centers for Medicare and Medicaid Services (CMS) issued a letter to governors signaling their willingness to provide states with more flexibility for Medicaid:

“[W]e commit to ushering in a new era for the federal and state Medicaid partnership where states have more freedom to design programs that meet the spectrum of diverse needs of their Medicaid population.”<sup>1</sup>

On Jan. 11, 2018, CMS issued additional guidance for states that want to use 1115 waivers to make Medicaid conditional on meeting work requirements, something that has never been approved before.<sup>2</sup> This openness to more flexibility has led more states to consider using section 1115 waivers to make changes to their Medicaid programs that likely would not have been approved by previous administrations.

This brief explains the basics of 1115 waivers, requirements for states, and how states have used them to implement innovative ways of delivering health care to their Medicaid populations, with a particular focus on trends from the past two years.

### WHAT ARE 1115 WAIVERS?

Section 1115 of Title XIX of the Social Security Act allows CMS to waive many requirements of the Medicaid statute in order for states to demonstrate or test innovative methods of health care delivery in their Medicaid programs. Section 1115 waivers allow states to include services and populations normally not covered by Medicaid as state plan expenditures. However, CMS will only approve 1115 waivers that are budget-neutral — the cost to the federal government cannot be more than it would have been without a waiver.<sup>3</sup>

A state’s application for an 1115 waiver must include:

- The goals and objectives of the demonstration
- A description of the proposed delivery system, eligibility requirements, benefits, and cost-sharing, to the extent these would differ from the state’s current program or federal requirements
- Estimates of the expected increase or decrease in annual enrollment and expenditures

<sup>1</sup> The Secretary of Health and Human Services. (2017). Letter to Governors. Retrieved from <https://www.hhs.gov/sites/default/files/sec-price-admin-verma-ltr.pdf>

<sup>2</sup> Centers for Medicare and Medicaid Services. (2018). Letter to State Medicaid Directors. Retrieved from <https://www.medicare.gov/federal-policy-guidance/downloads/smd18002.pdf>

<sup>3</sup> 42 U.S.C. § 1315

- Current enrollment data and projections for each category of beneficiary whose health care coverage would be impacted
- Other features of the state’s Medicaid and Children’s Health Insurance Program that would be modified by the demonstration
- Specific waiver and expenditure authorities that the state is seeking for the demonstration
- The research hypotheses to be tested by the demonstration and the identification of appropriate evaluation indicators
- Evidence of compliance with public notice and comment requirements at both the state and federal levels

### ARKANSAS WORKS 1115 WAIVER — WORK AND COMMUNITY ENGAGEMENT REQUIREMENTS

- On June 1, 2018, Arkansas became the first state to implement work requirements.<sup>9</sup>
- Arkansas Works enrollees aged 19 to 49 years with incomes up to 100% FPL must report work or engagement in specified educational, job training, or job search activities for at least 80 hours per month, unless they meet state exemption criteria.<sup>7</sup>
- Eligible enrollees who fail to meet the work requirements for any three-month period during the plan year will be disenrolled from Arkansas Works and not allowed to re-enroll until the following plan year.<sup>7</sup>
- As of Oct. 8, 2018, 19% of enrollees subject to work requirements were locked out of coverage until the next plan year.<sup>10, 11</sup>

Waivers can be approved for an initial period of five years and for subsequent renewals of three to five years.<sup>4</sup> On Nov. 6, 2017, CMS announced it will consider 10-year renewals for “routine, successful, non-complex” 1115 waivers.<sup>5</sup>

## TYPES OF 1115 WAIVERS

### Alternatives to Medicaid Expansion

Seven states have active 1115 waivers that expand their Medicaid programs to cover all individuals up to 138% of the federal poverty level (FPL). States that use 1115 waivers to expand may have program features that were not explicitly stated in the Affordable Care Act (ACA), such as premium support for private insurance, cost-sharing requirements, healthy behavior incentives, and work requirements.<sup>6</sup> For example, Arkansas’ 1115 waiver allows it to use Medicaid funds to pay for private insurance for its expansion population and to impose work requirements, in addition to waiving the requirements for retroactive eligibility.<sup>7</sup> Indiana’s waiver allows it not only to provide premium assistance and healthy behavior incentives, but also to require copayments above those normally permitted by Medicaid, monthly contributions to health savings accounts, and work requirements.<sup>8</sup>

Arkansas, Indiana, and New Hampshire received approval in 2018 for amendments to their 1115 waivers that allow them to impose work requirements and penalties for noncompliance on Medicaid members. For example, Arkansas’ 1115 waiver was renewed on March 5, 2018, to add work requirements, and those failing to comply could lose coverage.<sup>10</sup> Indiana and New Hampshire received similar approval for work requirements through 1115 waivers on Feb. 1 and May 7, 2018, respectively.<sup>8,12</sup> Finally,

<sup>4</sup> 42 C.F.R. § 431, Subpart G

<sup>5</sup> Centers for Medicare and Medicaid Services. (2017). CMCS Information Bulletin: Section 1115 Demonstration Process Improvements. Retrieved from <https://www.medicaid.gov/federal-policy-guidance/downloads/cib110617.pdf>

<sup>6</sup> Medicaid and CHIP Payment and Access Commission. (2018). Expanding Medicaid to the New Adult Group through Section 1115 Waivers. Retrieved from <https://www.macpac.gov/publication/expanding-medicaid-to-the-new-adult-group-through-section-1115-waivers/>

<sup>7</sup> Centers for Medicare and Medicaid Services. (2018). Arkansas Works approval documents.

Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/ar-works-ca.pdf>

<sup>8</sup> Centers for Medicare and Medicaid Services. (2018). Healthy Indiana Plan approval documents. Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/in/Healthy-Indiana-Plan-2/in-healthy-indiana-plan-support-20-ca.pdf>

<sup>9</sup> Wilson, J. C., Thompson, J. (2018). Nation’s first Medicaid work requirement sheds thousands from rolls in Arkansas. Health Affairs Blog. Retrieved from <https://www.healthaffairs.org/doi/10.1377/hblog20181001.233969/full/>

<sup>10</sup> Arkansas Department of Human Services. (2018, Sept. 12). Coverage Closures for Arkansas Works Recipients Who Did Not Meet Work & Community Engagement Requirement for Three Months [Press release]. Retrieved from <https://humanservices.arkansas.gov/newsroom/details/coverage-closures>

<sup>11</sup> Arkansas Department of Human Services. (2018, Oct. 8). Arkansas Works Program: September 2018 Report. Retrieved from [https://humanservices.arkansas.gov/images/uploads/newsroom/101518\\_AWreport.pdf](https://humanservices.arkansas.gov/images/uploads/newsroom/101518_AWreport.pdf)

<sup>12</sup> Centers for Medicare and Medicaid Services. (2018). New Hampshire Health Protection Program Premium Assistance approval documents. Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/nh/nh-health-protection-program-premium-assistance-ca.pdf>

Kentucky received approval from CMS on Jan. 12, 2018, for an 1115 waiver that would allow it to impose work requirements on the expansion population;<sup>13</sup> however, that approval was set aside by the U.S. Federal Court for the District of Columbia and remanded to CMS for further explanation of its reasons for approval.<sup>14</sup> At the time of the writing of this brief, CMS has not filed a response. Features of the various alternate expansions, including Kentucky's, are shown in the figure below.<sup>6</sup>

APPROVED PROVISIONS AS OF JULY 2018	STATES
Alternative Medicaid expansion	AR, AZ, IA, IN, KY*, MI, MT, NH
Premium assistance	AR, KY*, MI, NH
Premium or monthly HSA contribution	AR, AZ, IA, IN, KY*, MI, MT
Work requirements/community engagement	AR, IN, KY*, NH
Healthy behaviors incentives	AZ, IA, IN, MI
Waived benefits — nonemergency transport reasonable promptness retroactive eligibility	IA, IN, KY* IN AR, IA, IN, KY*

\*Kentucky's waiver, although approved by CMS, is not yet effective due to ongoing litigation.

In addition to these features, four of the 1115 expansion states — Arkansas, Indiana, Michigan, and New Hampshire — have laws that require the state to reduce or eliminate Medicaid eligibility and benefits for the expansion population if the enhanced federal match is ever reduced below 90%.<sup>15</sup>

## Behavioral Health

Section 1115 waivers can also be used to provide additional behavioral health services to a state's Medicaid population. In July 2015, CMS issued guidance in support of state efforts, through 1115 waivers, to reform systems of care for people with substance use disorders (SUD) by:

- Enhancing the availability of short-term acute care and recovery supports for individuals with SUD
- Improving care delivery
- Integrating behavioral and physical care
- Increasing provider capacity and raising quality standards<sup>16</sup>

These waivers are active in 11 states: California, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Maryland, New Jersey, Utah, Virginia, and West Virginia. Several of these states are using these waivers specifically to combat the opioid epidemic. Twelve additional states have pending substance use disorder 1115 waivers.<sup>17</sup>

## Managed Long-Term Services and Supports

Many states have used 1115 waivers to mandatorily enroll their aged, blind, and disabled populations in capitated, managed care plans that provide for managed long-term services and supports (MLTSS). Section 1115 MLTSS waivers allow states to streamline program administration, improve care coordination, and expand access to home- and community-based services (HCBS). Eleven states currently have 1115 waivers for MLTSS: Arizona, California, Delaware, Hawaii, Kansas, New Jersey, New Mexico, New York, Rhode Island, Tennessee, and Texas. Nearly all 1115 MLTSS waiver states require their managed care organizations to cover a comprehensive set of benefits, including nursing home care, HCBS, acute and primary care, and behavioral health services.<sup>18</sup>

## Targeted Programs

States can also use 1115 waivers to provide specific services, not usually covered by Medicaid, to target populations who might not otherwise be eligible for Medicaid. For example, Georgia uses an 1115 waiver for its Planning for Healthy Babies program, which provides

<sup>13</sup> Centers for Medicare and Medicaid Services. (2018). KY HEALTH approval documents. Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/health/ky-health-cms-appvl-011218.pdf>

<sup>14</sup> Memorandum of Opinion, June 29, 2018. Stewart v. Azar. Civil Action no. 18-152 (JEB) (D.D.C. 2018).

Retrieved from <https://www.courthousenews.com/wp-content/uploads/2018/06/Kentucky-medicaid.pdf>

<sup>15</sup> Arkansas HB 1143 (2013), Indiana SB 165 (2016), Michigan HB 4714 (2013), New Hampshire HB 1696 (2016)

<sup>16</sup> Centers for Medicare and Medicaid Services. (2015). Letter to state Medicaid directors.

Retrieved from <https://www.medicaid.gov/federal-policy-guidance/downloads/SMD15003.pdf>

<sup>17</sup> Medicaid and CHIP Payment and Access Commission. (2018). Chapter 4: Access to Substance Use Disorder Treatment in Medicaid. Retrieved from <https://www.macpac.gov/wp-content/uploads/2018/06/Access-to-Substance-Use-Disorder-Treatment-in-Medicaid.pdf>

<sup>18</sup> Medicaid and CHIP Payment and Access Commission. (2018). Chapter 3: Managed Long Term Services and Supports: Status of State Adoption and Areas of Program Evolution. Retrieved from <https://www.macpac.gov/wp-content/uploads/2018/06/Managed-Long-Term-Services-and-Supports-Status-of-State-Adoption-and-Areas-of-Program-Evolution.pdf>

a limited Medicaid benefit package of family planning and family planning–related services to populations currently not covered under the Medicaid state plan.<sup>19</sup> Montana and Virginia use 1115 waivers to expand eligibility to those with severe mental illness, who would not normally qualify for Medicaid.<sup>20,21</sup> Maine uses an 1115 waiver to expand eligibility to those with HIV.<sup>22</sup>

### MAINE'S 1115 WAIVER FOR THOSE WITH HIV

- Purpose is to provide early and effective treatment of HIV disease
- Eligibility
  - HIV-positive
  - At or below 250% FPL
  - Do not otherwise qualify for Medicaid
- Provides a limited package of Medicaid benefits, including anti-retroviral therapy and case management
- Participants must agree to be monitored and maintain adherence to HIV treatment recommendations<sup>22</sup>

Finally, Indiana uses an 1115 waiver to provide supplemental Medicaid coverage to those with end-stage renal disease who are covered primarily by Medicare, but who would not otherwise qualify for supplemental Medicaid coverage as a dual eligible.<sup>23</sup>

## LOOKING FORWARD

When CMS approved Arkansas' 1115 waiver on March 5, 2018, CMS withheld judgment on Arkansas' request to limit their Medicaid expansion to those at or below 100% FPL, as opposed to the ACA's provision for expansion up to 138% FPL; CMS did not say when a

decision on this partial expansion request would be forthcoming.<sup>7</sup> If CMS eventually approves Arkansas' request, more states may seek to use 1115 waivers to limit Medicaid expansion to 100% FPL with the assumption that those between 100% and 138% FPL would receive subsidized coverage in the health insurance marketplace.

The future of 1115 waivers for work requirements depends on two decisions. First, in the case of *Stewart v. Azar*, challenging Kentucky's waiver that imposes work requirements on the expansion population, the court is currently awaiting a response from CMS.<sup>24</sup> If Kentucky ultimately loses this case, similar requirements approved for Arkansas, Indiana, and New Hampshire could also be invalidated. However, should Kentucky ultimately receive approval and survive further litigation, even more states may apply for 1115 waivers that would allow them to impose work requirements and other forms of community engagement on their Medicaid populations. Second, although CMS has thus far only approved work requirements for Medicaid expansion populations, Alabama, a nonexpansion state, applied for an 1115 waiver on Sept. 10, 2018, that would impose work requirements on low-income Medicaid parents who are currently covered under traditional Medicaid.<sup>25</sup> CMS's decision to approve or reject that waiver could also affect whether other nonexpansion states seek 1115 waivers for work requirements.

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<sup>19</sup> Georgia Department of Community Health. Planning for Healthy Babies. Retrieved from <https://dch.georgia.gov/planning-healthy-babies>

<sup>20</sup> Centers for Medicare and Medicaid Services. (2017). Montana Section 1115 Waiver for Additional Services and Populations approval documents. Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mt/mt-basic-medicaid-ca.pdf>

<sup>21</sup> Centers for Medicare and Medicaid Services. (2017). Virginia GAP and ARTS Delivery System Transformation approval documents. Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/va/va-gov-access-plan-gap-ca.pdf>

<sup>22</sup> Centers for Medicare and Medicaid Services. (2016). Maine Section 1115 Demonstration for Individuals with HIV/AIDS approval documents. Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/me/me-hiv-ca.pdf>

<sup>23</sup> Centers for Medicare and Medicaid Services. (2016). Indiana End Stage Renal Disease approval documents.

Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/in/in-esrd-ca.pdf>

<sup>24</sup> *Stewart v. Azar*. Civil Action no. 18-152 (JEB) (D.D.C. 2018).

<sup>25</sup> State of Alabama (2018). Medicaid Workforce Initiative Section 1115 Demonstration Application.

Retrieved from <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/al/al-workforce-initiative-pa.pdf>