

States can remove the federal Medicaid handcuffs

To: FGA Partners

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Date: July 23, 2021

Key Points

- States can stop providing continuous coverage for Medicaid enrollees and remove ineligible individuals.
- Those states would no longer be eligible to receive the 6.2 percentage point FMAP increase, but the federal government has no legal basis to recover the additional funds that have been provided to the state already throughout the duration of the PHE under §6008.
- The state would forfeit the 6.2 percentage point increase going forward for quarters in which the PHE continued.

Background

In March of 2020, Congress passed the Families First Coronavirus Response Act (FFCRA) as part of the federal government's response to COVID-19.¹ Section 6008 of the FFCRA temporarily increases the Federal Medical Assistance Percentage (FMAP)—the portion of traditional Medicaid costs paid by the federal government to the states—by 6.2 percentage points.²

This extra funding comes with significant strings attached that have created severe consequences across the nation. In exchange for the additional Medicaid funding, states must agree not to remove individuals who are either currently enrolled in Medicaid or will enroll during the declared emergency period unless they request their cases be cancelled, they die, or they move out of state.³ This effectively means that, by taking the deal, they have relinquished control of their Medicaid programs. Any changes to increase eligibility standards, increase cost sharing, raise premiums, or even implement commonsense program integrity procedures are not permitted.⁴ Once the COVID-19 Public Health Emergency (PHE) ends, the FMAP bump will end.⁵

To date, the PHE, which officially began on January 27, 2020, has been renewed approximately six times by the U.S. Department of Health and Human Services (HHS), with the expectation that it will continue to be renewed every 90 days through at least the end of 2021.⁶

Because states have been forced to retain even ineligible enrollees for now more than a year, there is real concern from states that this provision is now costing states more than the additional funding is saving them. As a result, states are interested in unlocking themselves from these federal handcuffs.

Legal Analysis: States May Withdraw from the FMAP Increase

According to § 6008(b), a state may not receive the 6.2 percentage point increase “with respect to a quarter,” if the state fails to provide continuous coverage of Medicaid enrollees during the PHE.⁷ In the preceding subsection, § 6008(a), the statute describes the duration for the 6.2 percentage point increase stating that “the Federal medical assistance percentage...shall be increased by 6.2 percentage points,” “...for each *calendar quarter* occurring during the period beginning on the first day of the emergency period...and ending on the last day of the calendar quarter in which day of such emergency period ends.” [emphasis added].⁸ Nowhere in the text of the statute are any other consequences of early withdrawal mentioned.

The key legal issue for determining precisely what the costs would be to a state that withdrew early from this increase would be the meaning of the statutory language, “may not receive the increase...with respect to *a quarter*.” [emphasis added].⁹ In interpreting this statutory language, courts will look at the plain text and “enforce it according to its terms,” giving the words their ordinary meaning.¹⁰ In other words, courts will simply look at the language in the statute and give the words the meaning that any reasonable person would.

The statute prohibits a state from receiving the 6.2 percentage point increase, “with respect to a quarter,” if the State fails to provide continuous coverage to its Medicaid enrollees—even those enrollees the state knows should not be receiving those benefits due to changed circumstances in assets and/or income.¹¹ The key words are “a” and “quarter.”

It is clear from the language that a state may not “receive” the 6.2 percentage point increase for any calendar quarter in which the state fails to follow the statute’s requirement that Medicaid enrollees be provided continuous coverage so long as the PHE continues.

Clearly, states can legally withdraw from the FMAP increase early and take back control of their Medicaid programs at the cost of the temporary 6.2 percentage point FMAP bump.

Bottom Line

Given the use of the phrase “a quarter,” congressional intent is clear, and there is nothing preventing a state from re-establishing their normal process of removing ineligible people from Medicaid if they are prepared to give up the 6.2 percentage point FMAP increase. There is also no legal basis for a claim that the federal government could recoup all of the funds provided to the state throughout the duration of the PHE under § 6008.

¹ Public Law 116-127 (2020), <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf>.

² *Id.* at §6008.

³ *Id.*

⁴ Ingram et al, “Extra COVID-19 funds come at a high cost to states,” Foundation for Government Accountability (2020), <https://thefga.org/research/covid-19-medicaid-funds>.

⁵ Centers for Medicare and Medicaid Services, “COVID-19 Frequently Asked Questions (FAQs) for State Medicaid and Children’s Health Insurance Program (CHIP) Agencies,” (2021), <https://www.medicaid.gov/state-resource-center/downloads/covid-19-faqs.pdf>.

⁶ U.S. Department of Health and Human Services, “Renewal of Determination that a Public Health Emergency Exists,” (2021), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-19July2021.aspx>.



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⁷ Public Law 116-127 (2020), §6008(a).

⁸ *Id.*

⁹ *Id.*

¹⁰ *See, e.g., King v. Burwell*, 576 U.S. 473, 486 (2015).

¹¹ Public Law 116-127 (2020), §6008(b).