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States Can Unlock the Federal Medicaid Handcuffs Without Fear of a Clawback

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KEY FINDINGS



THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT PROVIDED STATES WITH A TEMPORARY INCREASE IN MEDICAID FUNDING.



THE EXTRA FUNDING FORCED STATES TO GIVE UP SIGNIFICANT CONTROL OVER THEIR MEDICAID PROGRAMS AND LOCKED MILLIONS OF INELIGIBLE ENROLLEES INTO THE PROGRAM.



MEDICAID HANDCUFFS ARE DRIVING SKYROCKETING PROGRAM ENROLLMENT AND COSTING TAXPAYERS BILLIONS.



STATES CAN UNLOCK THE MEDICAID HANDCUFFS AND REMOVE INELIGIBLE ENROLLEES.



STATES CAN UNLOCK THE MEDICAID HANDCUFFS WITHOUT FEAR OF A CLAWBACK.

THE BOTTOM LINE:

STATE LAWMAKERS SHOULD UNLOCK THE FEDERAL HANDCUFFS TO RETAKE CONTROL OVER THEIR MEDICAID PROGRAMS.

Overview

Congress dramatically expanded welfare programs through a series of bills in response to the COVID-19 pandemic. In March 2020, Congress passed the Families First Coronavirus Response Act (FFCRA), which temporarily increased the amount of federal money provided to states for Medicaid.¹

States were offered a 6.2 percentage point increase in traditional Medicaid funding during the COVID-19 pandemic.² But the extra funding came with massive strings attached.³

States had to give up significant control over their Medicaid programs in exchange for the additional federal funding. So long as states accept the extra funding, they cannot change eligibility, adjust enrollment processes, or remove enrollees from the program—even enrollees that are ineligible to receive benefits.⁴ The only way to remove enrollees is if they die, voluntarily leave the program, or move out of state.⁵



THE ONLY WAY TO REMOVE ENROLLEES IS IF THEY DIE, VOLUNTARILY LEAVE THE PROGRAM, OR MOVE OUT OF STATE.

As a result, Medicaid enrollment has soared to record-high levels, with millions of ineligible enrollees locked into the program by these federal handcuffs.⁶

Medicaid Handcuffs Are Driving Skyrocketing Enrollment and Costing Taxpayers Billions

The number of people on Medicaid has ballooned, reaching an estimated 91 million by December 2021.⁷ This represents an increase of more than 18 million enrollees in less than two years—the largest increase in program history.⁸ Today, more than one in four Americans is on Medicaid.⁹



BY DECEMBER 2021, THE NUMBER OF PEOPLE ON MEDICAID HAD REACHED AN ESTIMATED 91 MILLION.

And, unsurprisingly, the federal Medicaid handcuffs are driving enrollment by locking enrollees into the program. According to data from 17 states, roughly 90 percent of all new enrollees during the COVID-19 pandemic are no longer eligible for Medicaid.¹⁰ This means that up to 17 million enrollees nationwide were ineligible by the end of 2021.¹¹

Locking ineligible enrollees into Medicaid is costing taxpayers billions, and the outlook will only get worse the longer the handcuffs are in effect.¹² States must unlock the federal handcuffs to regain control over their Medicaid programs.



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States Can Unlock the Medicaid Handcuffs and Remove Ineligible Enrollees

Under the FFCRA, states must comply with certain requirements in order to receive the extra federal funding.¹³ One requirement is that states cannot remove enrollees—whether eligible or not—until the COVID-19 pandemic ends.¹⁴

States are eligible for the federal funding bump during each calendar quarter until the public health emergency officially ends.¹⁵ But states may only receive the extra federal funding for quarters in which it agrees to continue providing Medicaid benefits to all individuals who were on the program in March 2020 or have enrolled since then—even those enrollees the state knows no longer qualify and should not be receiving benefits.¹⁶

Importantly, other than the loss of the additional federal funding, nowhere in the law are any other consequences of early withdrawal mentioned. **And there is nothing legally preventing states from opting out of the increased federal funding and regaining control of their Medicaid rolls.**



There is nothing legally preventing states from opting out of the increased federal funding and regaining control of their Medicaid rolls.



States Can Remove the Medicaid Handcuffs Without Fear of a Clawback

The Centers for Medicare and Medicaid Services (CMS) has provided detailed guidance to states on how the additional funding works.¹⁷ In the process, CMS addressed the issue of whether the agency will attempt to claw back the extra federal funding if a state decides to opt out of the program.¹⁸

Specifically, CMS assured states that if they opt out of the Medicaid handcuffs, they will only lose the extra federal funding for the quarter in which they opt out, and all remaining quarters until the COVID-19 emergency ends.¹⁹ CMS guidance is clear that states may receive the funding bump without threat of a clawback for previous quarters so long as the state met the requirements.²⁰

In short, there is no risk of a clawback.



Last Updated January 6, 2021

COVID-19 Frequently Asked Questions (FAQs) for State Medicaid and Children's Health Insurance Program (CHIP) Agencies

The Centers for Medicare & Medicaid Services (CMS) released six sets of general Frequently Asked Questions (FAQs) to aid state Medicaid and Children's Health Insurance Program (CHIP) agencies in their response to the coronavirus disease 2019 (COVID-19) pandemic. CMS also released two sets of FAQs providing guidance to states on the implementation of the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

On January 6, 2021, CMS released an updated FAQ document that incorporates all eight sets of COVID-19 FAQs into one, comprehensive FAQ document. Additionally, on November 2, 2020, a provision implementing section 6008(b)(3) of the FFCRA in CMS-9912 Interim Final Rule with Comment (CMS-9912 IFC) became effective. CMS's original interpretation of the condition specified in section 6008(b)(3) was issued in FAQs in April, May and June 2020. While most of these FAQs remain in effect following the November 2, 2020 effective date of the IFC, some FAQs are applicable only through November 1, 2020. Each of the previously published FAQs in Section III.1 of this document has been updated to respond to questions about section 6008(b)(3) of the FFCRA and includes a note with a designation of applicability related to the IFC.

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QUESTION: If a state decides it will no longer comply with the requirements of section 6008(b) of the FFCRA that are necessary to be eligible for the temporary 6.2 percentage point FMAP increase, must it forfeit the FFP associated with increased FMAP retroactive to the start of the PHE or to the start of the quarter in which it no longer complied?

ANSWER: The state must comply with the requirements of section 6008(b) for each quarter in which FFP associated the temporary 6.2 percentage temporary point FMAP increase is claimed.

If, during the PHE, a state decides to no longer comply with the 6008(b) requirements, FFP at the increased FMAP is no longer available for state expenditures **effective the start of the quarter in which the state is no longer in compliance.** However, **states are able to receive FFP associated with the increased FMAP for expenditures incurred in prior quarters,** if the state met the requirements of section 6008 (b) for that entire quarter.

<https://www.medicaid.gov/state-resource-center/downloads/covid-19-faqs.pdf>

CMS has reiterated this assurance under both the Trump and Biden administrations and has never walked back or contradicted this position in subsequent guidance. CMS has also never stated that locking ineligible enrollees onto the program is an ongoing condition that could be used to punish a state retroactively.²¹

In addition to the plain language of the statute which provides no legal authority for a clawback, CMS guidance on the issue provides additional meaningful protection from a clawback, as states can be expected to significantly rely on any guidance provided by the federal agency. A sudden about-face on this guidance would be unlawful.²²

In other words, though states would no longer be eligible for the increased funding, the federal government has no legal basis to recover the additional funds that have already been provided during months when the state was in compliance.

THE BOTTOM LINE: State lawmakers should unlock the federal handcuffs to retake control over their Medicaid programs.

Millions of ineligible enrollees are currently locked into the Medicaid program by the federal handcuffs.²³ Fortunately, there is nothing legally preventing states from opting out of the Medicaid handcuffs early. And states can opt out without fear of a clawback from the federal government. Though states would give up the temporary funding increase going forward (until the public health emergency ends), lawmakers would regain full control of their Medicaid programs, often saving more money than they would otherwise make from the funding increase.

With the massive increase in enrollment and the explosion in improper payments across the nation, the Medicaid program is on an unsustainable path unless states take immediate action.²⁴ Lawmakers must unlock the federal handcuffs and retake control over their Medicaid programs.

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6. Hayden Dublois and Jonathan Ingram, "The Medicaid crisis is here: How Congressional handcuffs are causing Medicaid to implode," Foundation for Government Accountability (2022), <https://thefga.org/paper/congressional-handcuffs-causing-medicaid-to-implode>.
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18. Ibid.
19. CMS assured states that they "are able to receive FFP associated with the increased FMAP for expenditures incurred in prior quarters if the state met the requirements of section 6008 (b) for that entire quarter." Ibid.
20. Ibid.
21. CMS has stated that "In order to receive the temporary FMAP increase (defined at §433.400(b)) for any quarter in which it is available, a state must meet the requirements described in paragraph (c)." See, e.g., Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, 85 Fed. Reg. 71142, 71164 (Nov. 6, 2020).
22. Exposing states to enormous liability without proper consideration of such reliance would be arbitrary and capricious. See, e.g., Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016), https://scholar.google.com/scholar_case?case=13500227649497518653.
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