

# States should remove the federal Medicaid handcuffs without fear of a claw-back

**To:** FGA Partners

**From:** Stewart Whitson, Legal Director, Foundation for Government Accountability

## Key Points

- States can save taxpayers billions of dollars per month by refusing to provide Medicaid coverage to ineligible individuals under §6008 (b) of the Families First Coronavirus Response Act (FFCRA).<sup>1 2</sup>
- Those states would no longer be eligible to receive the 6.2 percentage point Federal Medical Assistance Percentage (FMAP) increase going forward for quarters in which the public health emergency (PHE) continued but considering that the cost of retaining ineligible individuals now exceeds the benefit of the FMAP increase for most states, it is economically senseless for states to continue in the program.<sup>3</sup>
- States that opt out of the FMAP increase can be assured that the federal government has no legal basis to recover (i.e., “claw back”) additional funds already provided to the state throughout the duration of the PHE for previous quarters in which the state complied with the requirements under §6008 (b).<sup>4 5</sup>

## Background

In March of 2020, Congress passed the Families First Coronavirus Response Act as part of the federal government’s response to COVID-19.<sup>6</sup> 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.<sup>7</sup>

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 canceled, they die, or they move out of state.<sup>8</sup> This effectively means that, by taking the deal, states have relinquished control of their

Medicaid programs. Any attempts to increase eligibility standards, increase cost sharing, raise premiums, or even implement commonsense program integrity procedures are not permitted.<sup>9</sup> Once the COVID-19 Public Health Emergency (PHE) ends, the FMAP bump will end.<sup>10</sup>

To date, the PHE, which officially began on January 27, 2020, has been renewed approximately 11 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 for the foreseeable future.<sup>11</sup>

Retaining ineligible enrollees under §6008 of the FFCRA now effectively costs states more than the additional funding under the FMAP increase is saving them.<sup>12</sup> The ever-rising cost of supporting ineligible enrollees, coupled with the realization by many states that the Biden administration seemingly has no intention of ever ending the PHE, has caused states to strongly consider unlocking themselves from these federal Medicaid handcuffs.

However, some state officials have raised concerns that the Biden administration might attempt to claw back funds previously provided during quarters in which the state complied with §6008 of the FFCRA were the state to withdraw from the FMAP increase prior to the PHE coming to an end. Given the statutory language of §6008 of the FFCRA, and CMS's own interpretation of the statute outlined below, these concerns are unwarranted.

Bottom line, states may 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 without fear of a claw-back of funds received in earlier quarters. Given the economic costs of remaining in the program, they should withdraw without delay.

## States May Legally 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.<sup>13</sup> 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].<sup>14</sup> 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].<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.

## States That Withdraw From the FMAP Increase Can Do So Without Fear of a Claw-Back

In a very lengthy Q&A document published on June 30, 2020, CMS explained, in great detail, how the program would work for states.<sup>18</sup>

In the process, CMS specifically addressed this issue of potential claw-backs for states that exit the program, finding that a state that opts out of the program will only lose the 6.2 percent increase for the quarter in which the state opts out, and all quarters thereafter until the PHE ends. In other words, there is no risk of a claw-back.

Here is the FAQ and accompanying response from the document referenced above:

**36. 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?**

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.*<sup>19</sup> (emphasis added).

This interpretation is clear and expressly disavows any intent by CMS to read the statute as authorizing a claw-back for future non-compliance with the enrollment freeze. Moreover, to date, CMS has not contradicted or walked back this position in subsequent guidance. A review of CMS’s website and Federal Register documents that cite the FFCRA revealed that CMS has consistently

viewed an enrollment freeze as a condition of quarterly eligibility and never clearly stated that it is an ongoing condition that could be applied to punish a state retroactively.<sup>20</sup>

And in case any doubt remains, on October 4, 2022, in an email response to a query from the Congressional Research Service (CRS) in which CRS asked about claw-backs from previous quarters, CMS pointed to the same FAQ outlined above, and provided the same answer once again.<sup>21</sup> That is, “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.”

Obviously, CMS’s guidance provides meaningful protection from a claw-back, as it has created significant reliance interests by informing the decision of states to participate in the program for more than two years. A sudden about-face on that guidance, exposing states to enormous liability without proper consideration of such reliance, would be arbitrary and capricious, and therefore, unlawful.<sup>22</sup>

## Bottom Line

Given the statutory language of §6008 of the FFCRA, and CMS’s own interpretation of the statute, states may 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 without fear of a claw-back of funds received in earlier quarters. With the cost of covering ineligible enrollees now exceeding the benefits, the merits of withdrawing from the program and saving billions of taxpayer dollars every month in the process is clear. States should remove the federal Medicaid handcuffs without delay.

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

<sup>2</sup> Jonathan Ingram and Sam Adolphsen, “Stopping the Medicaid Madness: How Congress and States Can Start Salvaging Some Program Integrity,” Foundation for Government Accountability (2022), <https://thefga.org/paper/stopping-the-medicaid-madness-how-congress-and-states-can-start-salvaging-some-program-integrity/>.

<sup>3</sup> Hayden Dublois, Jonathan Ingram, and Trevor Carlsen, “Millions of Ineligible Medicaid Enrollees Come at a High Cost to States,” Foundation for Government Accountability (2022), <https://thefga.org/paper/ineligible-medicaid-enrollees-high-cost/>.

<sup>4</sup> FFCRA FAQ, Centers for Medicare and Medicaid Services (CMS), <https://www.medicaid.gov/state-resource-center/downloads/covid-19-faqs.pdf>.

<sup>5</sup> Email from CMS to CRS dated October 4, 2022, “Medicaid FFCRA FMAP Increase,” (2022), <https://thefga.org/wp-content/uploads/2022/12/CRS-Medicaid-FFCRA-FMAP-Increase.pdf>.

<sup>6</sup> Public Law 116-127 (2020), <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf>.

<sup>7</sup> *Id.* at §6008.

<sup>8</sup> *Id.*

<sup>9</sup> 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>.

<sup>10</sup> 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>.

<sup>11</sup> U.S. Department of Health and Human Services, “Renewal of Determination that a Public Health Emergency Exists,” (2022), <https://aspr.hhs.gov/legal/PHE/Pages/covid19-13Oct2022.aspx>.

<sup>12</sup> Hayden Dublois, Jonathan Ingram, and Trevor Carlsen, “Millions of Ineligible Medicaid Enrollees Come at a High Cost to States,” Foundation for Government Accountability (2022), <https://thefga.org/paper/ineligible-medicaid-enrollees-high-cost/>.

<sup>13</sup> Public Law 116-127 (2020), §6008(a).

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g., King v. Burwell*, 576 U.S. 473, 486 (2015).

<sup>17</sup> Public Law 116-127 (2020), §6008(b).

<sup>18</sup> FFCRA FAQ, Centers for Medicare and Medicaid Services (CMS), <https://www.medicaid.gov/state-resource-center/downloads/covid-19-faqs.pdf>.

<sup>19</sup> *Id.* at 124.

<sup>20</sup> *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) (“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).” (emphasis added)).

<sup>21</sup> Email from CMS to CRS dated October 4, 2022, “Medicaid FFCRA FMAP Increase,” (2022), <https://thefga.org/wp-content/uploads/2022/12/CRS-Medicaid-FFCRA-FMAP-Increase.pdf>.

<sup>22</sup> *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).