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Health Care Provisions in the Consolidated Appropriations Act, 2023

OVERVIEW

On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023 (H.R. 2617), an omnibus spending bill that provides for $1.7 trillion in discretionary spending by the federal government during federal fiscal year (FFY) 2023, which ends September 30th. Total non-defense spending is $800 billion, up by $68 billion, or 9 percent, over last year.

Major health care policy provisions in the bill include:

- An extension of the Medicare physician fee schedule bonus of 2.5 percent in 2023 and 1.25 percent in 2024;
- An extension of Medicare telehealth flexibilities through December 31, 2024;
- Medicare coverage of behavioral health services provided by licensed marriage and family therapists (LMFTs) and licensed mental health counselors (LMHCs);
- A phase-out of the Medicaid continuous coverage requirement and associated enhanced matching funds under the Covid-19 public health emergency (PHE), starting April 1st; and
- Requiring all state Medicaid programs to provide one year of continuous eligibility for children starting January 2024, and making permanent the option for such programs to provide the same option for postpartum women.

MEDICARE

Physician Fees and APM Bonus

The bill extends, at a reduced rate, an increase of Medicare payments to physicians under the Physician Fee Schedule by two years, through 2024. In 2020, Congress first increased these payments by 3.5 percent across the board; this amount was reduced to 3 percent in 2022. Its expiration would have resulted in a corresponding decrease in projected Medicare physician payments for 2023. Under the omnibus, these payments will be increased by 2.5 percent in 2023 (down 0.5 percent from 2022 rates) and 1.25 percent in 2024, before expiring.

The bill also extends the Medicare payment bonus for participation in advanced alternative payment models (APMs) through 2025. However, the bonus is reduced from 5 percent to 3.5 percent.

Extension of Telehealth Flexibilities

The bill extends the removal of geographic restrictions on Medicare reimbursement for telehealth through December 31, 2024, if the Covid-19 public health emergency (PHE) ends before this date. The bill does not change the continuing flexibilities while the PHE is ongoing.

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Other accompanying telehealth flexibilities are extended accordingly, such as the ability to provide audio-only telehealth and the requirement for mental health practitioners billing under Medicare to have an in-person visit (which would now take effect no earlier than January 2025).

The bill also requires the Department of Health and Human Services (HHS) to submit a report that would examine the effects of telehealth expansion on Medicare spending and utilization.

Medicare Coverage of LMFT and LMHC Services

Starting January 1, 2024, Medicare will cover services provided by licensed marriage and family therapists (LMFTs) and licensed mental health counselors (LMHCs). Services will typically be reimbursed at 75 percent of the amount Medicare would be for a psychologist's services.

New Residency Positions

Starting in FFY 2026, HHS will fund an additional 200 residency positions in hospitals. At least 100 of them will be reserved for psychiatry residencies. Each qualifying hospital will be required to receive at least one such slot before any hospital may receive more than one.

Enhanced Payment for Mobile Crisis Psychotherapy

The bill directs HHS to create new codes for psychotherapy for crisis services provided neither in a facility or office setting (i.e., in a mobile setting). Starting in 2024, such services would be reimbursed at 150% of the rate that Medicare pays for such services delivered at non-facility sites (approximately $225 for the first 60 minutes).

Coverage of Intensive Outpatient Services

The bill adds a new category of "intensive outpatient services" which corresponds to a lower intensity of Medicare partial hospitalization services. Intensive outpatient services must be required at least 9 hours per week, as determined at least once every two months. This is as opposed to partial hospitalization, which is required at least 20 hours per week, as determined at least every month.

Federally qualified health centers will be eligible to provide intensive outpatient services, and will be paid for such services at the hospital outpatient rate.

Stark and Anti-Kickback Exemption for Physician Wellness Programs

The bill establishes an exemption from Stark and anti-kickback laws for physician wellness programs that are offered to help improve practitioners' mental health and resiliency. Outside entities, such as hospitals or nursing facilities, would be able to provide such programs to physicians for free without being in violation of these laws. However, such programs must not be made contingent on the number or value of referrals made to the entity.

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Extension of Hospital Care at Home Initiatives

The bill directs HHS to accept waiver applications from hospitals that seek to continue providing care under the Acute Hospital Care at Home initiative after the end of the Covid-19 PHE. Participating hospitals would continue to have waivers of the relevant requirements of the program (i.e., providing inpatient services outside the hospital).

MEDICAID

Phase-Out of Continuous Coverage

The Families First Coronavirus Response Act (FFCRA) established a 6.2% enhanced Federal Medical Assistance Percentage (FMAP) during the Covid-19 PHE, subject to states maintaining continuous coverage for all Medicaid enrollees. The 2023 omnibus removes the tie to the end of the PHE and replaces it with a phase-out schedule, as follows:

- January through March: 6.2% enhanced FMAP
- April through June: 5% enhanced FMAP
- July through September: 2.5% enhanced FMAP
- October through December: 1.5% enhanced FMAP

The bill clarifies explicitly that states will no longer be prohibited from "initiating renewals, post-enrollment verifications, and redeterminations over a 12-month period […] as of April 1, 2023." Under existing guidance, states will have a 12-month period to begin all redeterminations and a 14-month period to complete them. States will be required to "attempt to ensure" that they have up-to-date contact information for all enrollees and to make a "good faith effort" to contact individuals through more than one means before disenrolling them.

States will be required to submit monthly reports to HHS on their eligibility redetermination process through June 30, 2024. These reports must include information States who fail to submit such reports may be subject to a decreased FMAP (by up to 1 percent).

12-Month Coverage for Children and Postpartum Women

The bill requires all Medicaid State Plans or waivers to provide that children under the age of 19 who are determined to be eligible for Medicaid will remain eligible for at least 12 months, or until they turn 19 or leave the state. The same requirement is applied to the Children's Health Insurance Program (CHIP), except that children may be transferred from CHIP to Medicaid during their coverage period. New York already provides 12-month continuous coverage for most enrollees.

The bill also makes permanent the option for states to offer 12 months of continuous coverage to postpartum women. As of December 2022, 26 states and the District of Columbia had implemented this option. New York has passed legislation to do so in the 2023 Enacted Budget.

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30-Day Pre-Release Services for Juveniles

Effective January 2025, the bill requires Medicaid State Plans to include a provision requiring the state to have a plan to coordinate necessary services for juveniles who are within 30 days of release from a public institution. Such services may include screenings and diagnostic services (including behavioral health services) and targeted case management for the 60-day period around release. Existing limitations on federal funding for such populations are repealed. These requirements are also applied to CHIP coverage.

Provider Directories

The bill establishes a new requirement for Medicaid managed care organizations to publish a public provider directory, updated on a quarterly basis, of all of their network providers, including physicians, hospitals, pharmacies, mental health providers, substance used providers, and long-term care providers.

Crisis Response Guidance

The bill directs HHS to issue guidance by July 1, 2025 that will provide recommendations on how states can establish a continuum of crisis response services, and how such services may be funded under Medicaid and CHIP. HHS will also establish a technical assistance center to help States establish such services. This is part of the bill's wider crisis response initiative (see below).

Medicaid Improvement Fund

The bill returns $7 billion to the Medicaid Improvement Fund, starting in FFY 2028, which may be used to fund improvements in state Medicaid information systems.

OTHER AREAS

Behavioral Health Initiatives

The bill contains a variety of initiatives related to behavioral health care, including:

- The creation of a Behavioral Health Crisis Coordinating Office within the Substance Abuse and Mental Health Services Administration (SAMHSA);
- Identification and publication of best practices for a crisis response continuum of care for use by crisis providers;
- Authorization of pilot programs for innovative technologies (such as social media and other technology platforms) for suicide prevention;
- Changes and increased funding for grants for programs to address postpartum depression;
- Establishment of a maternal mental health hotline and a Task Force on maternal mental health;
- Funding of a study on the costs of serious mental illness; and

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- Additional grants for peer-supported mental health services.

Maternal, Infant, and Early Childhood Home Visiting (MIECHV) Program

The bill reauthorizes the MIECHV program through 2027 and provides a total of $3.1 billion in funding. It creates certain new outcome reporting requirements, including an outcomes dashboard that will be publicly published by HHS. It also creates new regulations around virtual home visits under the MIECHV program.

Exemption of Telehealth from Deductibles for High-Deductible Plans

The bill extends the ability for high-deductible health plans (HDHPs) to provide coverage of telehealth services without requiring the enrollee to first meet the deductible, which has been authorized under Covid-19 legislation, through the end of 2024.

FDA Reforms

The bill makes significant changes to various authorities of the Food and Drug Administration (FDA). Notably, it modifies the FDA's accelerated approval process to allow the agency to require post-approval clinical trials to confirm the efficacy of a product. FDA would be able to set required parameters for such studies, including enrollment goals and a target completion date.

Public Health Preparedness and Response

The bill contains significant new and modified initiatives related to public health preparedness and response. This includes:

- Providing HHS with the authority to make awards for "the development of networks to improve health outcomes." These networks may include public entities, private entities, or public-private partnerships. HHS would award $35 million per year for the next five years for such projects.
- Providing additional funding for workforce initiatives, including loan forgiveness, community health worker awards, and other related initiatives.
- Revamping the Centers for Public Health Preparedness program to expand the focus to response efforts, which would conduct research, education, and training efforts related to public health and preparedness.
- Initiatives to improve the supply chain and manufacturing capacity for various medical products.

APPROPRIATIONS LEVELS

Some of the notable appropriations made in the bill include:

- $1.5 billion for the Advanced Research Projects Agency for Health (ARPA-H), up $500 million from last year, but down $3.5 billion from the President's request.

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- $47.5 billion for the National Institutes of Health (NIH), with an increase of at least 3.8 percent for each Institute and Center.
- $2.8 billion for mental health initiatives within SAMHSA, including a $150 million increase to the Mental Health Block Grant program and $385 million for Certified Community Behavioral Health Centers.
- $20 million for mental health crisis response grants.
- $1.9 billion for the Health Centers program, an increase of $110 million above the fiscal year 2022 enacted level.

An overall summary of the appropriations is available from the House Ways and Means Committee here.