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On September 6, 2024, the Governor signed Chapter 197 of the Acts of 2024, an Act to improve quality and oversight of long-term care. It takes effect 90 days later December 5, 2024. The Act Includes many important provisions including significant changes to MassHealth estate recovery.

How will the Long-Term Care Act affect MassHealth estate recovery?

Sections 20 and 21 of the Act amend section 31 of chapter 118E of General Laws by adding two new subsections (b1/2) and (e) that limit the scope of MassHealth estate recovery. Prior to the Act, Massachusetts was among only 23 states pursuing reimbursement for more costs than the federally required minimum.

Limiting recovery to only what is federally mandated

Once the Act takes effect, subsection 31(b1/2) will apply retroactively to the estates of individuals who died on or after August 1, 2024 limiting the scope of MassHealth estate recovery to only what federal law requires.[1] Section 31(b) requiring a broader scope of recovery will continue to apply to the estates of people who died before August 1, 2024.

a. Recovery for medical costs for services to people aged 55 or older limited to the costs of nursing homes, home and community-based services and related services

Section 31 (b1/2) only allows MassHealth to recover its costs for services to individuals age 55 or older for nursing facility services, home and community-based services and related hospital and prescription drug services as required under federal law.[2] This is a change from Section 31(b) which still applies to the estates of people who died prior to August 1, 2024 and requires MassHealth to recover for the costs of all services to individuals age 55 or older.[3]

b. Recovery for medical costs for services to people under age 55 who were "permanently institutionalized"

Currently Section 31(b)(1) requires estate recovery for MassHealth costs for people of any age who were inpatients of a nursing facility or other medical facility. The title of this subsection uses the phrase "permanently institutionalized" but that phrase is not defined in the state or federal statutes. The clarification in 31 (b1/2) (ii) cross-references to the federal statute which requires recovery for individuals under age 55 who were inpatients long enough to be subject to an assessment for the costs

[1] The relevant federal law is 42 U.S.C. § 1396p(b)(1)(A) and (B).

[2] Subsection (b1/2) does not repeat certain limitations required by the federal Medicaid Estate Recovery law at 42 USC 1396p. These federal limitations have not changed and include the prohibition on recovery for the costs of the Medicare Savings Program, the requirement for states to establish hardship waivers, and the prohibition on recovery from certain surviving family members including spouses, minor children and disabled adult children as defined in federal law. See also, the MassHealth regulations at 130 CMR 515.011.

[3] Subsection (b) is also governed by federal law limitations in 42 USC 1396p.

of their care and are not expected to return home. This is simply a state law acknowledgement of the governing federal law and not a change in the law.

c. The meaning of nursing facility services, home and community-based services and related services

"Nursing facility" is defined in the federal law at 42 U.S.C.1396r(a). It includes Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF-ID) but does not include psychiatric facilities.

"Home and community-based services" and "related services" are defined in 2001 guidance from CMS.[4] MassHealth has recently confirmed with CMS that these two definitions, while dated, still apply.

Under the 2001 CMS guidance, "home and community-based services" (HCBS) are limited to services under HCBS waivers authorized under Section 1915(c) of the Social Security Act.[5] MassHealth operates nine HCBS waiver programs for adults and a tenth for children.[6] The largest is the so-called Frail Elder waiver with enrollment capped at about 19,000. There are also HCBS waivers for people with developmental disabilities, brain injuries, and people transitioning from nursing homes back into the community.

To qualify for a HCBS waiver program individuals must qualify for MassHealth Standard but special financial eligibility rules apply. In addition, the HCBS waivers all require that someone be clinically eligible for nursing facility or other institutional care but be able to live safely at home with additional HCBS waiver services. Waiver services do not duplicate state plan services. Each individual participating in a HCBS waiver will have a service plan describing which HCBS services they receive. The scope of services available in HCBS waivers are described in the 1915(c) waiver documents posted on Medicaid.gov.[7]

"Related hospital and prescription drug services"

The CMS 2001 guidance define "related hospital and prescription drug services" as hospital and prescription drug services provided to an individual while receiving nursing facility services or home and community-based services. For people dually eligible for MassHealth and Medicare who receive nursing facility or HCBS waiver services, most of their hospital services and prescription drug services will be paid by Medicare. To the extent MassHealth pays the Medicare beneficiary's share of cost for hospital services, the payments are likely to fall under the federal law prohibition for recovery of Medicare cost-sharing. Therefore, recoverable spending for "related services" will primarily affect the few nursing home residents and HCBS waiver participants who do not have Medicare.

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[4] The CMS Guidance defining these terms is in Section 3810(A)(2) of Chapter 3 of the State Medicaid Manual. Certain other provisions of Section 3810 have been superseded by changes in the federal law such as the federal statutory prohibition on recovery for Medicare cost-sharing that took effect in 2010. 42 USC 1396p(b)(1)(B).

[5] Section 1915(c) of the SSA is codified at 42 USC 1396n(c). The 2001 guidance also refers to two other federal programs for home and community-based services but they were limited to selected states and have never been part of MassHealth.

[6] 130 CMR 519.007. This is the MassHealth website describing the home and community-based waiver programs.

[7] Regulations at 130 CMR 630.400 et seq describe services in four of the HCBS waiver, the two for people with Acquired Brain Injuries, and the two Moving Forward Plan waivers for people transitioning from nursing homes.

d. How the new law affects recovery for MassHealth managed care premium payments

When MassHealth was able to recover its spending for all services provided to individuals aged 55 or older, it also sought to recover the full amount of the capitated monthly premium payment for decedents who had been enrolled in managed care. Under the new law, MassHealth will only be able to recover the portion of its monthly payment to the managed care plan that represents the costs of nursing facilities, HCBS services or related services "based on the most appropriate actuarial analysis determined by the State."[8]

Most people under 65 with no coverage other than MassHealth are required to enroll in one of several different types of managed care plan. Some kinds of mandatory plans cover up to 6 months of nursing home care, and a portion of the premium MassHealth pays to those plans will be subject to estate recovery. In other kinds of mandatory plans, the capitated premium only covers primary care and behavioral health care. In this kind of mandatory managed care, nursing home care and related services subject to estate recovery will be paid directly by MassHealth not by the plan. No one enrolled in any of these mandatory managed care plans can be enrolled in a HCBS waiver.

There are also two kinds of voluntary MassHealth managed care plans that are paid a capitated monthly premium by MassHealth to deliver almost all MassHealth covered services including long term nursing home care: One Care and Senior Care Options (SCO). One Care is limited to individuals with disabilities who join while under 65 and who are enrolled in Medicare. No one enrolled in a HCBS waiver is eligible for One Care. SCO is limited to individuals aged 65 or over eligible for MassHealth Standard and is open to people enrolled in the Frail Elder HCBS waiver program. Both SCO and One Care cover short-term and long-term nursing home care.

For all the managed care plans that cover nursing home care, MassHealth will have to work with an actuary to determine what portion of the monthly capitated payment represents the cost of nursing facility and related services and is subject to estate recovery. For the SCO plans, MassHealth will have to also determine what portion of the monthly premium payment represents the cost of Frail Elder Waiver and related services subject to estate recovery.

Exempting CommonHealth and PCA services from estate recovery

Section 21 of the long-term care act creates a new subsection (e) in section 31 of chapter 118E that directs MassHealth to exempt the costs of CommonHealth coverage and the costs of personal care attendant (PCA) services from estate recovery provided the state obtains whatever federal approval is needed.

a. Personal Care Attendant (PCA) Services

The PCA benefit is a state plan benefits available in MassHealth Standard and CommonHealth and pays for a personal care attendant to assist person with disabilities who need help with at least two activities of daily living. MassHealth has confirmed with CMS that no approval is needed to exempt PCA services or any other community-based state plan service like Adult Day Health or Adult Foster Care from estate recovery. They are not subject to mandatory estate recovery.

[8]Section 3810(A)(6) of Chapter 3 of the State Medicaid Manual.

b. CommonHealth

CommonHealth is a program that began as a state-funded program but has long been included as one of the programs eligible for federal Medicaid reimbursement under the MassHealth 1115 demonstration. CommonHealth provides comprehensive benefits to individual with disabilities who do not financially qualify for MassHealth Standard. It uses a sliding scale premium charge rather than an upper income limit.

The only recoverable service in CommonHealth is up to 6 months of nursing facility services and related services while receiving nursing facility services. To exempt spending on these services from recovery MassHealth will likely require an amendment to the 1115 demonstration. The amendment can take effect only after it is approved.

Next steps for MassHealth to implement the new law

MassHealth is in communication with CMS and working on implementation of the new law. It moved quickly to submit a state plan amendment in September 2024 in order to implement the law retroactively to the estates of people who died on or after August 1 2024. Meanwhile, MassHealth has temporarily paused filing claims against the probate estates of individuals who died after August 1, 2024. It must develop new procedures for identifying recoverable amounts as well as updating its forms, notices, online information and regulations. We should have more information from MassHealth before the Dec 5, 2024 effective date. Keep an eye on its website for updated information.

This summary was prepared by Victoria Pulos, vpulos@mlri.org. It is not intended as legal advice.