



## Federal Issues

### Regulatory

#### **CMS Approves 12-Month Extension of Postpartum Medicaid & CHIP Coverage in GA and PA**

The Centers for Medicare & Medicaid Services (CMS) [announced](#) Georgia and Pennsylvania will extend Medicaid and Children's Health Insurance Program (CHIP) coverage for 12 months after enrollees give birth. The American Rescue Plan Act provided states with the flexibility to temporarily extend Medicaid postpartum coverage from 60 days to 12 months.

**Why This Matters:** CMS [estimates](#) an additional 57,000 people – 39,000 in Georgia and 18,000 in Pennsylvania – will benefit from the extensions of coverage. The two states join CA, CT, DC, FL, HI, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, NC, NJ, NM, OH, OR, SC, TN, VA, WA, and WV in extending coverage for one year. CMS is also working actively with other states to extend postpartum coverage.

## In this Issue:

### Federal Issues

#### *Regulatory*

- CMS Approves 12-Month Extension of Postpartum Medicaid & CHIP Coverage in GA and PA
- CMS Extends Timeline to Finalize Advantage Risk Adjustment Data Validation Rule
- CMS Finalizes Changes to Medicare FFS Enrollment and Special Enrollment Periods
- COVID-19 Updates
- White House Announces Plan to Access to Substance Use Disorder Medication-Assisted Treatment for Pregnant Women

### State Issues

#### New York

##### *Regulatory*

- Governor Extends Hospital Staffing Emergency
- Monkeypox Emergency Ends

#### Pennsylvania

##### *Legislative*

- House Advances Early Eye Drop Refill Legislation
- House and Senate Advances Prior Authorization Legislation

- **House and Senate Advances Childhood Lead Testing Legislation**

### **Industry Trends**

#### **Policy / Market Trends**

- **One-Pager: Medicare Advantage By the Numbers**
- **Second Circuit Upholds Private Right of Action for Medicare Advantage Plans Under MSP Statute**
- **Developments in Preventive Services Litigation (*Braidwood v. Becerra*)**
- **CMS Holds Sixth PHE Unwinding Webinar**

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## **CMS Extends Timeline to Finalize Medicare Advantage Risk Adjustment Data Validation Rule**

On October 28, the Centers for Medicare & Medicare Services (CMS) issued an [extension of timeline](#) to finalize the Medicare Advantage (MA) Risk Adjustment Data Validation (RADV) regulations proposed in November 2018. The current deadline of November 1, 2022, is now extended until February 1, 2023.

**Why This Matters:** The Social Security Act requires CMS to publish a final rule no more than three years after the publication of the proposed rule. Last year, CMS extended the deadline by one year, to November 1, 2022. However, CMS states that the agency is unable to meet that extended deadline due to “ongoing exceptional circumstances.” The agency states it continues to “have ongoing delays resulting from the agency’s focus on the COVID-19 public health emergency” and has “determined that additional time continues to be needed to address the complex policy and operational issues that were raised.”

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## **CMS Finalizes Changes to Medicare FFS Enrollment and Special Enrollment Periods**

CMS issued a [press release](#) and [fact sheet](#) announcing a [final rule](#) implementing provisions of the [Consolidated Appropriations Act, 2021](#) (CAA) and other revisions to fee-for-service (FFS) Medicare enrollment and eligibility rules generally effective January 1, 2023. The final rule specifically addresses:

- Immunosuppressive drug coverage under Medicare Part B for certain individuals whose Medicare entitlement based on end-stage renal disease (ESRD) would otherwise end 36 months after they receive a successful kidney transplant, provided they do not have certain other health coverage;

- Revised effective dates for FFS Medicare coverage for beneficiaries who enroll in the last 3 months of their initial enrollment period or in the General Enrollment Period;
  - Several new FFS Medicare special enrollment periods;
  - Streamlined rules for state “buy-in” premium payments for certain dual-eligibles; and,
  - Administrative changes to simplify existing regulations on FFS enrollment forms.
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## **COVID-19 Updates**

A new Kaiser Family Foundation (KFF) [issue brief](#) analyzes how COVID-19 countermeasures will be impacted as the public health emergency (PHE) comes to an end.

**Why This Matters:** The brief notes two major changes on the horizon. First, the federally purchased supply for COVID-19 therapeutics and vaccines will be depleted, as America shifts to the commercial market for manufacturing, procurement, and pricing. Secondly, several protections tied to the PHE will expire either immediately or a year following its end.

The brief mentions that the greatest impact of these changes will be to the uninsured and the underinsured since they could have limited access to free vaccines and potentially no coverage for treatments and tests.

The PHE was recently extended to January 11, 2023, and is anticipated to end sometime in 2023.

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## **White House Announces Plan to Expand Access to Substance Use Disorder Medication-Assisted Treatment for Pregnant Women**

The White House Office of National Drug Control Policy announced a plan to expand access to Medication-assisted treatment (MAT) or substance use disorder (SUD) among pregnant women. The plan also includes programs to train judges to incorporate MAT into sentencing for pregnant women with SUD, to increase access to medication for veterans, and to train employees of the Indian Health Service to screen for opioid use disorder among women of childbearing age. [Read More](#)

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## **State Issues**

### **New York**

Regulatory

### **Governor Extends Hospital Staffing Emergency**

Governor Hochul – citing concern about rising COVID hospitalizations and the threat of increased flu and RSV cases – again extended Executive Order 4 continuing the statewide disaster emergency due to health care staffing shortages. [EO 4.14](#) goes until November 26. While the emergency is extended, a previous extension discontinued the suspension of health plan utilization review requirements and appeal timeframes.

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## **Monkeypox Emergency Ends**

The Executive Order that declared a state of emergency related to monkeypox expired last Thursday. Officials cited a decline in new daily cases of the virus.

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## **State Issues**

### **Pennsylvania**

Legislative

#### **House Advances Early Eye Drop Refill Legislation**

On Tuesday, October 25, the House advanced [Senate Bill 1201](#) (Pittman, R-Indiana) to the governor for signature. Senate Bill 1201 provides coverage of prescription eye drops refills if the refill is requested:

- Between 21 and 30 days after the original date for 30-day supplies or after the insured received the most recent refill;
  - Between 42 and 60 days after the original date for 60-day supplies or after the insured received the most recent refill; and
  - Between 63 and 90 days after the original date for 90-day supplies or after the insured received the most recent refill.
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#### **House and Senate Advances Prior Authorization Legislation**

On Wednesday, October 26, the House unanimously advanced [Senate Bill 225](#) (Phillips-Hill, R-York) and the Senate unanimously concurred to the House amendment. Senate Bill 225 streamlines and standardizes the process for prior authorization and step therapy considerations for insurers, MCO's and contractors.

Senate Bill 225 is awaiting the governor's signature.

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#### **House and Senate Advances Childhood Lead Testing Legislation**

On Wednesday, October 26, the House advanced [Senate Bill 522](#) (Baker, R-Luzerne) and the Senate concurred with the House amendment. Senate Bill 522 ensures pregnant women and children receive blood testing to detect lead poisoning and requires applicable insurance policies cover blood lead tests.

Senate Bill 522 is awaiting the governor's signature.

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## Industry Trends

Policy / Market Trends

### One-Pager: Medicare Advantage By the Numbers

AHIP released a new [one-pager](#) with key statistics on Medicare Advantage (MA) and the care it delivers to **over 29 million American seniors and people with disabilities**.

#### Highlights include:

- **93%** of voters with MA are satisfied with their coverage.
- MA outperforms original Medicare in **16 out of 16** clinical measures.
- **3 in 4** senior voters say it is important for the federal government to protect funding for MA.
- **98%** of Medicare-eligible Americans have access to a zero-premium MA plan with drug coverage.
- MA plans have **50% fewer** net improper payments than original Medicare.
- **7 million** rural Americans are served by MA plans.
- **9 million** MA enrollees have an income below 200% of the federal poverty level.
- **32%** of MA enrollees are racial/ethnic minorities – compared to 21% of original Medicare enrollees.

As the numbers show, MA continues to be a prime example of the government and private market working together to deliver better services, better access to care, and better value. You can view all of the statistics from Medicare Advantage By the Numbers [here](#).

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### Second Circuit Upholds Private Right of Action for Medicare Advantage Plans Under MSP Statute

The U.S. Court of Appeals for the Second Circuit [joined](#) the 3rd and 11th Circuits in holding that Medicare Advantage (MA) plans have a private right of action under the Medicare Secondary Payer (MSP) statute. AHIP filed an [amicus brief](#) arguing for this result.

**Why This Matters:** The case, *Aetna Life Insurance Co. v. Big Y Foods, Inc.* (20-3853) involves an MA plan's efforts to obtain recovery of payments made to a MA beneficiary from Big Y Foods, which is considered a self-insured "primary plan" under the MSP. The focus of the decision is on the MSP statute

and whether its private right of action is available to MA plans. Examining the statute, the court concludes that the “plain text” makes it clear that MA plans have a private right of action.

The court proceeds to consider additional arguments. It rejects Big Y’s argument a private right of action for MA plans here serves no purpose other than increasing the profits of such plans. The court notes “the stated congressional purpose in creating MAOs was to spur innovation by sparking competition with traditional Medicare plans” and this competition, and the resulting innovation, depends on MA plans having access to a “level playing field.” Blocking access of MA plans to the private right of action would be inconsistent with that intent.

The court also considers the import of the PAID Act, passed in 2020. It noted this Act reflected Congressional awareness that MA plans increasingly use the private right of action to seek reimbursement in circumstances similar to this case. Congressional awareness of this understanding of the MSP, and its enactment of the PAID Act without making any changes that would alter that understanding, provides further evidence of Congressional support for the availability of private right of action to MSP plans.

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### **Developments in Preventative Services Litigation (*Braidwood v. Becerra*)**

Last month, Judge Reed O’Connor sitting in the federal district court for the Northern District of Texas (*Braidwood v. Becerra* formerly *Kelley v. Becerra*) ruled a U.S. Preventative Services Task Force (USPSTF) recommendation related to pre-exposure prophylaxis (PrEP) and its corresponding coverage mandate under the Affordable Care Act (ACA) violated the Religious Freedom Restoration Act (RFRA). In the same decision, the court found the USPSTF violated the Appointments Clause of the Constitution. The decision addressed claims brought by just one of several plaintiffs in the case and left unresolved a number of remaining issues, including the scope of relief (or remedy) the court would grant, as well as claims regarding coverage for contraceptive services.

**Why This Matters:** Earlier this week, the plaintiffs filed a [supplemental briefing](#) on those still unresolved issues. In their brief, plaintiffs request certain nationwide relief, including:

- vacating all agency actions implementing preventative care coverage mandates recommended by the USPSTF;
- setting aside actions taken by the USPSTF to implement the ACA’s preventative coverage requirement, including recommendations with “A” or “B” ratings; and,
- issuing an injunction preventing the government from implementing any coverage mandates based on such recommendations.

The plaintiffs have asked for such relief to apply to all agency and USPSTF actions dating back to March 23, 2010.

Separately, the plaintiffs asked the court to enter judgment in favor of the government on their contraceptive mandate-related claims. In its earlier decision, the district court rejected plaintiffs' arguments that the Health Resources and Services Administration (HRSA), and by extension its contraceptive services-related recommendations, violated the Constitution's Appointments Clause and the non-delegation doctrine. The plaintiffs indicated in their filing that they plan to appeal those decisions. Plaintiffs also set forth a number of arguments supporting their standing to bring such claims.

The government is expected to file its response no later than November 23. Supplemental briefing is expected to conclude in mid-January. A corresponding hearing date has not yet been scheduled. Similar to other ACA-related decisions rendered by Judge O'Connor, any appeal of the district court's decision will be to the U.S. Court of Appeals for the Fifth Circuit. AHIP will continue to monitor this case and report on any significant developments.

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### **CMS Holds Sixth PHE Unwinding Webinar**

CMS held the sixth webinar in its series on Medicaid and CHIP Continuous Enrollment Unwinding. During the webinar, Kim Glaun from the Medicare-Medicaid coordination office discussed considerations for consumers transitioning from Medicaid into Medicare at the end of the public health emergency (PHE). Glaun noted CMS has proposed a Medicare Special Enrollment Period (SEP) starting Jan. 1, 2023 for people who have not yet signed up for Medicare and will lose Medicaid coverage after the PHE and expects to finalize the SEP soon.

Next, Heidi Capriotti, Public Information Officer for the Arizona Health Care Cost Containment System (AHCCCS), discussed Arizona's efforts to reach out to Medicaid enrollees and share information on redeterminations prior to the end of the PHE, including use of text messaging, social media, and a 2-1-1 information line. Finally, Marcus Johnson of Vitalyst Health Foundation shared how his organization has partnered with AHCCCS to engage both traditional and non-traditional partners in preparing for the end of the PHE, including insurers, county health departments, federally qualified health centers (FQHCs), libraries, faith-based organizations, day centers and food banks. Materials from this meeting will be available on the [CMS Unwinding Resource Page](#) in the coming weeks.

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**Interested in reviewing a copy of a bill(s)? Access the following web sites:**

Delaware State Legislation: <http://legis.delaware.gov/>.

New York Legislation: <https://nyassembly.gov/leg/>

Pennsylvania Legislation: [www.legis.state.pa.us](http://www.legis.state.pa.us).

West Virginia Legislation: <http://www.legis.state.wv.us/>

For copies of congressional bills, access the Thomas website – <http://thomas.loc.gov/>.

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