
SMD# 23-004

**RE: Extension of 1915(c) Home
and Community-Based Services
Waiver Appendix K Expiration
Dates**

August 2, 2023

Dear State Medicaid Director:

The Centers for Medicare & Medicaid Services (CMS) is issuing the following guidance to states as they take actions to return to normal operations after the end of the flexibilities available to support states and beneficiaries during the COVID-19 Public Health Emergency (PHE). Specifically, this guidance announces an update to CMS's policy regarding the end date for flexibilities approved in states' section 1915(c) Home and Community-Based Services (HCBS) waiver Appendix K amendments. Under our prior policy, these flexibilities were set to expire six months after the expiration of the COVID-19 PHE. However, as described below, these flexibilities may remain in effect for a longer period of time.

States have relied extensively throughout the PHE on flexibilities permitted under Appendix K to authorize actions in their home and community-based services programs such as the use of telehealth or remote service provision, increased payment rates, expansion of self-direction service delivery models, addition or expansion of services, and expansion of provider networks to include family members and legally responsible individuals. In prior guidance¹, CMS indicated that the Appendix K authority for COVID-19 provisions would expire no later than six months after the expiration of the PHE. Given the end of the PHE on May 11, 2023, Appendix K authority would expire on November 11, 2023.

CMS is now indicating through this guidance that COVID-19 Appendix K flexibilities currently approved to end six months after the expiration of the PHE may be extended if the state takes action by November 11, 2023 to incorporate desired Appendix K provisions into underlying HCBS programs. The expiration extension allows states to avoid a lapse in approved provisions and only applies to Appendix Ks with flexibilities that are incorporated into underlying section 1915(c) waiver programs. The applicable Appendix K will remain in effect until the effective date of the section 1915(c) waiver action (amendment or renewal). Frequently, a single Appendix K submission reflects flexibilities applicable to multiple section 1915(c) waivers. Going forward, any flexibility previously granted in an Appendix K that a state would like to continue will need to be incorporated by formal submission of an amendment to or renewal of

¹ <https://www.medicaid.gov/federal-policy-guidance/downloads/sho20004.pdf>

each underlying waiver to which it will apply. As discussed below, each amendment or renewal request must be submitted to CMS by November 11, 2023, otherwise the Appendix K authority will expire on that date.

This policy update extends to circumstances where a state authorizes section 1915(c)-like services through a section 1115 demonstration and has comparable COVID-19 Appendix K (“Attachment K”) flexibilities currently authorized under that demonstration. This means that these COVID-19 Attachment K flexibilities currently approved to end six months after the expiration of the PHE will be considered to end on the later of November 11, 2023, or the approval date of a section 1115 demonstration action that incorporates the flexibilities requested by the state into the underlying section 1115 demonstration, provided the state’s request for the action is submitted by November 11, 2023.

CMS is issuing this guidance in recognition of the number of section 1915(c) waiver actions already submitted and expected to be submitted by states to incorporate Appendix K flexibilities into the ongoing operations of their HCBS programs. The nature of these amendments, namely those to modify services, payment rates and provider qualifications, meets the definition of a “substantive change” defined at 42 CFR § 441.304(d), and therefore requires an effective date no earlier than the date of CMS approval, and requires public notice to be conducted prior to submission of the action to CMS, as defined in § 441.304(f). The ability for these waiver actions to be submitted, reviewed and approved by November 11, 2023, to prevent a lapse in authority, is highly uncertain. In the name of minimizing disruption to beneficiaries, providers and states, CMS is issuing this extension of the Appendix K expiration date. States are nevertheless strongly encouraged to submit their section 1915(c) waiver actions and section 1115 demonstration amendments as quickly as possible, to minimize Appendix/Attachment K extensions for unreasonably long periods of time. If a state has not submitted a waiver action or demonstration amendment to incorporate Appendix K flexibilities into an underlying program by November 11, 2023, the Appendix K flexibility will expire for that program on that date.

Importantly, states will not need to amend existing approved Appendix K applications to take advantage of this extended expiration date. Borrowing on the approach described in recent guidance², this letter to State Medicaid Directors may serve as the necessary documentation for states’ approved Appendix K applications to now expire on the later of November 11, 2023, or the effective date of the section 1915(c) waiver action (amendment or renewal) that incorporates the Appendix K provisions requested by the state into the underlying section 1915(c) waiver program, provided the requests are submitted by November 11, 2023.

The effect of extending Appendix K authority also has the effect of extending state obligations to maintain the temporary changes to HCBS eligibility, covered services, and/or payment rates approved in the applicable Appendix K and in effect on April 1, 2021, in order to comply with maintenance of effort requirements found in section 9817 of the American Rescue Plan Act of 2021 (P.L. 117-2). States should refer to guidance³ issued to implement this provision and contact CMS for additional information. *States not seeking to have flexibilities authorized under*

² <https://www.medicaid.gov/federal-policy-guidance/downloads/sho23002.pdf>

³ <https://www.medicaid.gov/federal-policy-guidance/downloads/smd21003.pdf>

an approved Appendix K extended beyond November 11, 2023, should reach out to their HCBS contacts in CMS for assistance, and communicate this decision to all interested parties.

CMS notes that not all approved Appendix K flexibilities may be incorporated into underlying HCBS waivers⁴, and states are under no obligation to amend their waivers to continue Appendix K flexibilities beyond the expiration of the Appendix K. However, states are strongly encouraged to consult with their beneficiary, provider, and stakeholder communities to determine which relevant Appendix K flexibilities would be beneficial to continue.

Per 42 § CFR 441.304(c), some section 1915(c) HCBS programs may be operating under a temporary extension of waiver authority to give the state and CMS additional time to resolve issues preventing renewal of the waiver. While CMS does not typically permit amendments to waivers under temporary extension, CMS will authorize amendments to such waivers to incorporate relevant Appendix K flexibilities, due to the unprecedented nature of the COVID-19 PHE.

Questions regarding this guidance may be directed to Melissa Harris, Deputy Director, Medicaid Benefits and Health Programs Group, at melissa.harris@cms.hhs.gov. We look forward to continuing our partnership with states in the implementation of HCBS post-PHE.

Sincerely,

Daniel Tsai
Deputy Administrator and Director

⁴ See training available at <https://www.medicaid.gov/home-community-based-services/downloads/unwind-hcbs-phe-flexbles-feb2023.pdf>