



December 3, 2018

Karen L. Smith, MD, MPH, Director
California Department of Public Health
Licensing and Certification Program
P.O. Box 997377, MS 3202
Sacramento, CA 95899-7377

Dear Dr. Smith:

This is in response to your California Department of Public Health (CDPH) Center for Health Care Quality, Licensing and Certification Program letter dated November 21, 2018. In this letter, the state detailed a number of federal requirements that posed issues for California's health care delivery system due to the Camp and Woolsey/Hill wildfires. You requested any available flexibility and waiver requests with respect to these requirements.

The President declared a State of Emergency for California and the HHS Secretary declared a Public Health Emergency on November 13, 2018, retroactive to November 8, 2018, which allows for CMS programmatic waivers based on Section 1135 of the Social Security Act. CMS has posted information that includes flexibilities, blanket waivers, waivers with 1135 authority and waivers without 1135 authority. This information can be found at the following CMS website: <https://www.cms.gov/About-CMS/Agency-Information/Emergency/EPRO/Current-Emergencies/Current-Emergencies-page.html>

Under Section 1135 waiver authority, we are able to grant your requests. The language below outlines the 1135 waiver provisions and additional program flexibilities CMS has granted:

1. Provider participation, billing requirements, and conditions for payment.

- a. CDPH respectfully requests a waiver/flexibility to allow evacuating facilities (such as Intermediate Care Facilities for the Developmentally Disabled or Skilled Nursing Facilities) to receive payments for services provided to affected beneficiaries in alternative physical settings, such as temporary shelters or other care facilities.*

CMS Response: CMS approves the waiver to allow evacuating facilities to be fully reimbursed for services rendered during an emergency to an unlicensed facility (where the evacuating facility continues to render services). The evacuating facility would be responsible for determining how to reimburse the receiving facility. This arrangement would only be effective for the duration of the 1135 waiver. However, after the initial 30 days, CMS would require that the evacuating facility return the residents to the originating facility or discharge the residents and complete the discharge assessment.

Please also reference Blanket Waivers for California Wildfires at <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/CA-wildfires-blanket-waivers-11-14-18.pdf>

- b CDPH respectfully requests a waiver/flexibility to allow Federally Qualified Health Centers (FQHC) and Rural Health Clinics (RHC) to maintain FQHC/RHC status when providing services from alternative physical settings, such as a mobile clinic or temporary location in the event the clinic was damaged or destroyed.*

CMS Response: The 1135 waiver authority is not available for this request. With respect to Medicaid, providers may contact California Department of Healthcare Services to determine Medicaid's payment authority.

- c CDPH respectfully requests a waiver/flexibility to allow a non-operational hospital to receive payment for services provided by outpatient and supplemental service settings on the hospital license (clinics, hospice and home health providers, ambulatory surgery, etc.).*

CMS Response: We confirmed with the J-E MAC that a hospital that is no longer in operation, due to the wildfires, is not able to bill Medicare for services until the provider resumes operation in another location. The provider would need to contact the State Survey Agency regarding the provider's status and future plans. The provider can also submit a waiver to CMS which will be reviewed on a case-by-case basis. If the hospital owns a hospice or home health agency (HHA) located in another location, and the hospice and HHA have their own CMS Certification Number (CCN) and national provider identifier (NPI) and are properly licensed by the State separate from the hospital, then the hospice and HHA could separately bill Medicare. The hospice and HHA must still meet all Federal and State requirements. Also, related information is found on the following published link: <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/Provider-Survey-and-Certification-Frequently-Asked-Questions.pdf>

Provider Relocation: If a provider who has been adversely impacted by a declared public health emergency is unable to restart full operations, can they maintain their existing Medicare or Medicaid provider agreement while the facility is closed? Can a provider relocate, and what are the procedures for program certification if relocation is necessary?

Each Medicare and Medicaid certified provider in the declared emergency area(s) should contact their State Survey Agency (SA) regarding their status and future plans. CMS recognizes that there are times when a public health emergency may result in consequences beyond the provider's control. Therefore, some providers may never be able to reopen at their original location and others may reopen at their original location after some period of time. Some providers may not be able to reopen unless they relocate to a new site.

Participation as a Medicare and/or Medicaid certified provider is based on the ability of the provider to demonstrate they can furnish services in a manner that protects the health and safety of beneficiaries according to the specific regulations for each provider type. However, CMS will exercise discretion and flexibility on a case-by-case basis when determining to deactivate a provider's Medicare or Medicaid provider agreement and number and when the cessation of business is due to a declared public health emergency.

If the provider/supplier plans to reopen in a new location, CMS will need to determine if this will be a relocation of the current provider under its existing Medicare certification or a cessation of business at the original location and subsequent establishment of a new business at another location, which would require another Medicare certification. To retain the current provider certification, the entity must demonstrate to the Regional Office that it is functioning as essentially the same provider serving the same community. CMS will consider each request for relocation on a case-by-case basis and will typically use the following type of criteria:

- The provider remains in the same State and complies with the same State licensure requirements.
- The provider remains the same type of Medicare provider after relocation.
- The provider maintains at least 75 percent of the same medical staff, nursing staff and other employees, and contracted personnel (contracted personnel who regularly work 20 or more hours a week at the provider).
- The provider retains the same governing body or person(s) legally responsible for the provider after the relocation.
- The provider maintains essentially the same Medical Staff bylaws, policies, and procedures, as applicable.
- At least 75 percent of the services offered by the provider during the last year at the original location continue to be offered at the new location.
- The distance the provider moves from the original site.
- The provider continues to serve at least 75 percent of the original community at its new location.
- The provider complies with all Federal requirements, including CMS requirements and regulations at the new location.
- The provider maintains essentially the same policies and procedures, such as nursing, infection control, pharmacy, patient care, etc.
- CMS may use any other necessary information to determine if a provider/supplier continues to be essentially the same provider under the same provider agreement after relocation.

Facility Relocation: Several of my home health agency physical locations have been destroyed by the disaster. May I relocate and continue furnishing services?

Contact your CMS Regional Office. The Regional Office will review requests on a case-by-case basis, and limited exceptions to the physical location requirements may be allowed. In addition, please refer to the State's specific licensure and certification requirements during an emergency.

2. Waiver of Conditions of Participation and Certification

- a. *CDPH respectfully requests a blanket waiver be issued allowing certain conditions of participation, certification requirements, program participation or similar requirements for individual health care providers or types of health care providers, a hospital or provider of services, a health care facility, or a supplier of health care items or services relating to space and physical plant requirements for the period following the onset of the wildfires to allow for stabilization, assessment, and permanent relocation of evacuated patients and residents.*

CMS Response: These requirements directly impact the provision of safe patient care. CMS will continue to be responsive to the needs of all impacted providers and provide relief, as necessary and to the extent permitted, to ensure regulatory flexibilities allow for fulsome response and recovery activities. However, the expansive scope of this request exceeds our ability to ensure flexibilities granted do not jeopardize patient health and safety. As specific needs are identified/provided under this section, CMS will immediately consider how best to address those within our authority to permit regulatory flexibilities.

Additionally, one waiver, which is granted for the facility that was located in the emergency area, received patients under direction of the Survey State Agency due to the state of emergency need for placements, has provided care and services directly and was under a Denial of Payment for New Admissions which became effective November 6, 2018. This waiver will only apply to new admissions that are evacuees from the affected emergency area.

Also, another waiver/flexibility is pending action by CDPH to license on a temporary basis 13 swing beds in an unlicensed wing C of a hospital which due to the extreme conditions of the fire required the State Agency to place residents. The SNF from which the residents were removed was burnt to the ground and was non-operational. Please reference:

<https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/MedicareFFS-EmergencyQsAs1135Waiver.pdf>

Please also reference Blanket Waivers for California Wildfires at <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/CA-wildfires-blanket-waivers-11-14-18.pdf>

3. Waiver of Three-Day prior hospitalization for Skilled Nursing Facility Coverage. *CDPH respectfully requests a blanket waiver be issued allowing skilled nursing facility coverage of hospital transfers absent a qualifying three-day inpatient admission and for people who are evacuated, transferred, or otherwise dislocated due to the fires.*

CMS Response: CMS approves this waiver request. Skilled Nursing Facilities utilizing this flexibility should use the “DR” (Disaster Related) condition code for Medicare claims filed for Medicare beneficiaries receiving care under this waiver. Specific billing questions may be directed to the Medicare Administrative Contractor and references in #2 above.

4. Waiver for CAH Hospitals Exceeding 96 hour length of stay.

CMS Response: CMS approves this waiver request.

Please reference Blanket Waivers for California Wildfires at <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/CA-wildfires-blanket-waivers-11-14-18.pdf>

5. MDS and OASIS

- a. CDPH respectfully requests a blanket waiver be issued for timeframe requirements for OASIS and Minimum Data Set (MDS) assessments and transmission. The state or impacted provider (i.e., home health agencies and skilled nursing facilities, respectively) would still forward provider information and waiver requests to the CMS RO for tracking purposes.*

CMS Response: CMS hereby modifies the deadlines for OASIS and MDS assessments and transmission per the guidance contained in the Emergency Q&A’s here: <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/MedicareFFS-EmergencyOsAs1135Waiver.pdf>

Please also reference Blanket Waivers for California Wildfires at <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/CA-wildfires-blanket-waivers-11-14-18.pdf>

6. Flexibility in Survey Timelines and Suspension of Enforcement Activities

- a. CDPH respectfully requests a blanket waiver be issued for timelines for conducting Tier 1 and Tier 2 workload for facilities overseen by the Chico District Office as a result of the Camp Fire. A significant portion of the office staff have been displaced, with no opportunity to return to the community. Workload must be redistributed to staff outside the area. Remaining staff in the region will focus on support to the provider community to re-establish services.*
- b. CDPH respectfully requests a blanket waiver be issued for the temporary suspension of survey agency requirements for plans of correction and/or other survey enforcement timelines that were in process for facilities damaged or destroyed by the Camp Fire. We are not requesting a lapse of enforcement for actions of ill intentions.*

CMS Response: CMS approves this waiver request. See references in #2 above.

7. CMS-13 Requirements

- a. *CDPH respectfully requests a blanket waiver be issued allowing rehab hospitals the ability to treat medical/surgical and skilled nursing patients during the emergency period until appropriate relocation can occur. The rehab hospital would be exempted from the requirements of CMS-13 which requires 60 percent of the patients treated at a facility paid under the rehab prospective payment system is treated for one of 13 specified conditions.*

CMS Response: CMS approves this waiver request. Please reference Section I135Q-1 in the following link: <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/MedicareFFS-EmergencyQsAs1135Waiver.pdf>

8. EMTALA Waiver

- a. *CDPH respectfully requests a blanket waiver be issued for sanctions under Section 1867 of EMTALA for the direction or relocation of an individual to another location to receive medical screening pursuant to an appropriate state emergency preparedness plan; or the transfer of an individual who has not been stabilized if the transfer is necessitated by the circumstance of fires.*

CMS Response: Because the EMTALA waiver is limited to the 72-hour period following activation of the hospital's disaster protocol, CMS should be notified about when hospitals activate their disaster protocols. Further, evacuations and mass relocations of patients are not covered under EMTALA. We encourage hospitals to manage the movement of patients in a manner that best meets the needs of the patients, hospital, and community. If a hospital believes it needs relief under this waiver, even retroactively, it is encouraged to contact the CMS San Francisco Regional Office.

Please reference Section N of the following: <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/MedicareFFS-EmergencyQsAs1135Waiver.pdf>

9. Notice to residents prior to discharge

- a. *CDPH respectfully requests a waiver of the 60-day notice prior to discharge for a facility that has been destroyed/damaged by fire.*

CMS Response: CMS approves the waiver of 42CFR 483.15 c(3)-(6) because of the emergency nature of these evacuations. However, as directed in the Emergency Provider Survey and Certification Frequently Asked Questions and State Operations Manual guidance, notices can be given as soon as practicable to all responsible parties, receiving facilities, the State Survey Agency, the State Medicaid Agency, and Ombudsman. These notices may be made via a phone call, in person, mailed via certified U.S. Mail, sent via fax or email, or other method that allows confirmation of receipt. The WDSC-SF will continue to work with CDPH on this issue if questions remain.

10. Durable Medical Equipment

- a. *CDPH respectfully requests a blanket waiver that allows the authority to suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) where DMEPOS is lost, destroyed, irreparably damaged, or otherwise rendered unusable. Under this waiver, the face-to-face requirement, a new physician's order, and a new medical necessity documentation are not required for replacement. Supplies must still include a narrative description in the claim explaining the reason why the equipment must be replaced and are reminded to maintain documentation indicating that the DMEPOS was lost, destroyed, irreparably damaged, or otherwise rendered unusable as a result of the wildfires.*

CMS Response: CMS approves this waiver request. With respect to the 2018 California wildfires, CMS issued blanket waivers which includes granting the authority to suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) where DMEPOS is lost, destroyed, irreparably damaged, or otherwise rendered unusable. These temporary emergency waivers apply to the timeframes specified in the Secretary's declaration of the Public Health Emergency (PHE).

Please reference Blanket Waivers for California Wildfires at <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/CA-wildfires-blanket-waivers-11-14-18.pdf>

11. Replacement Prescription Fills

- a. *CDPH respectfully requests a blanket waiver for payment that may be permitted for replacement prescription fills (for a quantity up to the amount originally dispensed) of covered drugs in circumstances where dispensed medication has been lost or otherwise rendered unusable by damage due to the wildfires.*

CMS Response: CMS approves this waiver request.

Please reference Blanket Waivers for California Wildfires at <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/CA-wildfires-blanket-waivers-11-14-18.pdf>

Providers must resume compliance with normal Medicare fee-for-service rules and regulations as soon as they are able to do so. As a reminder, the waivers or modifications a provider was operating under are no longer available after the termination of the emergency period.

We acknowledge the devastation providers are currently experiencing and we hope these waiver provisions will provide the relief requested so provider personnel can focus on the health and safety of those impacted by the Wildfires.

If you have questions or concerns regarding this correspondence, please send inquiries to our corporate mailbox, ROSFOSO@cms.hhs.gov, or contact Steven Chickering, Associate Regional Administrator, at (415) 744-3682 or by e-mail at steven.chickering@cms.hhs.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven D. Chickering". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Steven Chickering
Associate Regional Administrator
Western Division of Survey and Certification

Cc: Jean Moody Williams, CQISCO
Sandra Pace, CQISCO
Scott Vivona, CDPH