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Clarity Comes To ACA's 'Minimum Essential Coverage'


Law360, New York (December 12, 2014, 3:04 PM ET) --

In the last few weeks, the Internal Revenue Services finalized rules and published subregulatory guidance about the definition of government-sponsored minimum essential coverage and about claiming a hardship exemption from the Affordable Care Act's individual mandate: IRS, Final Rulemaking, Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals, 79 Fed. Reg. 70464 (Nov. 26, 2014); IRS Notice 2014-76 (Nov. 21, 2014); and IRS Notice 2014-71 (Nov. 7, 2014).

During that same time, the Centers for Medicare & Medicaid Services issued two related guidance documents: Center for Consumer Information and Insurance (CCIIO), CMS, Guidance on Hardship Exemptions for Persons Meeting Certain Criteria (Nov. 21, 2014) and CMS, State Health Official Letter #14-002 (Nov. 7, 2014).

These rules and guidance documents clarify the types of Medicaid coverage that constitutes minimum essential coverage and the options for individuals receiving Medicaid not recognized as such.

Background

Under the ACA, most individuals who lack "minimum essential coverage" (MEC) will be subject to the "shared responsibility payment." ACA § 1501(b) (adding 26 U.S.C. § 5000A). The ACA also provides tax credits for individuals who lack access to MEC to pay for premiums to purchase a qualified health plan (QHP) on an exchange. Individuals with access to affordable MEC are not eligible for these tax credits. See ACA § 1401(a); 26 U.S.C. § 36B(c)(2); see § 5000A(f)(1).

IRS rules provide that Medicaid constitute MEC, except for certain types of limited Medicaid coverage:

- Optional coverage of family planning services under Section 1902(a)(10)(A)(ii)(XXI).
- Optional coverage of tuberculosis-related services under Section 1902(a)(10)(A)(ii)(XII).
- Coverage of pregnancy-related services under Sections 1902(a)(10)(A)(i)(IV) and (a)(10)(A)(ii)(IX).
- Coverage limited to treatment of emergency medical conditions in accordance with 8 U.S.C. § 1611(b)(1)(A), as authorized by Section 1903(v) (for nonqualified immigrants). 26 C.F.R. § 1.5000A–2(b)(1)(ii).

On Jan. 27, 2014, the IRS proposed to amend its rules to specify that Section 1115(a)(2) coverage and medically needy coverage would also not qualify as government-sponsored MEC. 79 Fed. Reg. 4302 (Jan. 27, 2014).

The IRS' exclusion of certain types of Medicaid from the definition of MEC raised the possibility that some Medicaid eligibles would also be eligible for tax credits to purchase a QHP.

However, in addition to the categories of coverage that constitute government-sponsored MEC under IRS rules, the Secretary of the U.S. Department of Health and Human Services has the authority to designate, in coordination with the Secretary of the U.S. Department of the Treasury, "other health benefits coverage" as MEC. § 5000A(f)(1)(E); see § 1.5000A-2(f). Pursuant to this authority, CMS regulations designate several specific types of plans (none of which pertain to Medicaid) as MEC. See 45 C.F.R. § 156.602. CMS rules also provide that the Secretary of HHS may deem additional coverage as MEC if it "meet[s] substantially all the requirements of title I of [ACA] pertaining to nongrandfathered, individual health insurance coverage." 45 C.F.R. § 156.604(a)(1).

IRS Rulemaking and Guidance About Government-Sponsored MEC and Hardship Exemptions

On Nov. 21, 2014, the IRS finalized rules and issued subregulatory guidance relating to the definition of government-sponsored MEC and claiming hardship exemptions. This follows IRS guidance just a few weeks prior announcing a special rule for women eligible for Medicaid because of a pregnancy.

Government-Sponsored MEC

Section 1115 of the Social Security Act authorizes the Secretary of HHS to approve Medicaid demonstration projects to test different policy ideas. The secretary can waive application of certain provisions of the Medicaid statute for these demonstration projects. "Medically needy" programs, which states have the option to implement, provide Medicaid coverage to individuals whose income exceeds the state's Medicaid eligibility levels, but who have significant out-of-pocket medical costs. In a medically needy program, an individual becomes eligible for Medicaid benefits after he or she "spends down" a certain amount of income on medical costs. Both Section 1115 coverage and medically need coverage can be less generous than regular Medicaid.

The IRS finalized regulations specifying that medically needy coverage and Section 1115 demonstration coverage will not be considered government-sponsored MEC. § 1.5000A-2(b)(2)(v)-(vi) (eff. Nov. 26,

2014). However, the preamble reminded readers that HHS may, in coordination with the Secretary of the Treasury, designate certain medically needy or Section 1115 coverage as MEC under Section 5000A(f)(1)(E).

The proposed rules had excluded only "coverage authorized under section 1115(a)(2)", not coverage authorized under Section 1115(a)(1), from the definition of government-sponsored MEC. 79 Fed. Reg. at 4308. Section 1115(a)(1) authorizes states to waive Medicaid requirements found in Section 1902; Section 1115(a)(2) authorizes states to provide a federal match for services not otherwise matchable under Section 1903. The IRS proposed limiting the exclusion to Section 1115(a)(2) coverage because it believed that Section 1115(a)(1) coverage generally only "involve[s] waivers of Medicaid requirements" and "not change[s] [to] the basic requirement to provide comprehensive Medicaid coverage." 79 Fed. Reg. at 4305. In the final rule, the IRS reverses course, excluding all coverage provided pursuant to Section 1115(a) from the definition of MEC. The IRS made the change in response to comments pointing out that demonstrations authorized under Section 1115(a)(1) may also provide limited benefits.

Hardship Exemptions

To avoid the shared responsibility payment, individuals must have MEC or be exempt. Some individuals will be eligible for a hardship exemption, which are generally granted by an exchange. See 26 C.F.R. § 1.5000A-3(h).

The IRS' proposed rules listed several specific hardship exemptions that individuals can claim on their income tax returns without a certification from the exchange. The proposed rules also allowed individuals to claim any other hardship exemption on their tax returns without exchange certification if so authorized by HHS and the IRS. 79 Fed. Reg. at 4308.

The final rules remove the proposed provisions listing specific hardship exemptions that can be claimed on a tax return without a certification from the exchange, and instead simply provide that taxpayers may claim a hardship exemption without such certification to the extent authorized by HHS and the IRS in "guidance of general applicability." See § 1.5000A-3(h)(3). The IRS also issued "guidance of general applicability," concurrently with the final regulations, to "provide[] a comprehensive list of all hardship exemptions that may be claimed on a federal income tax return without obtaining a hardship exemption certification" from the exchange. These include hardship exemptions for:

- Individuals for whom the combined cost of employer-sponsored coverage for two or more family members is considered unaffordable. See 45 C.F.R. § 155.605(g)(5).

- Individuals with gross income below the tax return filing threshold. See id. § 155.605(g)(3).

- Individuals who obtained or were "in line" to obtain MEC during the 2014 open enrollment period.

- Individuals who applied and were found eligible for the Children's Health Insurance Program during the 2014 open enrollment, but had a gap in coverage prior to the effective date of the CHIP coverage.

- Individuals eligible for services through an Indian health care provider or an Indian Health Service. See id. § 155.605(g)(6).

- At least for 2014 federal income tax returns, individuals ineligible for Medicaid as a result of a state not expanding Medicaid under the ACA. See id. § 155.605(g)(4). It is not clear whether this will extend to tax years after 2014.[1] See IRS, Notice 2014-76.

Hardship exemptions not on this list can only be claimed if the individual obtains a certification from the exchange.

This list in Notice 2014-76 includes all the specific exemptions previously listed in the proposed rules as not requiring exchange certification. That is, the specific hardship exemptions listed in the proposed rules as claimable without exchange certification remain claimable without such certification under Notice 2014-76.

Special Rule for Pregnant Women Eligible for Medicaid MEC

As explained below, CMS recognizes pregnancy-based Medicaid as MEC when it includes full state plan benefits. In addition, optional CHIP coverage of targeted low-income pregnant women provides pregnant women with access to full CHIP coverage and is also MEC. As a result, "[w]ithout a special rule, an individual enrolled in a [QHP] before the pregnancy would lose eligibility for the premium tax credit subsidy for the coverage as a result of the pregnancy," and then likely need to re-enroll in the QHP after her eligibility for pregnancy-based Medicaid or CHIP ended.

To avoid this churn between plans, the IRS announced a "special rule" in Notice 2014-71, issued on Nov. 7, 2014: women enrolled in a QHP who become eligible for Medicaid or CHIP recognized as MEC because of a pregnancy are "treated as eligible for [MEC] under the Medicaid or CHIP coverage for purposes of the premium tax credit<u>only if</u> [they] enroll[] in the coverage." (Emphasis added.) If these pregnant women do not voluntarily elect to enroll in Medicaid or CHIP, they are not considered to have access to Medicaid/CHIP MEC and can therefore retain their subsidies for QHP coverage.

CMS' State Health Officials Letter #14-002

On Nov. 7, 2014, in anticipation of the IRS' final rulemaking described above, CMS issued State Health Officials (SHO) Letter #14-002 to clarify the extent to which CMS will recognize certain types of Medicaid coverage as MEC under the Secretary of HHS' authority to do so.

Section 1115 Coverage

SHO #14-002 provides guidance on when Section 1115 coverage, which is excluded from the IRS' definition of government-sponsored MEC, will constitute MEC under the Secretary of HHS' Section 5000A(f)(1)(E) authority to recognize such coverage. CMS explains that it will recognize Section 1115 coverage as MEC if it consists of either:

1. coverage that meets the alternative benefit plan requirements; or
2. coverage "that is not less in amount, duration or scope than," or is "substantially equivalent to," "the coverage provided to categorically needy individuals eligible under a mandatory eligibility group under the state plan." In making this determination, CMS will not consider the nursing facility benefit or other services not generally covered by QHPs.

CMS asserts that "[m]ost demonstration projects" either "clearly" meet these requirements to be recognized as MEC or do not. However, CMS acknowledges that "[a] subset of the demonstration projects offer a benefit package that neither clearly meets nor clearly falls short of the standard for recognition as MEC." For these demonstrations, CMS will work with states to evaluate the benefits and cost sharing to determine whether the coverage meets CMS' standards for MEC.

CMS also outlines its policy for "designated state health programs" (DSHP) that receive federal funding through a Section 1115 demonstration. CMS explains that "FFP authorized under section 1115 ... for a DSHP does not impact the MEC status of such state health programs, which will not be recognized as MEC unless the state has obtained such designation from the Secretary in accordance with the regulations at 45 C.F.R. § 156.604."

It is welcome news that CMS will recognize Section 1115 coverage as MEC if it provides similar benefits as the state plan or an alternative benefit plan. Otherwise, millions of enrollees already receiving robust coverage through a demonstration might have faced a choice between the shared responsibility payment and enrollment in a QHP.

However, CMS did not indicate it would grant a hardship exemption from the shared responsibility payment for individuals enrolled in a Section 1115 demonstration that does not constitute MEC. This means individuals enrolled in non-MEC Section 1115 coverage will need to enroll in some other health care coverage that meets the MEC requirements (e.g., a QHP) to avoid the shared responsibility payment, unless they qualify for an exemption.

Medically Needy Coverage

SHO #14-002 provides guidance on when medically needy coverage, which is also excluded from the IRS' definition of government-sponsored MEC, will be recognized as MEC under the secretary's Section 5000A(f)(1)(E) authority. CMS explains that it "will consider recognizing as MEC coverage provided to medically needy individuals by applying the two-prong review":

1. Is the coverage "comprehensive" (i.e., does it "consist[] of full Medicaid benefits which are not substantially less in amount, duration or scope than the benefits covered under the Medicaid state plan for categorically needy individuals eligible under a mandatory eligibility group")? In making this determination, CMS will not consider a nursing facility or other services not generally covered by QHPs.
2. Is the individual required to spend down to receive coverage? If so, even comprehensive medically needy coverage will not be considered MEC for the individual subject to the spend-down.

If CMS recognizes medically needy coverage in a state as MEC, it will "provide a letter announcing such designation to the state and make it available on the Medicaid.gov website."

CMS also announced that it will grant a hardship exemption from the shared responsibility payment for individuals receiving medically needy coverage not recognized as MEC. This means that individuals enrolled in non-MEC medically needy coverage can avoid the shared responsibility payment without enrolling in other health care coverage. However, individuals eligible for non-MEC medically needy coverage may still choose to enroll in a subsidized QHP, either in lieu of or in addition to the medically

needy Medicaid coverage.

209(b) State Spend-Down

In most states, individuals eligible for the Supplemental Security Income program are also eligible for Medicaid. However,"209(b) states" impose requirements for aged, blind and disabled Medicaid eligibility that are stricter than those used in the SSI program. Federal law requires 209(b) to have a spend-down program, similar to a medically needy program, for individuals with income exceeding the 209(b) state's financial eligibility levels.

The IRS rules do not exclude coverage through a 209(b) state's spend-down process from the general rule that Medicaid coverage is government-sponsored MEC. As a result, CMS explains, this coverage constitutes MEC, even for individuals who must spend-down to access such coverage. This seems to create an inequitable result: individuals who must spend-down each month to receive benefits as part of a state's medically needy coverage program do not have MEC, but individuals who must spend-down each month to receive benefits under a 209(b) state's spend-down program have MEC.

CMS also announced a policy that 209(b) spend-down coverage is MEC "only once the Medicaid agency has approved eligibility for such coverage." If no such eligibility determination has been made, the individual may receive subsidies to purchase a QHP, even if he or she might be eligible for Medicaid under the spend-down process. This policy will allow eligible individuals in 209(b) states to choose between receiving spend-down Medicaid coverage and receiving subsidized QHP coverage.

Medicaid Coverage for Low-Income Pregnant Women

Certain coverage for low-income pregnant women is also excluded from the IRS' definition of government-sponsored MEC. SHO #14-002 announces the secretary's determination that this pregnancy-based coverage nonetheless constitutes MEC if it includes full state plan Medicaid benefits or coverage "equivalent" to full state plan benefits. CMS expects states with pregnancy-related coverage that does not constitute MEC to inform pregnant enrollees about that fact. CMS will provide a hardship exemption for women enrolled in non-MEC pregnancy-based coverage, which means they will not need to enroll in a QHP or other MEC to avoid the shared responsibility payment (though they have the option to do so).

CMS' policy on pregnancy-based coverage is also welcome news. Not counting full state plan coverage delivered to women eligible through certain pregnancy-related groups as MEC would have created an absurd result: the Medicaid state plan package would have been MEC when provided to most people (everyone except pregnant women), but not others (women eligible through a pregnancy-related group).

CHIP Coverage for Pregnant Women

States have the option to provide prenatal, delivery and postpartum care to low-income uninsured pregnant women through their CHIP programs by defining "child" to include unborn children.

Although CHIP is considered MEC under the IRS regulations, CMS advises that because "CHIP coverage under the unborn child option is coverage for the unborn child," it is not MEC for the mother and therefore "does not result in the pregnant woman's ineligibility for an [advance payment tax credit] for enrollment in a QHP." This means that an otherwise uninsured low-income pregnant woman may have

the choice between CHIP coverage for the unborn child and subsidized QHP coverage for herself. However, as with non-MEC pregnancy-related Medicaid, CMS will grant a hardship exemption for pregnant women receiving CHIP through the unborn child option, which means they will not be required to enroll in a QHP to avoid the shared responsibility payment. If the state does not limit CHIP eligibility for unborn children to those whose pregnant mothers' lack other coverage, the mother may elect to enroll in both CHIP and a QHP. Although not discussed in SHO #14-002, if an individual is dually enrolled in CHIP and QHP, the QHP would be the first payor and the state would be the payor of last resort. The state would be required to pay any QHP cost sharing in excess of the CHIP limits and wrap any CHIP benefits not provided by the QHP.

Special Enrollment Period for Individuals Terminated from Non-MEC Medicaid

Special enrollment periods are the only way for individuals to enroll in a QHP outside of open enrollment. The loss of health care coverage is a "qualifying event" triggering a special enrollment period, but generally only when the coverage lost is MEC. See 45 C.F.R. § 155.420(d)(1)(i).

SHO #14-002 notes that CMS regulations provide that the loss of two types of non-MEC Medicaid coverage also constitutes a "qualifying event" triggering a special enrollment period: the loss of pregnancy-related coverage and the loss of medically needy coverage. As a result, when an individual loses either of those types of coverage, he or she becomes eligible to enroll in a QHP. See § 155.420(d)(1)(iii)-(iv).

However, just as CMS will not grant a hardship exemption to individuals enrolled in non-MEC Section 1115 coverage, its regulations do not provide that the loss of non-MEC Section 1115 coverage is a qualifying event triggering a special enrollment period and the SHO does not provide any guidance about the issue. To avoid lengthy gaps in coverage for individuals who lose eligibility for a Section 1115 demonstration that does not meet the MEC requirements, states may want to seek guidance from CMS about whether there is any way for these individuals to become eligible for a special enrollment period. For example, a special enrollment period is available if "[t]he qualified individual or enrollee, or his or her dependent, demonstrates to the Exchange, in accordance with guidelines issued by HHS, that the individual meets other<u>exceptional circumstances</u> as the Exchange may provide." § 155.420(d)(9) (emphasis added); cf. CCIIO, CMS, Special Enrollment Periods and Hardship Exemptions for Persons Meeting Certain Criteria (May 2, 2014) (available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/SEP-and-hardship-FAQ-5-1-2014.pdf) (authorizing an "exceptional circumstances" qualifying event for AmeriCorps volunteers leaving service because the AmeriCorps' health plan is not MEC).

Summary: Implications of the Rules and Guidance

Below is a summary of the most important takeaways from the rulemaking and agency guidance with respect to Medicaid MEC and hardship exemptions:

Section 1115 Coverage

- Coverage under a Section 1115 demonstration will not be considered MEC unless it meets one of the tests announced by CMS (described above).

- Individuals enrolled in a non-MEC Section 1115 demonstration are not necessarily eligible for a hardship exemption.

- It is unclear whether individuals disenrolled from non-MEC Section 1115 coverage will be able to access a special enrollment period to enroll in a QHP.

Medically Needy Coverage

- Medically needy coverage will not be considered MEC unless it meets CMS' two-pronged test (described above). But a 209(b) state's spend-down coverage will generally constitute MEC.

- Individuals enrolled in non-MEC medically needy coverage are eligible for a hardship exemption.

- Individuals enrolled in non-MEC medically needy coverage are eligible for a special enrollment period to purchase a QHP if they are disenrolled from the medically needy coverage.

Pregnancy-Based Coverage

- Pregnancy-based Medicaid will only be recognized as MEC if it covers the state plan benefits that the state provides to other categorically needy populations.

- Women receiving CHIP because their unborn children are covered under CHIP are not considered to have MEC.

- Women enrolled in non-MEC pregnancy-based Medicaid or CHIP are eligible for a hardship exemption.

- Women enrolled in non-MEC pregnancy-based Medicaid are eligible for a special enrollment period to purchase a QHP if they are disenrolled from Medicaid.

- Women receiving subsidized QHP coverage who become eligible for Medicaid MEC or CHIP MEC because of a pregnancy are treated as eligible for MEC under Medicaid or CHIP for purposes of the premium tax credit only if they actually enroll in Medicaid or CHIP. If they do not elect to enroll in Medicaid or CHIP, they can retain their subsidized QHP coverage.

Claiming hardship exemptions without exchange certification. IRS Notice 2014-76 lists a number of hardship exemptions that can be claimed on a tax return without certification from the exchange. All other hardship exemptions must be certified by the exchange to be claimed on a tax return.

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[1] See also CCIIO, CMS, Guidance on Hardship Exemptions for Persons Meeting Certain Criteria.