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What Happens When the Public Health Emergency Ends?

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WHAT HAPPENS WHEN THE PUBLIC HEALTH EMERGENCY ENDS?

I. Background: What is the Public Health Emergency?

A. On January 31, 2020, The Public Health Service Act was used to declare a Public Health Emergency (PHE) in the entire United States. This gave the federal government, effective January 27, 2020, the flexibility to support Medicare and Medicaid beneficiaries through the Center for Medicare & Medicare Services (“CMS”).¹ The emergency powers helped the government put Covid vaccines on a fast track, loosen health care regulations, and greatly expand the amount of Medicaid funds going to states. The PHE may be renewed for ninety days by the Secretary of Health and Human Services. The last renewal was January 11, 2023.

As a result of the continued consequences of the Coronavirus Disease 2019 (COVID-19) pandemic, on this date and after consultation with public health officials as necessary, I, Xavier Becerra, Secretary of Health and Human Services, pursuant to the authority vested in me under section 319 of the Public Health Service Act, do hereby renew, effective January 11, 2023, the January 31, 2020, determination by former Secretary Alex M. Azar II, that he previously renewed on April 21, 2020, July 23, 2020, October 2, 2020, and January 7, 2021, and that I renewed on April 15, 2021, July 19, 2021, October 15, 2021, January 14, 2022, April 12, 2022, July 15, 2022, and October 13, 2022, that a public health emergency exists and has existed since January 27, 2020, nationwide.

Ending these protections abruptly would mean that states could start removing people from their Medicaid rolls, likely leaving some uninsured.

B. Texas continues to be under its own state disaster declaration issued by Governor Abbott in 2020.² In Texas the disaster declaration gives Abbott’s executive orders — normally nonbinding — the weight of law.³ Using these declarations the Governor has the ability to suspend any regulatory statute or state agency rule without legislative approval, transfer money between agencies without legislative oversight, commandeer private property and use state and local government resources, evacuate populations and

¹ More detailed and historical information is available at CMS.gov, specifically <https://www.cms.gov/About-CMS/Agency-Information/Emergency/EPRO/Current-Emergencies/Current-Emergencies-page>

² <https://gov.texas.gov/news/post/governor-abbott-renews-covid-19-disaster-declaration-in-december-2022>

³ <https://www.texastribune.org/2022/12/08/texas-public-health-disaster-covid-greg-abbott/>

restrict the movement of the people, among other things. These could also impact the unwinding process.

II. When will the PHE end?

A. As of this writing the answer is predictable, but not inevitable. The Biden administration has committed to giving the states and health care community sixty days notice before ending the PHE. Since the current was renewed on January 11, 2023, the current extension ends on April 11, 2023. The sixty days notice could conceivably shorten this, but that seems unlikely in the opinion of this author. In addition, the Consolidated Appropriations Act of 2023 extends certain elements of the PHE another 151 days after the extensions cease.⁴

III. What Happens when the PHE ends? Federal Provisions⁵

A. The expiration of the continuous coverage requirement authorized by the Family First Coronavirus Response Act (FFCRA) presents the single largest health coverage transition event since the first open enrollment period of the Affordable Care Act. When the continuous coverage requirement expires, states will have up to 12 months to return to normal eligibility and enrollment operations.⁶

B. CMS is creating a roadmap for the end of the COVID-19 Public Health Emergency:⁷

“While the PHE is in place CMS is committed to using the CMS Pandemic Plan as a guidebook for evaluating all existing flexibilities while developing a comprehensive long-term approach for the health care system based on recovery and resiliency. Given the importance of this effort, CMS’ strategic plan includes a cross-cutting initiative to address the current health emergency and ensure that CMS has a roadmap to support a health care system that is more resilient and better prepared to adapt to future disasters and emergencies that we know we can expect.”

⁴ AMA Article: 6 smart steps to keep people covered when PHE’s declared over. Dec 16, 2022

⁵ A more accurate question might be “What *could* happen when it ends?” The materials reviewed for this presentation are full of ambiguity and suggestions.

⁶ Links to Unwinding Guidance to the states can be found in a report by CMS at Medicaid.gov <https://www.medicaid.gov/resources-for-states/coronavirus-disease-2019-covid-19/unwinding-and-returning-regular-operations-after-covid-19/index.html>

⁷ <https://www.cms.gov/blog/creating-roadmap-end-covid-19-public-health-emergency>

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