

# Public Health Emergency (PHE) Unwinding Guidance for Elder and Special Needs Law Attorneys

## What is the Public Health Emergency (PHE) and why does it have to come to an end?

The Secretary of Health and Human Services (HHS) declared a Public Health Emergency (PHE) on January 31, 2020. Several laws were subsequently passed by Congress, such as the Families First Coronavirus Response Act (FFCRA), granting broad powers, flexibilities, and appropriations to federal and state agencies related to public health, including Medicaid continuous enrollment.

In December 2022, Congress signaled that the PHE would end in 2023 through the funding levels authorized in the end-of-year Consolidated Appropriations Act, (“the omnibus”), and in January the President confirmed that the Administration would indeed lift the PHE on May 11, 2023. Ultimately, ending the PHE is a decision that rests with the Secretary of Health and Human Services.

We are now entering a period of “unwinding” as we approach various end dates for flexibilities and other components of the PHE. An important example is that Medicaid continuous coverage ends March 31, 2023, per the omnibus (so states can begin redeterminations as early as April 1, 2023), and federal matches phase out throughout the year with new maintenance of effort requirements.

## When is the PHE ending, and what does that mean for the older adults and people with disabilities we serve?

Officially, the Public Health Emergency is ending on May 11, 2023. However, the 2023 Budget Resolution allows states to resume Medicaid redeterminations and possible terminations as of April 1, 2023, without losing the enhanced Federal Medical Assistance Percentages (FMAP) that had been provided on the condition that terminations were suspended during

the PHE. What this means is that a lot of our clients have been continuing to get Medicaid without the usual efforts required. During that time, changes in residence, income, resources, clinical status, insurance status, and transactional history may have taken place that now need to be reviewed so that coverage is not lost if the enrollee remains eligible when the enrollee is redetermined at or after April 1, 2023.

## What do I do if my client has been getting benefits from the PHE but will now be income and/or resource ineligible?

As NAELA members, you are the leading experts on Medicaid eligibility in your state. You must use what you know to help your clients take the actions they need to maintain Medicaid eligibility or resume it at the earliest possible opportunity if that is a desired and viable objective. Spending down, repaying the state, ABLE accounts, and Special Needs Trusts are possible examples of solutions to resource ineligibility.

For states that use Qualified Income Trusts/Miller Trusts, changes in income during the PHE may require the establishment of a QIT/Miller Trust where one was not needed before. For clients who were on Affordable Care Act (ACA) Medicaid but now have other creditable coverage such as Medicare, consider applications for other Medicaid programs that serve individuals who are dually eligible. Pay attention to possible [waivers](#) that your state has obtained in conjunction with the PHE unwinding.

## My client has new health insurance and has been getting benefits from the PHE under the Affordable Care Act. How will this affect them?

As the PHE ends, current recipients of Medicaid benefits through the Affordable Care Act will face redeterminations of their financial eligibility and may



lose their current coverage if no longer eligible. For individuals who have obtained new health insurance either through an employer or the ACA Marketplace, it is very important to make sure that premiums are paid to maintain the new insurance coverage.

While it is possible to have both private insurance and ACA Medicaid coverage, the private insurance will serve as the primary insurance. In addition, if the individual is able to maintain Medicaid eligibility after the end of the PHE and remains on Medicaid, the individual will lose eligibility for tax credits or other savings on the Marketplace plan.

### **What do I do if my client is wrongfully terminated from coverage after the PHE ends?**

States must complete a new redetermination after the continuous coverage requirement ends prior to terminating any individual's Medicaid coverage. This includes all individuals who were determined ineligible for Medicaid during the PHE because they failed to respond to a request for information but still received continuous coverage.

Once the State determines an individual is not eligible in any category or on any basis, coverage must be maintained until the individual receives advance written notice that states the legal and factual reason for the termination and includes information on the individual's hearing rights. The State must provide an opportunity for a fair hearing to any applicant or beneficiary whose claim for medical assistance is denied or not acted upon with reasonable promptness, as well as provide the opportunity to reapply for alternative Medicaid coverage in the event existing coverage is to be terminated.

### **My client was terminated based on the interim rule on the PHE unwinding. Can they join a class action suit? What other remedies may be available?**

Earlier this year, a class of individuals whose Medicare and Medicaid benefits were terminated in various states under interim federal guidance was certified under

the case of [Carr v. Becerra](#). If you know someone who was terminated from Medicaid during the PHE, contact Justice In Aging, Disability Rights Connecticut, or the National Health Law Program. Fair hearing/appeal rights also attach to all terminations, and if there was no appropriate notice of the adverse action, those fair hearing rights may be extended.

### **My state is going after benefits that were paid during the PHE. How can I protect my client?**

As a condition of receipt of the temporary FMAP increase, states are required to maintain continuous coverage for Medicaid beneficiaries through the end of the PHE. Medicaid beneficiaries who failed to continue to meet Medicaid eligibility criteria cannot be terminated until a full redetermination after the end of the PHE. States also are not permitted to seek recoupment for benefits paid to those individuals who failed to meet eligibility criteria during the PHE.

If your state seeks recoupment for benefits paid during the PHE, the state's actions should be challenged as a violation of both FFCRA and the advance notice requirements for adverse actions. Note that recoupment for benefits paid during the PHE is distinguishable from the imposition of a transfer penalty period for transfers of assets during the PHE.

### **If my client will no longer qualify for services, how can I help them during the transition?**

As NAELA members, it is incumbent on us to proactively notify our existing clients regarding the impending end of the PHE and affiliated protections. Steps should be taken to help prepare clients for the transition, including the possibility they will no longer qualify for services.

First and foremost, tell your clients to make sure that Medicaid has current and correct contact information for them, and to check their mailbox for letters from Medicaid. Second, advise your clients to cooperate with the renewal process and promptly respond to requests for information, even if they antic-



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ipate they will no longer qualify for services. Doing so will extend the duration of their benefits through the final advance notice of termination. Third, do not overlook other Medicaid programs for which your client may be eligible, e.g., income-sensitive only with no (or increased) resource limits. Fourth, assist your clients in evaluating coverage options under the Affordable Care Act and their affordability, as well as through employer-sponsored group health coverage if your client became employed during the PHE and is eligible for such coverage.

Prospective clients will also come to you to assist them when they receive a renewal notice from Medicaid or notice regarding termination of coverage, so be prepared to promptly assist them in the same manner to avoid or minimize gaps in coverage.

When working with your state agency, note that [SHO#23-002 \(1/27/2023\)](#) specifically reiterates the requirements of 42 CFR 435.916 and 435.1200(e). If your state agency determines an individual is ineligible for a Medicaid program, the state agency must then assess the individual's eligibility for other Innovation Accelerator Programs—IAPs including CHIP, BHP, and qualified health plans (QHPs) offered through a Health Insurance Marketplace® with advance payments of premium tax credits or cost-sharing reductions—and transfer the individual's account to the appropriate program.

States with Marketplaces that use the federal eligibility and enrollment platform are reminded that they should only transfer accounts to the Marketplace for individuals about whom the state has sufficient information to determine Medicaid and CHIP ineligibility, again prioritizing the importance of updating contact information. States with Marketplaces that use the federal eligibility and enrollment platform should not transfer accounts to the Marketplace for individuals whose Medicaid or CHIP coverage is terminated for procedural reasons, such as failure to return a renewal form or other requested information needed to determine eligibility, again prioritizing the need to participate in the renewal process. States that operate State-based Marketplaces using their own platform may, at state option, transfer accounts to the

Marketplace for a determination of advance payments of premium tax credits or cost-sharing reductions for individuals whose coverage has been terminated from Medicaid or CHIP for procedural reasons. State agencies must also reconsider eligibility without requiring a new application for MAGI-based beneficiaries, where coverage is terminated for failure to return their renewal forms and limited other circumstances (states are given the option to apply this policy to non-MAGI beneficiaries as well). CMS's [Temporary Special Enrollment Period FAQ](#) could also provide useful guidance.

Last, keep an eye out for future updates affiliated with the proposed Federal Register rule to streamline determination, enrollment, and renewal processes (document [87 FR 54760](#)).

### **What is national NAELA doing to help prepare lawyers like me for the PHE unwinding?**

NAELA has convened a task force focused on creating materials and programming to keep members informed and connected, and to share what they are learning about this emergent situation in real-time with their peers and colleagues.

NAELA held a [town hall webinar](#) in March 2023 titled “PHE Unwinding Without Losing Your Mind: Tips & Town Hall” with resources and information shared by task force members. This follows a previous [webinar](#) with information on the PHE held in March 2022.

On May 4, 2023, at 1:30 pm ET, the Elder Law and Disability Planning Update at the NAELA National Conference will include updates on the PHE unwinding.

NAELA continues its collaborative efforts with coalition partners like the Disability and Aging Collaborative (DAC), the Leadership Council of Aging Organizations (LCAO), and the Consortium for Constituents with Disabilities (CCD); will continue to monitor federal rulemaking/agency activity and legislation related to Medicaid, PHE, and other topics; and will continue to share anything we learn with members.



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## Other resources

### Important waiver-related dates:

- Medicaid Maintenance of Eligibility (MOE)/Continuous coverage: March 31, 2023
- Section 1135 waiver (Medicaid and Medicare): End of the PHE (May 11, 2023)
- Disaster relief SPA: End of the PHE (May 11, 2023)
- Section 6008 Medicaid protections (other than MOE): Month after the PHE ends (June 11, 2023)
- Emergency 1115 waiver: 60 days after the end of the PHE (early July 2023)
- Appendix K: 6 months after the end of the PHE (November 11, 2023)

### Centers for Medicare & Medicaid Services:

- [CMS Waivers, Flexibilities, and the Transition Forward from the COVID-19 Public Health Emergency](#)
- [Unwinding and Returning to Regular Operations after COVID-19](#)
- [Medicaid and CHIP Continuous Enrollment Unwinding: A Communications Toolkit](#) (available in English, Spanish, Chinese, Hindi, Korean, Tagalog, Vietnamese)
- [Anticipated 2023 State Timelines for Initiating Unwinding-Related Renewals As of February 24, 2023](#)

### Georgetown University Center for Children and Families:

- [50-State Unwinding Tracker](#)
- [Tips and Best Practices for Unwinding the Medicaid Continuous Coverage Protection](#)

### Justice in Aging:

- [Unwinding Medicaid Continuous Coverage Protections: Implications and Advocacy for Individuals Dually Eligible for Medicare and Medicaid](#)
- [Fact Sheet: Unwinding Medicaid Continuous Coverage Protections—What Advocates for Older Adults Need to Know](#)

- [The Nationwide Preliminary Injunction in Carr v. Becerra and What It Means for Medicaid Enrollees in Your State](#)

### Kaiser Family Foundation:

- [Medicaid and CHIP Eligibility, Enrollment, and Renewal Policies as States Prepare for the Unwinding of the Pandemic-Era Continuous Enrollment Provision](#)

### National Health Law Program:

- [Unwinding Medicaid Continuous Coverage: Checklist for Redeterminations](#)

### State Health and Value Strategies:

- [Resources for States on Unwinding the Medicaid Continuous Coverage Requirement](#)

## Acknowledgements

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