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By: Peter J. Strauss, Esq.
Email: pstrauss@pierrolaw.com


Harsh New Restrictions on NY Medicaid Home Care - Postponed


Favorable regulations to continue until January 1, 2022

For many years, New York didn't have a look-back period for Medicaid home care. That's right, an applicant could give away all his or her assets and then apply for Medicaid community-based care the following month, without penalty.

But that is now changing, with new rules passed in New York that will limit eligibility and access for new applicants. Because of a new statute in New York passed in 2020, for transfers made on or after October 1, 2020, there is a new 30-month "lookback" period for Medicaid home care. Applicants who transferred assets during this new lookback period will face a period of ineligibility when Medicaid will not be available to them. However,

There is good news in this bleak scenario: the "start time" when new rules take effect has been pushed back. Because of the Covid 19 pandemic, the implementation of this new law had been delayed several times because of provisions in the federal Families First Cares and there was uncertainty about when it would be implemented. We have now learned that the new start date for enforcement of the new law is *January 1, 2022* As a result, there is a period of time (now through December 31, 2021) where Medicaid planning can be done,

1-866-951-7526 

info@pierrolaw.com 

www.pierrolaw.com 

and applicants can begin service without application of the new penalty or other stringent rules. ¹

This window of opportunity benefits people that have chronic conditions and need home care benefits and do the appropriate planning and apply before the new implementation date takes effect there are no penalties or delays. For those applicants, the old rules still apply, such that if asset transfers are made (such as gifts to family members or transfers into an irrevocable trust (a Medicaid Asset Protection Trust), the gifts won't cause a waiting period, *but only if the application for Medicaid is filed prior to the new implementation date*.

If that is not done and an application is filed in January of 2022, there will be 14 month look back period. The look back period will increase every succeeding month by one month, up to 30 months. Fortunately, existing exceptions to the transfer of asset penalty rules, such as gifts to a spouse or a person who is disabled or blind, have not been repealed.

What If the Planning Cannot Be Done Before December 31, 2021?

Suppose a person can't effectuate a plan immediately or doesn't need Medicaid benefits yet but expects needing home care benefits at some point in the future? In that scenario, the new asset transfer and other rules will apply, but planning should be done as soon as possible so that any waiting periods can be limited by applying certain techniques we have developed. We recommend that an experienced elder law attorney be consulted, and a workable plan be achieved as soon as possible. Questions of the patient's capacity will arise and necessary advance directives, such as powers of attorney, trusts and health care proxies need to be put in place.

Other Restrictive New Rules

In addition to the new rules regarding asset transfers, New York State is also changing the medical criteria that an applicant must meet in order to receive Medicaid assistance at home. Applicants will now have to prove they need assistance with three Activities of Daily Living (ADLs) instead of two. ADLs include:

1. Bathing
2. Personal Hygiene
3. Dressing (upper body/lower body)
4. Walking/locomotion

¹ Clients should be on alert because it is not out of the question that the state may once again postpone the implementation date, depending on the pandemic circumstances.

5. Transfer to toilet
6. Toilet use/incontinence care
7. Bed mobility – Turning & Positioning
8. Eating

There is an exception for applicants who suffer from Alzheimer’s disease or another dementia diagnosis who require supervision with more than one ADL.

In addition, Medicaid will now require that an independent physician approved by the New York State Department of Health certify that the applicant needs care at home, rather than the applicant’s current medical provider. This will create new challenges as applicants will be forced to arrange an assessment with an unknown medical provider who is unfamiliar with their long-term health, past history and family situation.

There is also a new assessment tool that is being implemented to help Medicaid providers.

Also troubling is a new “safety requirement” that appears to state that even if, with care, a person is deemed to be unsafe at home, Medicaid will not provide home care benefits. If this safety requirement is driven by budgetary concerns rather than real concern for patient safety, it may lead to even more difficulty in obtaining benefits. And, if the patient cannot get home care benefits but does not meet requirements for skilled nursing home placement, she or he may be at great risk.

Nursing Home Care

With regard to nursing home care, New York state will continue to impose a five-year lookback period to qualify for nursing home Medicaid benefits, the new rules mentioned above only apply to Medicaid benefits provided in the home.

Medicaid, unlike Medicare, is a means-based program, which means that only persons of limited means are eligible (“countable” assets of only \$15,900). With careful planning, however, assets can be protected. There are some assets that are not “countable” in determining eligibility in New York that have not been eliminated.

Consequences of the New Rules

While clarification from New York State Department of Health is necessary on some of the details involved with application of the new 30-month lookback rule and the other new requirements, it is clear these changes will be catastrophic for many seniors.

Without planning, instead of getting needed care in the comfort of home, seniors who have failed to plan will be ineligible to receive benefits and will need to privately pay during a penalty period, thus being forced to spend down life savings before Medicaid is available.

“Spousal Refusal” Is Still an Option

A bright spot here is that the planning opportunity known as Spousal Refusal is still available. This means that a Medicaid applicant’s eligibility for Medicaid (in home or nursing home) cannot consider the assets or income of his or her “community” spouse, who often still lives in the home, in determining the applicant’s financial eligibility.

Where Does This Leave a Medically Needy Person Who Can Remain at Home?

There are going to be hardships. But persons who act before the new law becomes effective will get the benefit of the current favorable rules to qualify for Medicaid before the new, harsher rules take effect. A person may qualify for Medicaid home care benefits if he or she had completed long term care or Medicaid planning before October 1, 2020 or can act before the new rules takes effect on January 1, 2022. If planning is not accomplished prior to that date, planning can still be done but there is likely to be some “period of ineligibility” unless one of the exceptions to the transfer of asset rules apply.

Please visit the web site for Pierro, Connor & Strauss, LLC, www.pierrolaw.com, for webinars that the firm has presented on the new Medicaid law as well as caregiving, estate planning and tax issues.

This memorandum was prepared March 1, 2021, based on the most recent information provided by the New York State Department of Health.

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