New England Building
503 South Kansas Avenue
Topeka, KS 66603-3404

Kansas
Department for Aging
and Disability Services

Phone: (785) 296-4986
Fax: (785) 296-0256
kdads.wwwmail@ks.gov
www.kdads.ks.gov

Laura Howard, Secretary

Laura Kelly, Governor

September 23, 2020

Re: HCBS Retainer Payments (No. 41 on General Issues Resolution Log)

What are retainer payments?

Retainer payments allow a provider to continue to bill for individuals who are enrolled in a program or who are receiving a HCBS service as specified in his/her person-centered service plan when circumstances prevent the individual from receiving the service. Therefore, retainer payment amounts are tied to amounts reflective of the services that would have been provided to a waiver participant should the pandemic not have occurred. Self-quarantining activities during the COVID-19 pandemic, which may lead to the temporary closure of a program, are circumstances that may prevent individuals from receiving their HCBS services.

States can request authority to make retainer payments to certain habilitation and personal care providers to maintain capacity during the emergency. CMS has permitted states to make retainer payments since 2000, in *Olmstead* guidance, to equalize treatment of personal assistance services and nursing facility services, for which bed hold payments are permitted. In the *Olmstead* decision, the U.S. Supreme Court found that states have community integration obligations under the Americans with Disabilities Act. The 2000 guidance applies to personal assistance services provided through HCBS waivers, and CMS's Section 1115 COVID-19 demonstration waiver template allows states to request authority for retainer payments to habilitation and personal care providers such as adult day health centers that have closed due to social distancing orders and could go out of business and be unavailable to provide services after the pandemic.

As of June 2020, over 37 states have authorized retainer payments through Appendix K or alternative authorities.

Why are retainer payments needed?

Many Medicaid providers are under fiscal strain as a result of the pandemic. Some providers are dealing with both increased operational costs related COVID-19, as well as substantial losses in revenue as utilization has declined for non-urgent care or closures were necessary to address the pandemic. Further, Medicaid providers may have been more fiscally vulnerable prior to the pandemic**.** Home and Community-Based Services providers that rely on Medicaid funding, may operate with lower operating margins and are vulnerable to fiscal stress from the pandemic.

With strained capacity prior to the Public Health Emergency due to workforce shortages and a variety of additional factors, It is critical that provider networks are maintained to the greatest extent possible during this period of stress on the system. Preserving provider networks during this difficult time will help to ensure necessary services are available throughout the Public Health Emergency and beyond.

What are the CMS rules/guardrails?

Retainer payments are limited to providers of habilitation and personal care services. States interested in utilizing retainer payments for multiple (up to three) episodes of up to 30 days per beneficiary will be expected to include or add the following guardrails in their Appendix K submissions:

- Limit retainer payments to a reasonable amount and ensure their recoupment if other resources, once available, are used for the same purpose. In terms of setting a reasonable amount, a retainer payment cannot exceed the payment for the relevant service; the state may specify that a retainer payment will be made at a percentage of the current rate (e.g., 75 percent).

- Collect an attestation from the provider acknowledging that retainer payments will be subject to recoupment if inappropriate billing or duplicate payments for services occurred (or in periods of disaster, duplicate uses of available funding streams), as identified in a state or federal audit or any other authorized third-party review. Note that “duplicate uses of available funding streams” means using more than one funding stream for the same purpose.
- Require an attestation from the provider that it will not lay off staff, and will maintain wages at existing levels.
- Require an attestation from the provider that they had not received funding from any other sources, including but not limited to unemployment benefits and Small Business Administration loans, that would exceed their revenue for the period prior to the PHE, or that the retainer payments at the level provided by the state would not result in their revenue exceeding that of the period prior to the PHE. If a provider had not already received revenues in excess of the pre-PHE level but receipt of the retainer payment in addition to those prior sources of funding results in the provider exceeding the pre-PHE level, any retainer payment amounts in excess would be recouped. If a provider had already received revenues in excess of the pre-PHE level, retainer payments are not available.

Status of HCBS Retainer Payments in Kansas

Medicaid HCBS providers of I/DD Day Services, I/DD Residential Services, and Personal Care Services (multiple waivers) that experienced business interruption (i.e. closure) due to COVID-19, may qualify for retainer payments in Kansas. Payments will be made at 75% of the Medicaid rate for services that would have been provided according to an individual’s person-centered service plan as of March 1, 2020. The process for issuing retainer payments will adhere to the CMS guidance provided in the above section.

Currently, MCOs are pulling data to compare provider revenues for the period prior to the Public Health Emergency to the period of March 2020 through June 2020. This data will be used to compile a list of eligible providers which will be reviewed with KDADS prior to initiating the payment process. Once a list of eligible providers is determined, the MCOs will contact said providers and each will be asked to complete an attestation form to be submitted to each MCO. The MCOs will then work with the providers to complete the payment process.