

Sept 10, 2024

On September 6, 2024, the Governor signed [Chapter 197 of the Acts of 2024](#), an Act to improve quality and oversight of long-term care. The 66-page Act includes many important provisions affecting nursing homes, Assisted Living Residences, Continuing Care Retirement Communities, and related topics including significant changes to MassHealth policies regarding estate recovery and pooled trusts.

How did the Long-Term Care (LTC) Act affect MassHealth estate recovery?

Sections 20 and 21 of the LTC Act amend section 31 of chapter 118E of General Laws by adding two new subsection (b ½) and (e) that limit the scope of MassHealth estate recovery. Prior to the Act, Massachusetts was among only 23 states pursuing reimbursement for more costs than the federally required minimum. The relevant federal law is found at 42 U.S.C. § 1396p(b).

Limiting estate recovery to only what is federally mandated

State law clarifies the federal law limitation on recovery while people were under age 55 and “permanently institutionalized.”

Section 31(b)(1) of the Act requires estate recovery for MassHealth costs for people of any age who were inpatients of a nursing home or other medical facility. The clarification in Section 31 (b ½) (i) cross-references to the federal statute which only permits recovery for individuals under age 55 if they were inpatients long enough to be subject to an assessment for the costs of their care and are not expected to return home. This is a state law clarification of the governing federal law.

For estates of people who died after Aug.1, 2024, state law limits recovery to nursing home services, home and community-based services and related services while people were age 55 or older.

Currently, for people who died after April 1, 1995, MassHealth is required by the old Section 31(b)(3) to recover the costs of all MassHealth services after a MassHealth beneficiary turns age 55.¹ The new law amends 31(b) to apply to individuals who died on or before July 31, 2024. For individuals who died on or after August 1, 2024, 31 (b ½) (ii) authorizes recovery for only the costs of nursing home care, home and community-based services and related hospital and prescription drug services for people aged 55 or older where recovery is mandated by federal law.

The meaning of home and community-based services and related services

In 2001, CMS issued guidance on the meaning of “home and community-based services” (HCBS) and “related hospital and prescription drug services” for purposes of estate recovery. Under the 2001 CMS guidance, HCBS was largely limited to HCBS waivers. The HCBS waivers all require that someone is clinically eligible for nursing home care and apply the nursing home spousal impoverishment financial eligibility rules. CMS defined “related services” as hospital and prescription drug costs incurred while someone is a nursing home resident or enrolled in a HCBS program. However, since 2001 Congress has

¹ Federal law prohibits recovery for the costs of the Medicare Savings Program, and this prohibition is in the MassHealth Estate Recovery regulations.

enacted some new state plan optional services called Home and Community-Based state plan services that we understand CMS also considers to be subject to mandatory recovery as HCBS.

MassHealth operates nine HCBS waiver programs that are subject to mandatory estate recovery for adults aged 55 or older on MassHealth Standard. The largest is the so-called Frail Elder Waiver (FEW) with enrollment capped at about 19,000. There are also HCBS waivers for people with developmental disabilities, brain injuries, and people transitioning from nursing homes. MassHealth has not adopted any of the new HCBS state plan services, therefore community-based long-term state plan services in Massachusetts should not be subject to mandatory estate recovery. However, because CMS has issued no written guidance since 2001, the scope of mandatory recovery for HCBS will not be entirely clear until MassHealth amends its state plan and publishes written criteria to implement the new law.

The new law also limits estate recovery for MassHealth payments to managed care plans.

Restricting estate recovery to only what is federally mandated will also prevent recovery of the full amount of MassHealth's fixed monthly payments to managed care plans. According to the 2001 CMS guidance, states are only authorized to recover the portion of the fixed managed care payment that represents recoverable services. Recoverable services are limited to the federally mandated services of nursing home, HCBS and related services to the extent they are covered by the managed care plan.

Exempting CommonHealth and PCA services from estate recovery

Section 21 of the LTC Act creates a new subsection 31(e) in chapter 118E that directs MassHealth to exempt the costs of CommonHealth coverage and the costs of PCA services from estate recovery provided the state obtains whatever federal approval is needed.

CommonHealth

CommonHealth is a program that began as a state-funded program but has long been included as one of the programs eligible for federal Medicaid reimbursement under the MassHealth 1115 demonstration. Except for long-term nursing home care, CommonHealth provides comprehensive benefits to individual with disabilities who do not financially qualify for MassHealth Standard. It uses a sliding scale premium charge rather than an upper income limit.

The changes to CommonHealth will likely require an amendment to the 1115 demonstration and will take effect at a future date to be determined by the terms of the federal approval.

Personal Care Attendant (PCA) Services

The PCA benefit is a state plan benefits available in MassHealth Standard and CommonHealth that pays for a personal care attendant to assist persons with disabilities who need help with at least two activities of daily living. If CMS determines that the PCA benefit is subject to mandatory recovery as a HCBS, then it too may require an 1115 amendment to be exempted. However, we know CMS approved California's state plan amendment limiting recovery to only what is federally mandated, and CMS did not require California to recover for personal care attendant services. If the same is true in Massachusetts, the costs of PCA services will be exempt from recovery by virtue of 31(b½).

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