SF182 TA

Estate Recovery Background

Estate recovery allows local agencies to make claims against the estates of certain deceased Medical Assistance enrollees, or the estate of the deceased enrollee's surviving spouse, to recover the amount Medical Assistance paid for certain health care services. In 2016, the legislature passed changes to the Medical Assistance estate recovery program that limited the Department of Human Services (DHS) to only the estate recovery activities required by the federal government.

- Currently, estate recovery applies to enrollees who are age 55 or older and receive Medical Assistance long-term services and supports (LTSS) or who, at any age, permanently reside in a medical institution and receive Medical Assistance services.
    - In either of these situations, a local agency must claim against an estate after the enrollee's death to recover what Medical Assistance paid for LTSS.
- If the member was permanently institutionalized, then the claim must attempt to recover the costs of all Medical Assistance services, not just LTSS, that the member received during the period of institutionalization.
- The federal government defines LTSS as:
    - Nursing home services
    - Home and community-based services, such as services through Alternative Care (AC), Elderly Waiver (EW), or the Brain Injury (BI), Community Alternative Care (CAC), Community Access for Disability Inclusion (CADI), or Developmental Disabilities (DD) waivers
    - Home care nursing
    - Home health aide services
    - Medical supplies and equipment
    - Personal care assistance (PCA)
    - Physical therapy, occupational therapy, and speech therapy when the service is provided by a home health agency
    - Hospital and prescription drug services received during the time the enrollee was provided nursing facility services or home and community-based services.
- DHS also pursues estate recovery on all General Assistance Medical Care (GAMC) services. GAMC was a public health care program that ended in 2011.

Federal law prohibits state Medicaid agencies, DHS in Minnesota, from collecting on these services until after an enrollee's death.

DHS does have a hardship exemption from estate recovery for any business that is run by the MA recipient's decedents, that makes up the majority of the child's income, when the child cannot afford to pay off the MA amount. This deals with situations where a child has taken over a small business, but the MA recipient never transferred ownership. Examples of this include small farms, mechanic shops, homes modified for home daycare, etc.

More information about estate recovery is available in the MHCP Estate Recovery and Liens handout (DHS-7273) and on the estate recovery page of the DHS website.

SF182 TA

The Estate Recovery Process

There are two primary methods for estate recovery:

- After a Medical Assistance recipient dies, DHS learns of the death via a data match with the Minnesota Department of Health. If the individual is 55 or older, the system checks for LTSS claims. If the system finds LTSS claims, it automatically produces a claims payment history of recoverable LTSS claims. This claims history is sent to the county that has financial responsibility for the case. The county then sends a letter to the family, informing the family that the MA recipient's estate is subject to a claim and works with the family on recovery, which may involve DHS placing a lien on certain real property, the county sending an affidavit of collection, or making a claim in probate.
- The family of a Medical Assistance recipient, or a spouse of a pre-deceased Medical Assistance recipient, opens a probate court case. As part of that probate case, the person representative of the estate is required to send a notice to the Commissioner of Human Services. DHS enters this information into its system and the system determines whether or not there are recoverable LTSS claims. If there are recoverable LTSS claims, the estate and county of financial responsibility are both sent a letter stating that there are claims. When there are recoverable LTSS claims, the county files a claim in the probate case in court. If there are no recoverable LTSS claims, the personal representative and county where the court case is occurring both get sent a letter stating that there are no claims.

DHS does not place liens on the property of living Medical Assistance recipients, unless the person has moved permanently into a nursing facility.

What Information DHS Currently Has

For the group of enrollees who are impacted by this bill, DHS has the information that they were, or are, enrolled in Medical Assistance and claims data for any services paid for by MA. There is no flag or other such indicator on a person's record that indicates whether or not they would be subject to estate recovery after their death. Enrollees are able to request a claims history from DHS to see what claims MA has paid for them, but not all claims are subject to estate recovery. DHS is also able to create a history of recoverable claims for enrollees.

Additionally, this population became eligible for MA under the ACA expansion population. This population is not subject to an asset test. Unless we collect asset information, DHS would have no way of knowing who would have been eligible for MA in 2014, absent the adoption of the ACA expansion. DHS would have to go back and rework a person's eligibility for all MA recipients age 52+, which would involve gathering information about their assets, disability status, and income from that time period.

Without any specific legislation directing the agency to reinstate the previous estate recovery process, DHS is not able to collect on the estate of individuals in this group, unless they remain enrolled in MA, or become MA eligible again, and receive LTSS at age 55 or older.

SF182 TA

Data Retention Concerns

SF 182 creates an obligation to destroy all medical assistance welfare data collected or created during a specified timeframe (1/1/2014 to 6/30/2016) for certain individuals. A duty to destroy under Minnesota law could create jeopardy under federal law, which has specific retention requirements.

The state remains liable for repayment of federal funds.

If the federal government audited Minnesota on any Medicaid program during the period of which data was destroyed, and no claims or payment history existed to support paid claims, it could result in the full recovery of the federal share. This could result in millions in recoveries by the federal government.

Some examples of federal retention requirements

- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) administrative simplification rules require a covered entity to retain required documentation for six (6) years from the date of its creation or the date when it last was in effect, whichever is later. The HIPAA requirements are available at 45 CFR 164.316(b)(2). This retention requirement is generally interpreted to include (but is not limited to) all parts of the designated record set.
- The Centers for Medicare & Medicaid Services (CMS) requires records of providers submitting cost reports to be retained in their original or legally reproduced form for a period of at least 5 years after the closure of the cost report. This requirement is available at 42 CFR 482.24[b][1].
- CMS requires Medicare managed care program providers to retain records for 10 years. This requirement is available at 42 CFR 422.504 [d][2][iii].
    - While this is a Medicare requirement and would not apply to the Medicaid data held by the Medicare Advantage MCOs, we do not see how it would be possible to destroy Medicaid data without also destroying Medicare data because a services that might have been Medicare sometimes becomes paid by Medicaid, and Medicare copayments are a Medicaid benefit.
- Under 42 CFR 438.3(u), managed care organizations (MCOs) must retain data for 11 years (the current year plus 10 years back). This includes all claims data, as well as many other data types.
- Some insurers and other third party payers require that health plan enrollees' medical records be kept for a certain time period.
- New CMS interoperability regulations (CMS-9115 and CMS-9123) require that affected payers make available claims data to enrollees upon request dating back to January 1, 2016. This timeline overlaps with the timeline for data destruction in this bill.
- There are dozens of other federal retention periods that are summarized in Appendix A here: https://library.ahima.org/PB/RetentionDestruction#.YBBMUDhYauU

This bill will make responding to future work more difficult.

Deletion of this data will also risk the Department's ability to respond to tort cases. Claims, especially workers' compensation cases, can extend over 10 years and are not limited to long term services and supports.

This bill may also make program evaluation more difficult.

SF182 TA

Information about claims paid by Medical Assistance are also regularly used for program quality evaluation and required health care quality measurement. Data removal will limit how far back we could look at trends.

IT Considerations

We did discuss this information with our partners at MN.IT, and they had a few additional considerations regarding this bill as written:

- Our processes to check for duplicate claims requires us to keep some data on file in order for the process to accurately identify claims which need to be denied.
- There is a potential cascading effect of modifying or deleting this data, as claims information is often shared with other parts of DHS, such as the Surveillance & Integrity Review Section (SIRS), and MDH. This will take significant staff time and resources.
- A possible workaround could be allowing individuals in this group to make a request that their data be destroyed after any legally required retention period. However, there would still be significant time and resources required to identify where all of the data lives for each individual, each time a request is made, in order to undertake this process.

Potential Unintended Consequences for Counties

Counties have both paper and electronic filing systems that are independent from MMIS and MAXIS with eligibility and case data. Counties would need to be involved in any data destruction plans. Additionally, there are situations in which counties can assess overpayments to enrollees. Overpayments occur when an enrollee receives more Minnesota Health Care Programs (MHCP) benefits than they were entitled to as a result of fraud, theft, abuse or error on the part of the enrollee. It is possible that the deletion of this data may impact their abilities to complete these investigations and follow through on recoupment.

Questions from Our 1/26 Conversation

Could the bill include a future effective date past the retention lookback period?

Adding a future effective date does not address the burden of data mining that the agency would have to undertake in order to comply with the language in the bill.

Is there any way to de-identify the data for this group?

42 CFR § 431.17 prescribes the kinds of records a Medicaid agency must maintain and the retention period. As it relates to the content of the records, a State plan must provide that the Medicaid agency will maintain or supervise the maintenance of the records necessary for the proper and efficient operation of the plan. The records must include -

(1) Individual records on each applicant and beneficiary that contain information on -
    (i) Date of application;
    (ii) Date of and basis for disposition;
    (iii) Facts essential to determination of initial and continuing eligibility;
    (iv) Provision of medical assistance;

SF182 TA

(v) Basis for discontinuing assistance;
(vi) The disposition of income and eligibility verification information received under §§ 435.940 through 435.960 of this subchapter; and
(2) Statistical, fiscal, and other records necessary for reporting and accountability as required by the Secretary.

Based on the information we are required to keep under this regulation, we don't believe that we can de-identify the data and remain in compliance.