

State Flexibility Requests

Q: What is the difference between a “flexibility” and a “waiver”?

A: “flexibility” is either a sub-regulatory policy or procedure or a policy or procedure that can be amended under the terms of the implementing statute or regulation and that, in either case, CMS can amend at will without reprogramming its systems. A waiver or a modification is generally thought of as a waiver or modification of a statutory requirement of the Social Security Act (Act) that may be waived or modified under the authority of § 1135 of the Act.

THA requests the following state flexibilities from the Texas Department of Health & Human Services:

1. Suspend all hospital licensing rules related to bed capacity, so that hospitals may accept patients in greater numbers than dictated by their licensed bed capacity. This should not require action from the Governor.
 - In the event that a hospital receives an influx of patients or designates a single location to treat COVID-19 patients, this would allow the hospital to utilize more rooms than permitted by its license.
2. Suspend all necessary state statutes and rules to allow health care providers employed by a hospital and licensed and in good standing in another state to practice in Texas.
 - In the event of an outbreak in Texas, this would expedite bringing in new health care providers to assist.
3. Suspend all hospital transfer regulations and requirements, except for the requirements to have Memoranda of Transfer and that transfers be doctor-to-doctor. Allow hospitals to rapidly discharge, transfer, or receive patients, provided that reasonable measures are in place to protect the health and safety of the patients. See Tex. Health & Safety Code § 241.027 and 25 Tex. Admin. Code §§ 133.44 and 133.61. This requires the Governor’s permission.
 - This would permit hospitals to transfer patients to appropriate alternate care facilities more quickly and with less paperwork in order to send patients to appropriate care settings to prevent the spread of infection.
4. Suspend 25 Tex. Admin. Code § 133.41(j), which requires verbal orders to be dated, timed, and authenticated within 96 hours by the prescriber or another practitioner who is responsible for the care of the patient. A related federal condition of participation requires verbal orders to comply with state law. See 42 C.F.R. § 482.24.
 - In the event of an influx of patients, this would allow physicians to see more patients in a shorter period of time.
5. Temporarily suspend the discharge planning requirements and designated caregiver requirements under 25 Tex. Admin. Code § 133.50 to facilitate expedited discharge.
 - Texas law requires hospitals to designate a caregiver for receipt of aftercare instructions, unless the patient declines. If a patient declines, the hospital must note it in the medical record. Suspending this rule would speed up the discharge process to make room for more acute patients due to COVID-19.

6. Temporarily suspend routine inspections and on-site investigations of hospitals, except for surveys related to COVID-19 and initial surveys necessary for facilities to open or add space. See Tex. Health & Safety Code § 241.051.
 - This will ensure that HHSC does not put surveyors at unnecessary risk of infection and ensure that hospitals can focus on infection prevention and control.
7. Waive 30-day spell-of-illness limitation in STAR PLUS Program and Medicaid Fee-For-Service, so that patients who require long periods of hospitalization due to COVID-19
 - This will ensure that STAR PLUS and FFS Medicaid beneficiaries still can access their benefits without being discharged.
8. Temporarily suspend provisions requiring medical care to be provided in a specific location. This requires a waiver by the Governor of Health and Safety Code § 241.023 and 25 Tex. Admin. Code §§ 133.41(e) and 133.163(f).
 - This waiver will allow a medical director to relocate medical supplies and diagnostic tools to a safe site for the testing and treatment of COVID-19 retroactively.
9. Temporarily waive the portion of 25 Tex. Admin. Code § 133.21(a)(4) requiring hospitals to comply with §133.41(e) that states “licensed hospital locations, including multiple-location sites, shall have an emergency suite that complies with §133.161(a)(1)(A),”
 - This would allow a multi-campus hospital to designate a single physical location for treatment of COVID-19 patients without receiving other patients in its emergency department.
10. Temporarily suspend 25 Tex. Admin. Code § 133.41(o) to allow flexible nurse staffing in temporary patient care units.
 - This would allow hospitals to stand up temporary care units that would otherwise not meet staffing requirements in order to care for COVID-19 patients.
11. Temporarily suspend 25 Tex. Admin. Code § 133.41(l) as applied to acute care hospitals outside of a licensed psychiatric unit to facilitate and expedite the delivery of medical care.
 - This would promote the efficient delivery of care by suspending cumbersome paperwork that would impede the delivery of both medical and mental health services.