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# Telehealth Coverage Expansions and Enforcement Waivers During the COVID-19 Pandemic

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On March 6, President Trump signed into law the Coronavirus Preparedness and Response Supplemental Appropriations Act (the Act). The Act includes a provision allowing the Secretary of the Department of Health and Human Services (HHS) to waive certain Medicare payment requirements for telehealth services during the public health emergency. On March 17, HHS's Centers for Medicare & Medicaid Services (CMS) unveiled key telehealth coverage expansions that will significantly broaden Medicare beneficiaries' access to telehealth services in response to the COVID-19 pandemic. The CMS telehealth service expansions include:

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- **Origination site:** Medicare requires that beneficiaries be located in certain types of originating sites at the time the telehealth encounter occurs, such as a physician's office, hospital, rural health clinic or skilled nursing facility. Under the waiver, Medicare will allow coverage for telehealth services furnished to beneficiaries in any health care facility and in their home.

- **Geography:** Medicare covers telehealth services only for beneficiaries presenting from an originating site located in either a rural health professional shortage area (HPSA) or in a county not classified as a metropolitan statistical area (MSA). Under the waiver, these geographic restrictions have been removed to allow coverage for telehealth services furnished to beneficiaries in all areas of the country.

- **Patient status (new vs. established):** To the extent the Act requires that the beneficiary have an established relationship with a particular provider before receiving telehealth services, CMS announced that it will not conduct chart audits to verify that a prior relationship existed for claims submitted during the public health emergency.

- **Technology:** Medicare only covers telehealth services when furnished using technology meeting the definition of an "interactive telecommunications system," which excludes telephones. As part of the waiver, patients will be able to access their doctors using a wider range of communication tools, including telephones that have audio and video capabilities (*i.e.*, smartphones).

For physicians and other professionals unfamiliar with telehealth reimbursement, Medicare telehealth services are typically billed using the same evaluation and management (E/M) CPT codes for regular office or other outpatient visits (*i.e.*, 99201-99215). When billing these codes, providers are instructed to utilize Place of Service Code "02" to indicate the services was rendered via telehealth. The Medicare reimbursement amounts for telehealth visits are equal to those amounts reimbursed for in-person visits. The Medicare telehealth coverage expansions outlined above are effective for services furnished March 6, 2020 through the duration of the public health emergency.

In addition to the telehealth coverage expansions by CMS, concurrent HHS agency announcements were made by the Office of Inspector General (OIG) and the Office of Civil Rights (OCR) regarding certain enforcement discretions to be exercised by the agencies in connection with telehealth services during the public health emergency.

## OIG Enforcement Discretion

Generally, routine reductions or waivers of cost-sharing amounts (*e.g.*, coinsurance and deductibles) owed by Medicare or Medicaid beneficiaries potentially implicate federal fraud and abuse laws, including the Anti-Kickback Statute and the Civil Monetary Penalty Law prohibition on beneficiary inducements. In response to the COVID-19 pandemic, the OIG stated it will not subject physicians and other practitioners to OIG administrative sanctions (*e.g.*, federal program exclusion) for reducing or waiving cost-sharing obligations owed by beneficiaries for telehealth services. This enforcement discretion will only apply to telehealth services furnished (1) in compliance with the then-applicable coverage and payment rules and (2) during the public health emergency.

## HIPAA Enforcement Discretion and Waivers

OCR announced (available at: https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html) that it will not impose HIPAA penalties for noncompliance in connection with the good faith provision of telehealth during the public health emergency. For providers wanting to use audio or video communication technology to provide telehealth services to patients during the public health emergency, OCR stated that these providers may use any nonpublic-facing remote communication products that are available to communicate with patients. The exercise of discretion applies to telehealth services provided for any reason, not just the diagnosis and treatment of COVID-19 and includes a failure to have a business associate agreement in place with a technology vendor as required under HIPAA.

OCR specified certain examples of popular video chat applications that providers may utilize during the public health emergency, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype. Conversely, Facebook Live, Twitch and TikTok are examples of video chat applications that should not be used in the provision of telehealth services as these applications are public-facing and introduce privacy risks. Providers intending to use the acceptable nonpublic-facing applications are encouraged to notify their patients that these third-party applications potentially introduce privacy risks. In addition, providers should enable all available encryption and privacy modes when using these applications.

HHS has also provided limited waivers of certain HIPAA Privacy Rule regulations (available at: https://www.pepperlaw.com/publications/hhs-waives-hipaa-sanctions-to-facilitate-suppression-of-coronavirus-2020-03-19/).

## Licensure Restrictions

Licensure requirements restrict who may administer telehealth services to patients in any particular state. These state laws may impose restrictions with respect to certain services, such as treatment of substance abuse or the administering of prescriptions. These restrictions are still applicable and must be followed even in this emergency situation unless the relevant government authority has announced otherwise.

To help remove these barriers and facilitate greater access to health care services, HHS issued an 1135 waiver of the requirement that "physicians or other health care professionals hold licenses in the state in which they provide services if they have an equivalent license from another state." States have also begun loosening restrictions.[1] For example, California has waived license requirements for any out-of-state medical personnel that come to California to provide health care services in an effort to assist in preparation for, respond to, mitigate the effects of, and recover from COVID-19.[2] State waivers have been limited but may be further relaxed as state governments explore additional ways to ensure health care services are delivered to those in need.

Licensure issues are layered and complex. These issues will likely require cooperation from multiple states as well as the federal government to achieve full portability of patient information seamlessly across state lines. The federal waiver must be carefully considered in the larger context of applicable state licensure requirements.

## Endnotes

1 See New York Executive Order No. 202, March 7, 2020, declaring a state of emergency and permitting unlicensed individuals, that are trained and deemed adequate by New York's Commissioner of Heath, to collect test swabs from individuals suspect of being infected (https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york).

2 California Proclamation of a State of Emergency, March 4, 2020 (available at: https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf).