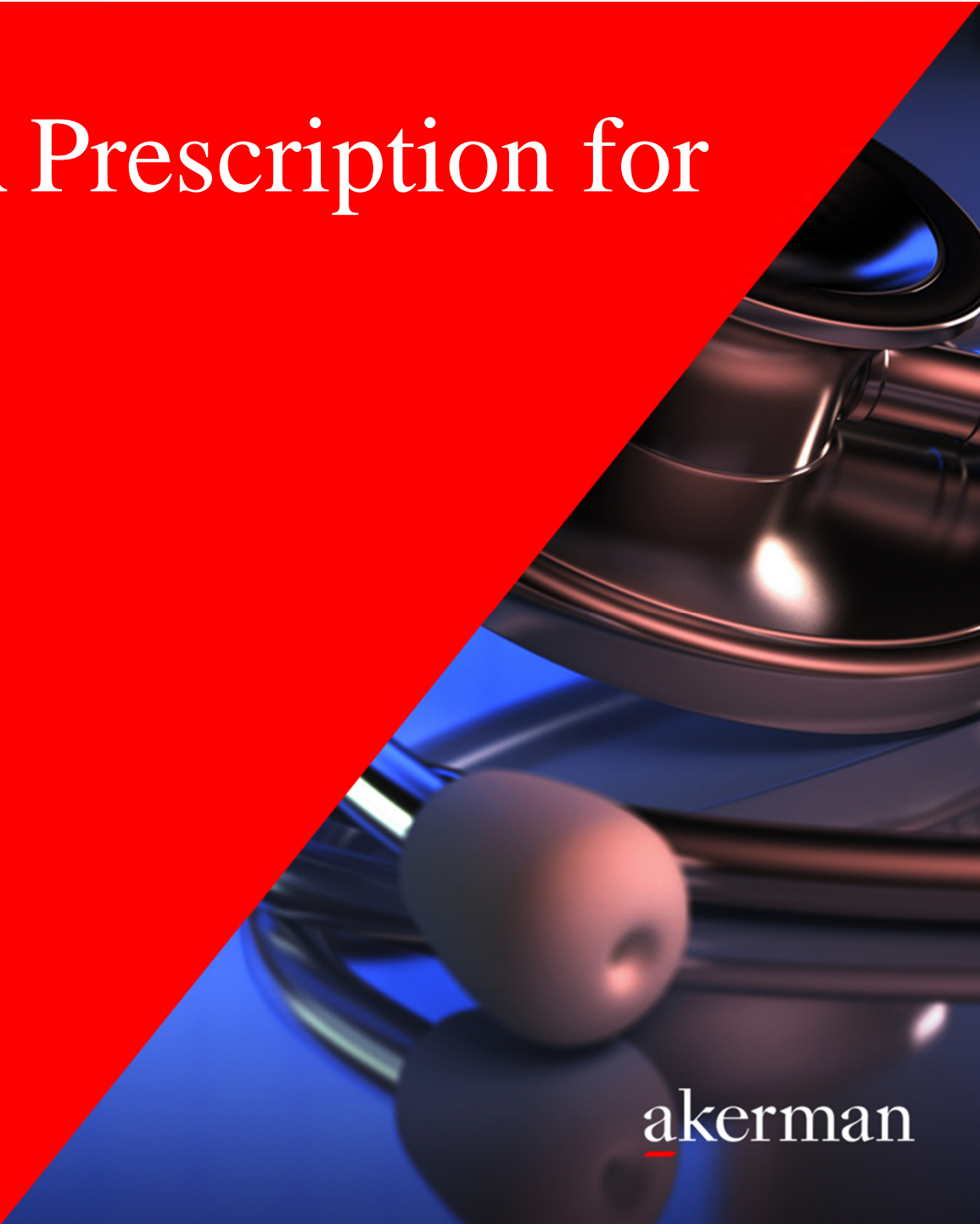


Telehealth: A Prescription for COVID-19

Friday, April 3, 2020



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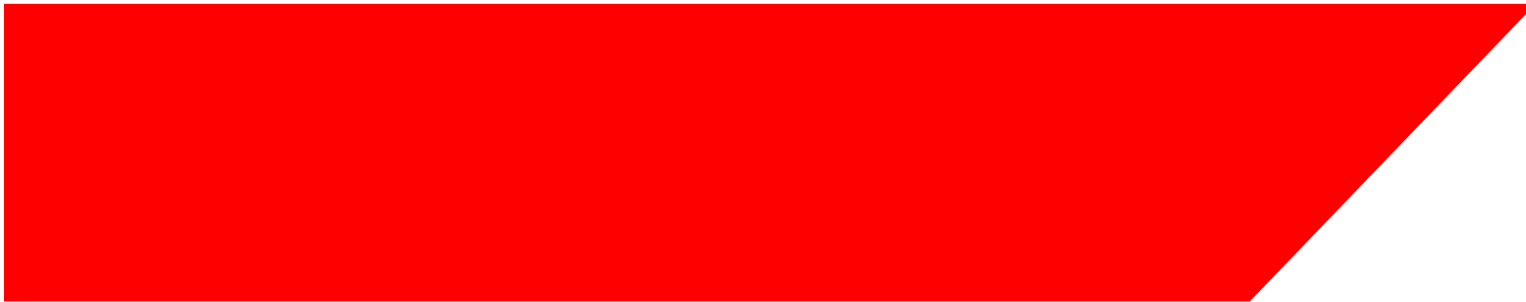
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Telehealth: Federal Changes



Agencies Involved

- Centers for Medicare & Medicaid Services (CMS)
- U.S. Department of Health & Human Services (HHS)
- Office of Inspector General (OIG)
- Drug Enforcement Agency (DEA)
- Internal Revenue Service (IRS)
- Federal Trade Commission (FTC)
- Federal Communications Commission (FCC)
- Food & Drug Administration (FDA)
- Office for Civil Rights (OCR)
- Substance Abuse and Mental Health Services Administration (SAMHSA)
- Office of National Coordinator (ONC)
- Department of Homeland Security (DHS)

CMS - Medicare

Coronavirus Preparedness and Response Supplemental Appropriations Act

- Starting March 6, 2020
 - All Medicare beneficiaries may receive telemedicine services
 - Medicare will provide payment for telehealth services provided in any healthcare facility, home, physician office, skilled nursing facility, and hospital
 - Applies to individuals who received Medicare services from the physician or other qualified provider (or physician or practitioner in the same practice), within prior 3 years from the date of the telehealth services
 - May be provided by phone as long as the phone has audio and video capabilities that allow for two-way, real-time interactive communication

CMS – Medicare (*cont.*)

Coronavirus Preparedness and Response Supplemental Appropriations Act

- Falls into categories of:
 - Telehealth visits: Synchronous audio-visual visits between a patient and clinician for evaluation and management
 - Online digital visits: Digital visits or brief check-in services furnished using communication technology that are employed to evaluate whether an office visit is warranted via patient portal or smart phone
 - Remote patient monitoring: Collecting and interpreting physiologic data digitally stored and/or transmitted by the patient/caregiver to the physician/qualified health professional



CMS – Medicare (*cont.*)

TYPE OF SERVICE	WHAT IS THE SERVICE?	HCPCS/CPT CODE	Patient Relationship with Provider
MEDICARE TELEHEALTH VISITS	A visit with a provider that uses telecommunication systems between a provider and a patient.	<p>Common telehealth services include:</p> <ul style="list-style-type: none"> • 99201-99215 (Office or other outpatient visits) • G0425-G0427 (Telehealth consultations, emergency department or initial inpatient) • G0406-G0408 (Follow-up inpatient telehealth consultations furnished to beneficiaries in hospitals or SNFs) <p>For a complete list: https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes </p>	<p>For new* or established patients.</p> <p>*To the extent the 1135 waiver requires an established relationship, HHS will not conduct audits to ensure that such a prior relationship existed for claims submitted during this public health emergency</p>
VIRTUAL CHECK-IN	A brief (5-10 minutes) check in with your practitioner via telephone or other telecommunications device to decide whether an office visit or other service is needed. A remote evaluation of recorded video and/or images submitted by an established patient.	<ul style="list-style-type: none"> • HCPCS code G2012 • HCPCS code G2010 	For established patients.
E-VISITS	A communication between a patient and their provider through an online patient portal.	<ul style="list-style-type: none"> • 99421 • 99422 • 99423 • G2061 • G2062 • G2063 	For established patients.

<https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>

CMS – Medicare (*cont.*)

CARES Act (3/27/20)

- Safe harbors high deductible health plans that do not have a deductible for telehealth and remote care services
- Allows distant site payment for telehealth by FQHCs and RHCs to patients in their homes
- Allows hospice “face-to-face” visits and recertification via telehealth
- Allows home health services via telehealth



CMS – Medicare (*cont.*)

Waivers and New Rules (3/30/20)

- Generally
 - CMS issued temporary blanket waiver of certain laws, rules and regulations
 - SNFs, CAHs, DME, Psych Units, Inpatient Rehab Units, LTCHs, HHAs, Enrollment Appeals, Medicaid & CHIP
 - <https://www.cms.gov/files/document/covid19-emergency-declaration-health-care-providers-fact-sheet.pdf>

CMS – Medicare (*cont.*)

Waivers and New Rules (3/30/20)

- Telehealth waivers
 - CMS will now allow for 80+ additional services to be furnished via telehealth
 - Can evaluate beneficiaries who have audio phones only
 - Can bill for telehealth at same rate as in-person visits
 - No longer requires established patient relationship
 - Allows hospitals to transfer telehealth equipment
 - EDs can use telehealth services to triage patients
 - Remote patient-monitoring services allowed for patients who have only one disease
 - Physicians can supervise their clinical staff virtually when appropriate

CMS – Medicare (*cont.*)

Waivers and New Rules (3/30/20)

- Stark waivers
 - Effective March 1, 2020 and available without CMS notification
 - Waivers apply to 18 provisions under Stark
 - Illustrative examples:
 - To accommodate patient surges, hospital rents office space or equipment from a physician practice at below FMV or no charge
 - A hospital uses medical office space and supplies of independent physicians to treat patients of non-COVID-19 patients to isolate patients away from those suspected of COVID-19 exposure.

CMS – Medicare (*cont.*)

Waivers and New Rules (3/30/20)

- A hospital lends money to an exclusive provider physician practice to offset lost income from cancellation of elective surgeries in order to take care of COVID-19 needs
- A compensation arrangement that commences before written documentation but satisfies all other elements of an exception
- *An entity provides free telehealth equipment to a physician practice to facilitate telehealth visits for patients who are observing social distancing or in isolation or quarantine*
- <https://www.cms.gov/files/document/covid-19-blanket-waivers-section-1877g.pdf>
- <https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Spotlight>

CMS – Medicare (*cont.*)

Other Resources

- Toolkits
 - Explore general concept of telehealth, choosing telemedicine vendors, initiating a telemedicine program, monitoring patients remotely, and developing documentation tools, and outlining temporary virtual services that could be used to treat patients during this specific period of time



CMS – Medicare (*cont.*)

Other Resources

- March 20, 2020 Telehealth Toolkits for GPs and ESRD Providers
 - <https://www.cms.gov/files/document/general-telemedicine-toolkit.pdf>
 - <https://www.cms.gov/files/document/esrd-provider-telehealth-telemedicine-toolkit.pdf>
 - <https://www.cms.gov/files/document/covid-19-nursing-home-telehealth-toolkit.pdf>
- March 27, 2020 Telehealth & Telemedicine Toolkit for Long Term Care Nursing Home Facilities
- CMS: MLN Booklet – Telehealth Services (3/20/2020)
 - <https://go.cms.gov/mln-telehealth-services-icn901705>

CMS – Medicare (*cont.*)

Things on the Horizon

- While Medicare covers telehealth services that include audio-video communications, even with liberalizations, it requires video component
- 44 million Medicare recipients don't have access to those services at home, Sen. Edward J. Markey (D-Mass.) letter to Seema Verma
- Also impacts ability to counseling services, Dr. Jared Skillings, American Psychological Association
- Mental health becomes an acute issue in pandemic

CMS - Medicaid

- States are not required to submit a State plan amendment to pay for telehealth if the services are furnished in the same manner as when furnished face-to-face.
- States may pay a qualified physician or other licensed practitioner serving as the distant site billing provider, and the payment may include costs for the time and resources facilitating care at the originating site.
- States may pay, separately or as part of the fee-for-service rate, for appropriate ancillary costs, including technical support transmission charges and equipment necessary for the delivery of telehealth services, subject to an approved State plan payment methodology.
- <https://www.medicaid.gov/medicaid/benefits/downloads/medicaid-telehealth-services.pdf>
- <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/cib040220.pdf>

HHS

- Waiver or Modification of Requirements Under Section 1135 of the Social Security Act
- Effective March 15, 2020 at 6p.m., retroactive to March 1, 2020
- Effective for 60 days (subject to extension for successive 60-day periods) or for the duration of the COVID-19 national emergency (if earlier), except HIPAA waivers below
- Includes waivers of:
 - Licensure requirements for physicians and other health care professionals to practice in a State if they have an equivalent license from another State and not barred from practice in State

HHS (*cont.*)

- March 24, 2020 Letter to Governors
<https://cdn2.hubspot.net/hubfs/5096139/Governor%20Letter%20from%20Azar,%20March%2024%20-%DE-Identified.pdf>
- March 24, 2020 Guidance to States (to Extend Capacity of Healthcare Workforce)
<https://cdn2.hubspot.net/hubfs/5096139/Enclosure%20in%20March%2024%20Letter%20deom%20Secretary%20Azar%20to%20Governors%20with%20Recommendations%20for%20Maximizing%20Healthcare%20Workforce%20for%20COVID-19.pdf>

OIG

- March 17, 2020 Policy Statement notifying physicians and practitioners that they will not be subject to administrative sanctions for reducing or waiving any cost-sharing obligations that Federal health care program beneficiaries would owe for telehealth services.
- Goal: Permit health care providers the flexibility to offer services via telehealth at reduced cost without fear that doing so could be perceived as a beneficiary inducement
- Requirements:
 - the waiver or reduction only applies to telehealth services, which must be furnished consistent with the then-applicable (described above) coverage and payment rules; and
 - they must be furnished during the time period of the COVID-19 Declaration (i.e. after January 27, 2020 until lifted).

OIG (*cont.*)

- Physicians and other practitioners are not required to either reduce or waive cost-sharing obligations and that those offering telehealth services to federal healthcare program beneficiaries must abide by all other federal, state, and local statutes and regulations in effect.
- OIG Telehealth Factsheet: <https://go.usa.gov/xdtXT>

OIG *(cont.)*

- Attorney General Barr called on US Attorneys to stay aware of pandemic-driven fraud in a memo sent 3/16/2020
- US Attorneys' Offices on high alert for fraudulent efforts to capitalize on the fear of the virus, some setting up hotlines and educational campaigns
- Examples:
 - Selling shares in small companies that purport to have developed a product to help during the crisis
 - Fake cures
 - Online shops pretending to sell masks and other high- demand items

OIG *(cont.)*

- Examples:
 - Apps claiming to track the spread of disease but infect devices with malware
 - Phone scams purporting to need payment of a bill for virus treatment
 - Fake charities
 - Emailing phishing attempts purportedly from health authorities
- First case filed out of N.D.Ga. alleging 1.3M scheme to defraud U.S. v. Santos, case number 2:20-mj-9096 (D.N.J.)

DEA

- Exception to Controlled Substances Act (21 U.S.C. 829(e), in the event the Secretary of HHS declares a public health emergency
- Permits telehealth prescribing of controlled substances *without a prior in-person examination* under certain conditions:
 - The prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice
 - The telemedicine communication is conducted using an audio-visual, real-time, two-way interactive communication system
 - The practitioner is acting in accordance with applicable federal and state law
- <https://www.dea diversion.usdoj.gov/coronavirus.html>

IRS

- March 11, 2020 guidance allowing high-deductible plans to waive cost sharing for coronavirus-related testing and treatment (Notice 2020-15)
- CARES Act finalizes proposal to allow high-deductible health plans to waive cost sharing for telehealth services for enrollees with health savings accounts

FTC

- The Federal Trade Commission (FTC) protects consumers from unfair or deceptive acts or practices as well as false or misleading claims
- That priority is continuing in telehealth ventures during the COVID-19 pandemic
- Has co-published (with the FDA), consumer warnings about fake websites and phishing emails to promote bogus products
- Has co-issued (with the FDA) warning letters to seven sellers of unapproved and misbranded products
- <https://www.fcc.gov/covid-scams>

FCC

- CARES Act allows FCC to distribute \$200M in support of telehealth services
- FCC is using funds to launch new telemedicine program
- Not-for-profit and teaching hospitals, clinics and local health agencies are eligible
- Money can be spent on
 - Broadband connections for patients and at-home devices that assist with monitoring programs

FCC (*cont.*)

- Treatment of COVID-19, as well as prevention and preparation for the disease (e.g. treating other diseases that would free up resources in hospital facilities)
- Anticipate one week to take the package to review and then emergency approval from the Office of Management and Budget
- To be published in Federal Register prior to effective date

FCC (*cont.*)

- The FCC also proposed rules for a longer-term telehealth pilot program for broadband to patients with mental health issues, high-risk pregnancies and opioid addiction
 - Providers must place competitive bids on overlapping projects
 - This three-year, \$100 million pilot program will be funded through the Universal Service Fund and cannot be used to buy take-home devices.
- On March 20, 2020, the FCC issued a Declaratory Ruling allowing hospitals, health care providers, and government to communicate about the virus without violating the TCPA

FCC (*cont.*)

- Calls must be:
 - From a hospital, or be a health care provider, state or health official, or other government official as well as a person under the express direction of such an organization and acting on its behalf; and
 - Solely informational, made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk from the COVID-19 outbreak.
- Calls may not include contain advertising or telemarketing of services or be made to collect any debt

FDA

- On March 20, 2020, the FDA released a policy supporting remote patient monitoring:
 - Allows manufacturers of certain FDA-cleared non-invasive, vital sign-measuring devices to expand their use so that health care providers can use them to monitor patients remotely
 - The devices include those that measure body temperature, respiratory rate, heart rate and blood pressure
 - Policy is limited to the term of the crisis

FDA (*cont.*)

- <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/enforcement-policy-non-invasive-remote-monitoring-devices-used-support-patient-monitoring-during>
- Also issued alert to consumers about unauthorized COVID-19 test kits
- <https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-alerts-consumers-about-unauthorized-fraudulent-covid-19-test-kits>

Privacy-Related Agencies

- Office for Civil Rights (OCR) has issued:
 - Telehealth FAQs
 - Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency
 - [HHS Limited Waiver of HIPAA Sanctions and Penalties During a Nationwide public Health Emergency](#)

Privacy-Related Agencies (*cont.*)

- <https://www.hhs.gov/about/news/2020/03/20/ocr-issues-guidance-on-telehealth-remote-communications-following-its-notification-of-enforcement-discretion.html>
- <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>
- Substance Abuse and Mental Health Services Agency (SAMHSA) has issued:
 - <https://www.samhsa.gov/sites/default/files/covid-19-42-cfr-part-2-guidance-03192020.pdf>

Privacy-Related Agencies (*cont.*)

- Office of National Coordinator for Health Information Technology (ONC) has issued:
 - [Health IT.gov: Your Health Information Security](#)
 - <https://www.healthit.gov/coronavirus>
- Department of Homeland Security (DHS) has issued:
 - <https://www.us-cert.gov/ncas/current-activity/2020/03/06/defending-against-covid-19-cyber-scams>

Telehealth: State Changes



State Telehealth Updates

1. Licensure
2. Telehealth Practice Requirements
3. Teleprescribing
4. Medicaid Reimbursement
5. Private Payor Reimbursement



State Telehealth Updates - Licensure

- Majority of states have issued some form of waiver related to the licensure of certain healthcare professionals (e.g., MDs, NPs, PAs).



State Telehealth Updates – Licensure

(cont'd)

- Common Types of State Licensure Waivers:

1. Emergency/temporary licenses for out-of-state practitioners – temporary license to practice within the applicable state granted if the practitioner is duly licensed and in good standing in another state.
 - Expedited process
 - Submission of a form or application to licensure board typically required
 - E.g., GA – “emergency practice permits” issued to out-of-state licensed physicians, PAs, APRNs, and respiratory care professionals; TX – emergency license issued to out-of-state licensed physicians and fast-track licensing for out-of-state licensed nurses.

State Telehealth Updates – Licensure

(cont'd)

2. Expedited licensure process for retired or inactive practitioners – expedited licensure process to re-activate practitioners who retired or became inactive within the last X years.

- Expedited process
- Submission of a form or application
- E.g., TX – expedited re-issuance of license for retired physicians who have been retired for less than 4 years; IL – suspension of reinstatement requirements for lapsed or inactive licenses for less than 3 years.



State Telehealth Updates – Licensure

(cont'd)

3. Extension of licenses expired or set to expire and waiver of late fees.
 - Automatic extension of expired or expiring licenses
 - May be limited to licenses that have expired or are expiring within a certain time period
 - E.g., TX – medical licenses expired or set to expire between Feb. 28, 2020 and May 31, 2020 automatically extended until August 31, 2020; IL – automatically extending licenses through end of September.



State Telehealth Updates – Licensure

(cont'd)

4. Temporary licenses to graduating professional students.
 - Issuance of temporary licenses for graduating professionals
 - Submission of application or form
 - E.g., NC – fellows with resident training licenses may apply for a limited emergency license and nursing students who are eligible to graduate may apply for “graduate” temporary license.

State Telehealth Updates – Licensure

(cont'd)

- Relaxation of licensure requirements are state, profession, and duration specific so the following should be reviewed:
 - Whether license waiver or other licensure flexibility exists in the applicable state (e.g., Governor order; emergency regulation; professional board policy)
 - What types of professions are subject to the waiver (e.g., MDs, APRNs, PAs)
 - What information, application, or form must be submitted and to whom (e.g., emergency practice permit form)
 - Duration of temporary/emergency license (e.g., until X date or date state of emergency ends)
 - Scope of practice restrictions under emergency license (e.g., supervision requirements; volunteer services only; COVID-19 related care only)

State Telehealth Updates

Telehealth Practice Requirements



- Changes to existing telehealth practice requirements including, for example:
 1. Waiver of the requirement to establish a prior practitioner-patient relationship via an in-person exam (e.g., GA; KY);
 2. Expansion of the definition of “telehealth” or “telemedicine” to include audio-only communications consistent with Medicare telehealth updates (e.g., TX; IL);
 3. Relaxation of types of devices that may be used to deliver or receive telehealth services consistent with OCR updates (e.g., smart phone via non-public facing applications such as FaceTime)(e.g., IL);

State Telehealth Updates

Telehealth Practice Requirements (cont'd)

4. Expansion of qualified “originating sites” (e.g., NC – no restrictions on originating sites and can include any location where the patient is located); and
5. Expansion of qualified “distant sites” (e.g., TX – for purposes of Medicaid beneficiaries, a FQHC may be a distant site provider).

“Originating Site” = Patient’s location



“Distant Site” = Provider’s location



State Telehealth Updates

Teleprescribing

- Suspension of certain teleprescribing requirements including, for example:
 1. TX – licensed physician may provide chronic pain patient with prescription refill of chronic pain medication via telephone and refills for all other medications may be done via telemedicine if an existing physician-patient relationship exists;
 2. FL – physical examination requirement waived for renewal of prescriptions for controlled substances; and



State Telehealth Updates

Teleprescribing (*cont'd*)

3. GA – controlled substances may be prescribed for patients for whom the practitioner has not conducted an in-person medical evaluation if certain requirements are met, but does not address the 72-hour supply of non-controlled substances limitation that exists.

State Telehealth Updates

Medicaid Reimbursement

1. Expansion of “covered” services
 - E.g., FL – expansion to include behavioral health services (e.g., therapy services); therapy services (e.g., PT, OT, SLT); IL – behavioral health services; virtual check-ins via telephone;
2. Expansion of eligible devices to include audio-only (e.g., telephone);
3. Expansion of qualified “originating sites” & “distant sites”; and
4. Waiver of patient cost sharing amounts (e.g., TX; IL).

State Telehealth Updates

Private Payor Reimbursement

1. Payment parity – many states already had payment parity laws in place (e.g., IL requires in-network providers to cover medically necessary telehealth services presumably at the same rate as in-person services, but the Governor's Executive Order does not specify);
2. State insurance commissioner requiring waiver of patient cost sharing obligations and waiver or expediting prior authorization requirements/process for telehealth services from in-network providers (e.g., IL; GA; KY); and
3. Many private payors have issued updated policies regarding telehealth reimbursement (e.g., Anthem, Humana, and UnitedHealthcare waiving patient cost sharing obligations for telehealth).

State Telehealth Updates

Reminders



- These waivers are temporary
- Quickly changing so check for updates
- Same standard of care as in-person services applies
- Any telehealth practice delivery or other requirement not specifically waived or suspended still applies
- Privacy and security requirements of patient information still applies – don't forget state laws on sensitive health information!
- Documentation of telehealth services is key

Telehealth: Privacy



Privacy Considerations

- HIPAA
 - Notification of Enforcement Discretion for Telehealth Remote Communications
 - Limited Waiver Under Section 1135
 - General OCR Bulletin on HIPAA
- 42 CFR Part 2
 - SAMHSA Guidance
 - CARES Act
- Other Privacy Laws

HIPAA Notification of Enforcement Discretion for Telehealth

What is it?

- OCR will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Privacy, Security, and Breach Notification Rules against *health care providers* in connection with the “*good faith provision of telehealth*” using *non-public facing* audio or video communication products *during the COVID-19 nationwide public health emergency*
- Applies to telehealth provided for any reason

See <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>

HIPAA Notification of Enforcement Discretion for Telehealth

- Providers encouraged to use vendors who will sign a HIPAA business associate agreement
 - *but* OCR will not penalize providers who use less secure products to provide “the most timely and accessible care possible” during the public health emergency

HIPAA Notification of Enforcement Discretion for Telehealth

- Vendors who represent they will enter HIPAA BAAs:
 - Skype for Business/Microsoft Teams
 - Zoom for Healthcare
 - Google G Suite Hangouts Meet
 - Updox
 - VSee
 - Doxy.me

HIPAA Notification of Enforcement Discretion for Telehealth

What is good faith/bad faith in providing telehealth?

- Depends on facts and circumstances
- Examples of bad faith:
 - conduct in furtherance of a criminal act, e.g., fraud, identity theft, intentional invasion of privacy
 - sale of PHI or use of PHI for marketing
 - violating state licensing laws or professional ethical standards that result in disciplinary action
 - use of public-facing remote communication products

See <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html>

Non-Public Facing vs. Public-Facing

- Non-Public Facing

- Default allows only the intended parties to participate in conversation
- Apple FaceTime, Facebook Messenger video chat, Google Hangouts, Whatsapp video chat, or Skype
- Also includes some texting apps like Signal, Jabber, iMessage

- Public-Facing

- Designed to be open to the public or allow wide/indiscriminate access to the communication
- Examples per OCR: Facebook Live, Twitch, TikTok

Example

QUESTION:

If a covered healthcare provider uses telehealth services and ePHI is intercepted during transmission, will OCR impose a penalty on the provider for violating the HIPAA Security Rule?

ANSWER: No.

- OCR won't pursue otherwise applicable penalties for breaches resulting from the good faith provision of telehealth services during the COVID-19 nationwide public health emergency
- If a provider follows the terms of the Notice and any applicable OCR guidance, it will not face HIPAA penalties if it experiences a hack that exposes protected health information from a telehealth session.

NOTE: This response presumes the provider complies with the notice and reporting requirements of the Breach Notification Rule

Limitations of Notice

- Applies only during the COVID-19 nationwide public health emergency
- Applies only to health care providers
- Doesn't affect application of the HIPAA Rules to other areas of health care outside of telehealth during the emergency
 - Requires compliance with applicable OCR guidance, such as the Notification of Enforcement Discretion FAQs and any other FAQs on COVID-19 and HIPAA
- Encourages use of electronic communication products that include strong security features and whose vendors will sign BAAs
- OCR doesn't endorse use of or capabilities of any particular products
 - Providers should conduct their own diligence
 - Does vendor have publicly known potential privacy or security issues?
 - Example: Zoom proposed class action lawsuit

SAMHSA – Part 2 Records

COVID-19 Public Health Emergency Response and 42 CFR Part 2 Guidance

- Goal = ensure that substance use disorder treatment is uninterrupted
- The increased use of telehealth and telephonic consultations to patients means providers may not be able to obtain written patient consent to disclose substance use disorder records.
- A Part 2 program may disclose patient identifying information to medical personnel, without patient consent, to the extent necessary to meet a bona fide medical emergency where patient's prior informed consent can't be obtained(42 C.F.R. § 2.51)

SAMHSA – Part 2 Records (*cont'd*)

COVID-19 Public Health Emergency Response and 42 CFR Part 2 Guidance

- Information disclosed to the medical personnel treating such a medical emergency may be re-disclosed by such personnel for treatment purposes as needed
- Providers must document such disclosures pursuant to the medical emergency exception
- Providers must make their own determination of whether a bona fide medical emergency exists

See <https://www.samhsa.gov/sites/default/files/covid-19-42-cfr-part-2-guidance-03192020.pdf>

The CARES Act

42 CFR Part 2

- Revises the Public Health Services Act to align 42 CFR Part 2 more closely with HIPAA Privacy and Security Rules (Section 3221)
 - only require initial patient consent before a CE, BA or Part 2 program may use/disclose Part 2 records for TPO
 - adds protections for against use or disclosure of Part 2 records in legal and other proceedings
 - imposes new anti-discrimination protections

HIPAA

- Requires HHS to issue guidance regarding compliance with HIPAA during COVID-19 emergency (Section 3224)

State Privacy & Security Laws

Need to consider relevant state data privacy and security laws that have not been waived or relaxed during the COVID-19 emergency:

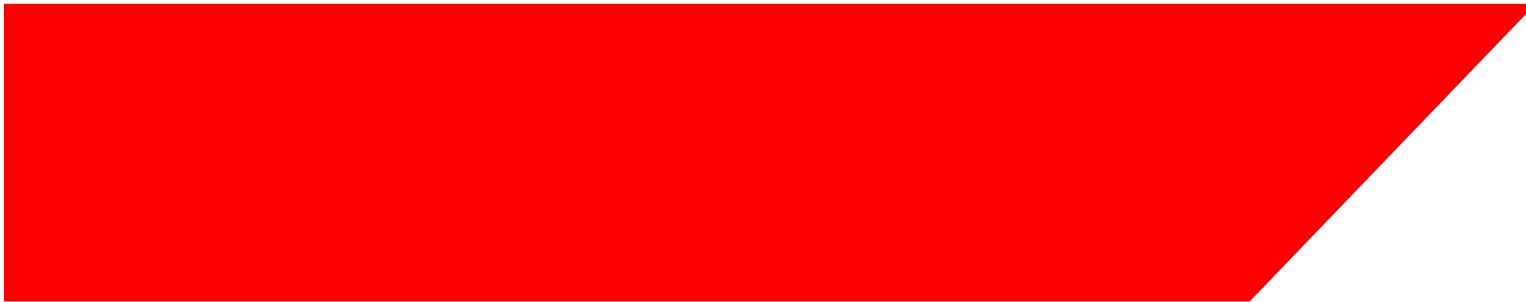
- State patient confidentiality laws, including those addressing mental health care and substance use disorder treatment
- State data privacy laws governing personally identifiable information
- State data breach notification laws
 - safe harbors for encrypted data



Best Practices

- When possible, use applications/products that offer HIPAA BAAs
- Notify patients that the third-party applications may pose privacy risks & document patient consent
- Enable all available encryption and privacy modes
- Providers should be in private setting (office, home office) when using telehealth applications
- Encourage patients to use a private location, e.g., separate room in house, when seeking telehealth services
- Conduct basic diligence on proposed telemedicine app/vendor
- Plan for transition back to “full enforcement” of privacy and security laws after the COVID-19 emergency

Telehealth: Practical Considerations



Practical Considerations

- Where are your state law gaps?
- Does your malpractice insurer cover telehealth services?
- Does your EHR vendor include a telehealth service?
- How are you going to document the encounter?
- How will you schedule telehealth services?
- Where will you conduct telehealth services?
- Patient-facing telehealth policies procedures?
- Telehealth-specific consents?



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