

CLIENT ALERT

May, 2023

1

DEA REVERSES PROPOSED RULE TO EXTEND TELEHEALTH PRESCRIPTIONS OF CONTROLLED SUBSTANCES

by Kimberly J. Ruppel

Reversing previously proposed rules, the DEA recently issued new guidance allowing the continued use of telehealth when prescribing controlled substances following the end of the Covid-19 public health emergency ("PHE"). Waivers of the requirement for in-person encounters that were in place during the PHE will remain in effect for practitioner-patient telehealth relationships established as of November 11, 2023, for a one-year extension until November 11, 2024. In other words, as long as a practitioner and patient have established a telehealth relationship on or before November 11, 2023, the PHE flexibilities will be extended through November 11, 2024, for that established relationship. However, these telemedicine flexibilities will not apply to practitioner-patient relationships established after November 11, 2023.

Before the PHE, the Ryan Haight Act allowed a provider to prescribe controlled substance medications to a patient only after conducting an in-person evaluation of that patient (with limited exceptions). At the beginning of the PHE, the Drug Enforcement Agency ("DEA") granted temporary exceptions to the in-person requirement. It allowed prescribing controlled medications via telehealth encounters to prevent lapses in care.

Recognizing the approaching end of the PHE on May 11, 2023, the DEA announced two new proposed rules for telehealth prescriptions of schedule III – V controlled substances in March 2023. These rules would have loosened the restrictions on telehealth prescribing from pre-PHE standards but would have implemented limiting conditions on go-forward prescribing practices. The DEA acted to facilitate patient access to controlled medications consistent with public health and safety and also maintain effective controls against diversion.

The DEA invited public comment on the proposed rules as part of the standard rule-making process. Behavioral health industry groups initially expressed concern for patients who had been prescribed controlled substances via telehealth during the PHE but did not have an established in-person relationship with a provider and then might not continue treatment after the PHE waiver expired.

The DEA received nearly 40,000 comments in response to the proposed rules. As a result, the DEA, jointly with the Substance Abuse and Mental Health Services Administration ("SAMHSA"), is still evaluating the terms of a final rule. Additional time will allow the government to address public comments concerning facilitating continuity of care for those telehealth relationships established during the PHE and shortly after, preventing backlogs of in-person evaluations in the short term, and addressing the urgent public health need for access to medication used to treat opioid use disorder. Further, limiting the time for establishing

a telehealth practitioner-patient relationship to November 11, 2023, was an effort by the DEA to reduce the opportunity to form telehealth companies that might engage in inappropriate prescribing practices if the period was extended further.

This temporary extension also provides DEA, SAMHSA, and other agencies with a longer timeframe to educate patients, practitioners, and pharmacies about any changes in regulatory requirements. It is consistent with certain other extensions of healthcare-related flexibilities beyond the end of the PHE.

For behavioral health practitioners and patients, this is a welcome extension. More guidance is expected on future telehealth controlled substance prescribing requirements. Follow Dickinson Wright's [Health Law Blog](#) to remain updated.

ABOUT THE AUTHORS



Kimberly Ruppel is Chair of Dickinson Wright, PLLC's Telehealth Task Force. Kim has over 20 years of experience as a commercial litigator who represents healthcare providers, insurers, and benefit plans in healthcare contract litigations, licensing and regulatory disputes, governmental fraud and abuse investigations, HIPAA compliance counseling, and insurance claims and coverage disputes. She can be reached at 248.443.7291 or kruppel@dickinsonwright.com.

DICKINSONWRIGHT.COM

DICKINSON WRIGHT

ARIZONA CALIFORNIA FLORIDA ILLINOIS KENTUCKY MICHIGAN NEVADA OHIO TENNESSEE TEXAS WASHINGTON DC TORONTO