

HEALTHCARE UPDATE ON RAPIDLY CHANGING TELEHEALTH DEVELOPMENTS

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Telehealth is particularly well suited for initial screening of patients and providing quicker and safer access to providers during the COVID-19 pandemic. Telehealth includes, for example, the use of real-time video interaction, “store and forward” technology, remote patient monitoring or online chat groups and internet sites. The use of telehealth technology for providing health care services implicates various laws, regulations, licensing, and payor billing and reimbursement rules. However, recent announcements and orders surrounding telehealth have relaxed many of these requirements during this public health emergency, as follows:

Waiver of Certain Telehealth Restrictions. As of March 6, 2020, certain telehealth restrictions for Medicare beneficiaries will be lifted. Policymakers intended to create broader access to care for seniors in particular during this health crisis. Highlights of the new rules include:

- Telehealth services will now be paid under the Physician Fee Schedule at the same amount as in-person services;
- Medicare coinsurance and deductible still apply for these services. However, healthcare providers are allowed to reduce or waive cost-sharing for telehealth visits paid by federal healthcare programs;
- Medicare will make payment for professional services furnished to beneficiaries in all areas of the country in all settings, including a beneficiary’s home. This removes the requirement for a beneficiary to travel to a physician’s office, skilled nursing facility or hospital for a telemedicine visit;
- These rules apply for new or established patients. To the extent the new waiver rules require an established provider-patient relationship, HHS will not conduct audits to ensure a prior relationship existed for claims submitted during this public health emergency.

OCR HIPAA Discretion. The Office of Civil Rights has informed the industry that with respect to telehealth it will not impose penalties for noncompliance with HIPAA regulations during the COVID-19 public health emergency so long as the provider acts in good faith in its use of telehealth technology. This is not just with respect to use of telehealth for diagnosis and treatment of COVID-19, rather it applies to any telehealth service, including, for example, treatment of a sprained ankle, dental consultation or psychological evaluation. Best practices for providers to demonstrate good faith so as not to inadvertently fall out of compliance during this period include:

- Using non-public facing audio or video communication products. Examples of this type of technology include Apple FaceTime, Facebook Messenger video chat, Google Hangouts video or Skype;
- Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.

- Examples of public-facing technology identified by the OCR that would not fall within the good-faith exception include Facebook Live, Twitch and TikTok, and similar video communication applications that are public-facing.
- Entering into a Business Associate Agreement with a technology vendor used to provide telehealth. The following vendors represent they provide HIPAA-compliant video communication products and that they will enter into a HIPAA BAA (these BAA’s have not been reviewed by OCR and the OCR does not endorse them): Skype for Business, Updox, VSee, Zoom for Healthcare, Doxy.me, Google and G Suite Hangouts Meet.

Elimination of In-Person Exam For Telehealth Prescription of Controlled Substances. Prior to the outbreak of COVID-19, controlled substances generally could not be prescribed via telehealth without a provider conducting an in-person examination of the patient. The Secretary of Health and Human Services and the DEA Administrator confirmed the public health emergency exception to that rule is now in effect. Accordingly, schedule II – V controlled substance prescriptions may be issued without an in-person exam so long as the following requirements are met:

- The prescribing provider is appropriately licensed to practice medicine and prescribe controlled substances;
- A valid prescription is issued for a legitimate medical purpose in the ordinary course of practice; and
- A telehealth evaluation is conducted using an audio-visual, real-time, two-way interactive communication system.

Provided the above criteria is satisfied, a provider may issue a prescription for a controlled substance using any of the currently available methods set forth by the DEA during this time of public health emergency.

This means a prescription may be issued: (1) electronically for schedule II – V medications; (2) by calling in an emergency schedule II medication to a pharmacy; or (3) by calling in a schedule III – V medication to a pharmacy.

Free or Reduced Cost Sharing Amounts for Telehealth Services. Ordinarily, routine reductions or waivers of costs owed by beneficiaries, such as coinsurance and deductibles, implicate the federal anti-kickback statute and other regulatory schemes.

However, during the current public health emergency, the OIG will not consider reduced charges or free telehealth services, standing alone, as an inducement or likely to influence future referrals which might otherwise result in fines or other penalties.

This means that so long as a provider complies with otherwise applicable coverage and payment rules relating to telehealth, the provider is permitted to reduce or completely waive a patient’s coinsurance or deductibles for telehealth services without fear of penalty from the OIG

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under the federal anti-kickback or other applicable federal statutes. It is important to note this unique permission is only relevant up to June 17, 2020, or the length of this public health emergency (whichever is shorter), unless extended by the OIG.

Conclusion

Social distancing and telehealth go hand in hand. Now is the time for healthcare providers and payors to encourage their patients, insureds, and beneficiaries to make use of this valuable tool where available. Relaxation of a number of telehealth rules and restrictions allow patients to receive easier access to healthcare during this public health emergency. The changes being made to telehealth rules during this emergency period may be the start of a longer-term telehealth focus.

For assistance in remaining compliant and up-to-date with the rapidly changing state and federal rules on telehealth or implementing a telehealth program with your business, reach out to your Dickinson Wright healthcare law attorney.



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