

Telehealth Services Expand During COVID-19 Crisis

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By Lori Beam

Telehealth systems are ideal for outbreak responses because they help triage low-acuity patients, mitigate overcrowding of hospitals and clinics, prevent unnecessary human exposure, and deliver timely quality care.

In response to calls for broadening access to telehealth services during the COVID-19 outbreak, several federal agencies began taking action in the early stages of the pandemic:

• **Payment Policies** – The Centers for Medicare & Medicaid Services (CMS) and Health and Human Services Office of Civil Rights (OCR) exercised the waiver authority granted under the Coronavirus Preparedness and Response Supplemental Appropriations Act to expand payment policies for telemedicine services and relax certain federal privacy regulations. **CMS's Medicare Telemedicine Health Care Provider Fact Sheet** explains the new payment policies effective for the duration of the COVID-19 emergency.
• **Privacy Rule** – **OCR issued its COVID-19 and HIPAA emergency response notice and related tools** explaining how HIPAA's privacy rule would apply in certain telehealth situations.
• **Controlled Substances** – The U.S. Drug Enforcement Agency exercised its emergency authority to relax the normal in-person medical evaluation condition to prescription authority

Based on these waivers and guidance, during the COVID-19 emergency:
• Medicare
– Will pay for telehealth services furnished to beneficiaries in all areas of the country in all settings at the same rate as regular, in-person visits.
– Will not require the existence of a prior patient-physician relationship for claims submitted during the emergency.
– Physicians may inform patients of the availability of telehealth options, but patients must initiate the services.
• OCR
– Will exercise enforcement discretion and not impose penalties for noncompliance with HIPAA during the good faith provision of telehealth services. However, states still have the authority to enforce their own health privacy and security laws.
– Lists several popular apps and products that can be used and encourages providers to notify patients

of potential privacy risks of using the apps.
– States that public-facing communication vehicles such as Facebook Live, Twitch and TikTok should never be used to provide telehealth.
• DEA
– Registered practitioners may issue prescriptions for controlled substances for patients without requiring an in-person medical evaluation if they (1) issue the prescription for a legitimate medical purpose in the usual course of their practice, (2) conduct the telemedicine communication using an audio-visual, real-time, two-way interactive communication system, and (3) act in accordance with applicable federal and state law. However, state laws on prescription authority still apply unless the state specifically acted to waive its corresponding requirements.

Many state governors and legislatures have considered – and some have followed up on – these federal actions to relax their own requirements impacting telehealth.

Through **Executive Order No. 20-08,** Kansas made the following temporary changes:
• Encourages physician use of telemedicine to reduce patient travel.
• Allows out-of-state physicians to use telemedicine when treating patients in Kansas without physician licensure in Kansas if they (1) give written notice to the Kansas Board of Healing Arts and (2) hold an unrestricted physician license in their state of practice and (3) are not subject to investigation or disciplinary proceeding.
• Authorizes the Kansas Board of Healing Arts to extend the same loosening of licensing requirements to other healthcare professionals it regulates.
• Waives the requirement that physicians conduct an in-person exam before issuing a prescription or ordering administration of medication including controlled substances.

Missouri proposed, but as of March 27th has not adopted, **House Bill No. 2566.** The Bill would:
• Allow healthcare providers not licensed in Missouri to provide telehealth services to patients in Missouri if they:
o Hold an active, unrestricted license for a health care profession in another state, territory or D.C.
o Have never held a license subject to discipline by a licensing agency (excluding any related to nonpayment of fees related to the license).
o Have never had a controlled substance license or permit suspended or revoked by a state or the DEA.
o Comply with existing professional liability insurance requirements.
• Exception: Health plans are not required to reimburse health providers for telehealth services if the provider is not licensed in Missouri.

Several health plans – including Aetna, Cigna and BlueCross BlueShield — announced they are making telehealth more widely available or are offering free telehealth services for some period of time. Vice President Mike Pence also announced a commitment from health plans to cover telehealth services, though no details were provided.

Various medical associations are furnishing key resources for helping providers adopt and furnish telehealth services during the COVID-19 crisis:

• The American Medical Association launched the **AMA Telemedicine Quick Reference Guide** aimed at helping clinicians figure out best practices covering everything from policy and coding to implementation.
• The American Psychiatry Association issued **Telepsychiatry and COVID-19** that includes best practices and a toolkit.

These collaborative efforts during a crisis are very helpful. But, they do not uniformly or comprehensively address federal and state laws impacting the provision of telehealth services during the COVID-19 crisis.

Addressing issues related to a launch or expansion of telehealth services during COVID-19 require consideration of the particular telehealth services, the laws and telehealth waivers of particular states in which the patients are located, available telehealth coverage under the Medicaid programs and by commercial payers in those states, and other unique federal and state laws regarding telehealth and COVID-19 care.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors. Lori Beam (lbeam@sb-kc.com) or any other shareholders in Seigfreid Bingham's Health Law Group, including Mark Thompson, Joseph Hiersteiner, Mark Gilgus, John Neyens, Mark Opara, and John Fuchs, or your regular contact at Seigfreid Bingham at 816-421-4460.