

Employee Benefit Plan Review

The Rapidly Evolving Telemedicine Regulatory Landscape in the Wake of COVID-19

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In connection with the ongoing COVID-19 pandemic, many health care providers and their patients are actively seeking to shift services that are typically provided in an office setting over to telehealth visits. Understandably, providers want to limit office visits to only persons with critical needs that cannot wait or be evaluated remotely, both in order to free up space in medical offices and hospitals, as well as to limit unnecessary exposure. Beginning in March, the federal government and state agencies have proactively taken steps to increase the use and flexibility of telehealth and provide reimbursement for such services where reimbursement was not so readily available prior to the current public health emergency.

In general, state Medicaid agencies (“Medicaid Agencies”), pursuant to federal oversight, strictly regulate the provision of, and reimbursement for, telehealth visits under each state’s Medicaid program. Each state further regulates the practice of telemedicine, including the methodology, establishment of a physician/patient relationship, requirements regarding prescribing and physician or practitioner licensure in the state through various state agencies including, in many cases, the state medical boards, state health department, other licensing boards, and the state pharmacy board (“Licensing Boards”). Additionally,

state insurance departments (“Departments of Insurance”) regulate the payment for telemedicine and reimbursement of health care providers by commercial health insurers. Further, the Centers for Medicare and Medicaid Services (“CMS”), which regulates the Medicare program and has oversight authority over state Medicaid plans, sets certain standards regarding the permissible use of telemedicine and reimbursement by Medicare as well as for Medicaid plans under federal law.¹

To effect these changes, state regulatory authorities and CMS have issued emergency directives, orders, waivers and/or regulations (“Guidance”) dually aimed at getting patients the care they need via telemedicine (where feasible), and ensuring that providers will not be penalized (be it from a licensing or reimbursement perspective) by virtue of the fact that they rendered certain services via telemedicine rather than in-person. As a general matter, the Guidance falls under four broad categories:

- Medicaid Agency Guidance;
- Licensing Board Guidance;
- Department of Insurance Guidance; and
- CMS Guidance, in the form of both blanket and state by state waivers.

Below are some important issues for providers and payors to consider in connection

with the Medicaid Agency, Licensing Board, Department of Insurance, and CMS Guidance.

STATE BY STATE MEDICAID, LICENSING BOARD, AND DEPARTMENT OF INSURANCE GUIDANCE

Expansion of Permissible Telemedicine Platforms

The majority of states are issuing Guidance granting broad authority to providers to conduct both (i) telephonic visits, and (ii) visits on technology platforms that previously may not have satisfied regulatory requirements for telemedicine visits (i.e., FaceTime).² Consideration should also be given to Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) compliance and guidance and waivers from the U.S. Department of Health and Human Services Office of Civil Rights regarding privacy and security of telehealth platforms.

Waiver or Emergency Licensing Options for Physicians Providing Telehealth Across State Borders

A number of state Licensing Boards, under the authority of declarations of emergency by state governors or other executive orders, have waived the requirement that a physician or other practitioner providing services to a resident of a state have an active license in such state, in favor of authorizing a practitioner to provide telehealth services if the practitioner is licensed in any state or territory.³ Alternatively, some states have put processes in place to allow emergency, temporary licensing of physicians pursuant to a more streamlined, efficient process.⁴

Clarification and Modification of What Services Are Reimbursable

The scope of services that may be rendered via telemedicine in a given jurisdiction, and the availability of reimbursement for such services, is evolving rapidly. Further, in some jurisdictions, a service rendered via a live-interactive system (e.g.,

a platform such as or similar to a Zoom or FaceTime visit) will be reimbursed at a more generous rate than a regular telephone encounter.⁵ Other states are expressly requiring that Medicaid managed care plans reimburse telephone and video visits at rates equal to in-person visits.⁶

States vary broadly and the requirements regarding what platforms and types of telehealth services are reimbursable is highly nuanced. For example, in one jurisdiction, a five to 30 minute Medicaid evaluation and management service with an established patient via telephone is reimbursable, but not if a related evaluation and service was provided in the previous seven days or if it leads to an evaluation and management service within the next 24 hours.⁷ Providers and payors must carefully examine all applicable Guidance in their jurisdiction to understand the rapidly evolving landscape and what is permissible and reimbursable on any given day under Medicaid as well as commercial health insurance.

Modification of Who Is Eligible for Telemedicine Services

Some states are changing eligibility requirements for which covered persons may receive covered telemedicine services. For example, some state Medicaid Agencies are waiving certain requirements that otherwise mandate that certain telemedicine services be restricted to homebound persons.⁸

Other states have expanded the definition of permissible “telehealth originating site” under applicable regulations to include covered persons’ homes or other secure locations as approved by the covered person and the provider.⁹

Further, some states have liberalized prior restrictions that telehealth services may only be provided to an established patient in order to allow a practitioner to establish a physician-patient relationship via a telehealth visit.¹⁰

CMS MEDICAID & MEDICARE WAIVERS

CMS has issued specific waivers and other Guidance regarding Medicaid and Medicare telemedicine during the pandemic. For example, according to blanket Medicaid waivers issued by CMS in response to the COVID-19 pandemic, state Medicaid fee-for-service plans are not required to submit a state plan amendment or Medicaid Section 1135 waiver to pay for telehealth services if payments for services furnished via telehealth are made in the same manner as when the service is furnished in a face-to-face setting.¹¹

Additionally, CMS has issued sample state plan fee-for-service payment methodologies for telehealth.¹²

Lastly, CMS has developed a process to quickly review and respond to state requests for Section 1135 waivers in addition to the blanket waivers and has already approved many.¹³

With respect to Medicare, pursuant to a waiver under Section 1135 of the Social Security Act and the Coronavirus Preparedness and Response Supplemental Appropriations Act, Medicare has now authorized reimbursement for office, hospital and other visits furnished via telehealth nationwide, including in patients’ homes, starting March 6, 2020 and has waived the requirement that practitioners providing telehealth must be licensed in the state where the patient resides provided that the physician is licensed in a U.S. state or territory.¹⁴ A broad group of practitioners including physicians, nurse practitioners, psychologists, and licensed clinical social workers, among others, will be able to offer these telehealth services.¹⁵ On March 30, CMS announced further expansions to access to telehealth for persons with Medicare. The changes include providing coverage for audio-only (telephone) visits, as well as coverage for emergency department visits, initial nursing facility and discharge visits, and home visits.¹⁶

BEST PRACTICES AND RECOMMENDATIONS

In light of the foregoing, below are several tips for providers and payors:

Know the Guidance – Providers and payors should carefully review Medicaid Agency, Licensing Board, Department of Insurance and CMS Guidance and check back frequently as additional Guidance is being adopted to respond to the public health emergency on an ongoing basis. It is important to understand the positions and any waivers of each of the foregoing state and federal agencies, and to monitor them regularly, as Guidance is evolving by the moment. Of particular importance to providers are state restrictions on whether telemedicine visits will be reimbursed if a related evaluation and service was provided in recent days, or if the telemedicine visit leads to an evaluation and management service in the next several days. Knowing and understanding the applicable Guidance is critical to ensuring that reimbursement will be available.

Consent – Providers should be careful to obtain proper consents from their patients before beginning any telehealth encounter and should comply with federal and state requirements regarding such consents. If consent may be obtained verbally under applicable law and Guidance, the practitioner should carefully document in the medical record that consent was provided. Providers should be sure that the patient understands (i) the benefits (e.g., lack of exposure to COVID-19 in a medical office) and downsides (e.g., inability for the provider to administer an actual physical exam and potential technological disruptions or possibility of a security breach) of the telehealth encounter, and (ii) that, should the patient so desire, they may still opt for an office visit (if applicable), or alternatively, defer the visit until such time as it is safe to come in for an office visit.

Controlled Substances – Providers should carefully examine the requirements in their jurisdiction regarding prescribing of opioids and other controlled substances via a telehealth encounter and whether any waivers have been implemented in a particular jurisdiction. As always, it is best to review the applicable authorities and consult legal counsel proactively.

Privacy – Providers must remain aware that, even when working remotely or providing patient services via telephone or telemedicine, state and federal privacy requirements still apply. Providers may want to seek legal counsel regarding the unique nuances that telemedicine raises from a privacy perspective.

Scope of License – Providers should assume that, in the absence of Guidance to the contrary, Guidance does not alter the scope of practice of any health care provider or authorize the delivery of health care services in a setting or manner not otherwise authorized by law. Providers should carefully review and comply with state Licensing Board Guidance regarding waiver of state licensing requirements or emergency temporary licensure requirements.

Recordkeeping – Providers should assume, in the absence of express Guidance to the contrary, that all applicable recordkeeping requirements remain in place and must be adhered to. 🌀

NOTES

1. See, e.g., Medicaid State Plan Fee-for-Service Payments for Services Delivered Via Telehealth, available at <https://www.medicaid.gov/medicaid/benefits/downloads/medicaid-telehealth-services.pdf>; See also, e.g., Medicare Telehealth Frequently Asked Questions dated March 17, 2020, available at <https://edit.cms.gov/files/document/medicare-telehealth-frequently-asked-questions-faqs-31720.pdf>.
2. Note that it is important to review the guidance in your state prior to conducting telehealth visits. This guidance can be found typically in executive orders from the State Medicaid Agency, governor, Licensing Boards, or Department of Insurance as well as any emergency rules that have been passed.

3. See, e.g., https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-52.pdf.
4. See, e.g., <https://gov.texas.gov/news/post/governor-abbott-fast-tracks-licensing-for-out-of-state-medical-professionals> and <http://www.tmb.state.tx.us/page/licensing>.
5. See, e.g., Alaska Division of Health Care Services Telehealth in Alaska & Telemedicine COVID-19 Updates, available at http://manuals.medicaidalaska.com/docs/dnld/Update_Temp_Expansion_of_Medicaid_Telemed_Coverage_Revised.pdf.
6. See, e.g., State of California—Department of Health Care Services March 18, 2020 Supplement to All Plan Letter Dated March 18, 2020, available at <https://www.dhcs.ca.gov/Documents/COVID-19/APL19-009-Supplement-Telehealth-031820.pdf>.
7. See Alaska Division of Health Care Services Telehealth in Alaska & Telemedicine COVID-19 Updates, available at <http://dhss.alaska.gov/dph/HealthPlanning/Pages/telehealth/default.aspx>.
8. See, e.g., Connecticut Medical Assistance Program Provider Bulletin 2020-10, Policy Transmittal 2020-09 March 2020, available at https://www.ctdssmap.com/CTPortal/Information/Get%20Download%20File/tabid/44/Default.aspx?Filename=pb20_10.pdf&URI=Bulletins/pb20_10.pdf.
9. See, e.g., Maryland Department of Health Publication Entitled “COVID-19 #1: Temporary Expansion of Medicaid Regulations to Permit Delivery of Telehealth Services to the Home to Mitigate Possible Spread of Novel Coronavirus,” available at <https://www.mhaonline.org/docs/default-source/resources/coronavirus/COVID-19-temporary-expansion-of-medicard-regulations-to-permit-delivery-of-telehealth-services-to-the-home-to-mitigate-possible-spread-of-novel-coronavirus.pdf>.
10. See, e.g., <http://www.tmb.state.tx.us/id/1BDA79E4-958A-B895-A61F-CAF8F58D221A>.
11. CMS Publication Entitled “Medicaid State Plan Fee-for-Service Payments for Services Delivered Via Telehealth,” available at <https://www.medicaid.gov/medicaid/benefits/downloads/medicaid-telehealth-services.pdf>. See also, e.g., <https://www.medicaid.gov/medicaid/benefits/downloads/medicaid-chip-telehealth-toolkit.pdf>.
12. *Id.*
13. See, e.g., <https://www.cms.gov/newsroom/press-releases/cms-approves-medicard-section-1135-waivers-11-additional-states-response-COVID-19>.
14. Medicare Telehealth Frequently Asked Questions dated March 17, 2020, available at <https://edit.cms.gov/files/document/medicare-telehealth-frequently-asked-questions-faqs-31720.pdf>.
15. “President Trump Expands Telehealth Benefits for Medicare Beneficiaries During COVID-19 Outbreak,” CMS press release dated March 17, 2020.
16. CMS Fact Sheet Entitled “Additional Background: Sweeping Regulatory Changes to Help U.S. Healthcare System Address COVID-19 Patient Surge,” available at <https://www.cms.gov/newsroom/fact-sheets/additional-background-sweeping-regulatory-changes-help-us-healthcare-system-address-COVID-19-patient>.

■ Feature

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