



New Executive Order forecasts permanent telehealth funding changes

Healthcare Alert

COVID-19 Alert

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On August 3, 2020, President Trump issued a new executive order that, among other things, seeks to reshape telehealth funding at the federal level on a permanent basis (the Order).

As we have detailed in past alerts, the Social Security Act (SSA), at SSA 1834(m), contains severe and outmoded restrictions on Medicare funding for telehealth services. For example, this section generally limits funding to scenarios where a patient travels to a physical facility in a rural area. The novel coronavirus disease (COVID-19) pandemic has highlighted the shortcomings of this approach for the 60 million elderly and disabled Americans on Medicare, and earlier this year, Congress expanded the authority of the Department of Health and Human Services (HHS) to waive telehealth restrictions under SSA 1135. This waiver authority has allowed more beneficiaries to access covered health care services from the safety of their homes, but it is only available so long as the present public health emergency (PHE) and the President's declaration of a national emergency under the Stafford Act and National Emergencies Act both remain in effect.

As noted in the Order, claims data from the Centers for Medicare and Medicaid Services (CMS) of HHS evidenced a weekly jump in virtual visits for CMS beneficiaries, from approximately 14,000 pre-PHE to almost 1.7 million in

the last week of April and further, HHS data showed that “nearly half (43.5 percent) of Medicare fee-for-service primary care visits were provided through telehealth in April, compared with far less than one percent (0.1 percent) in February before the PHE.” Importantly, the Order noted that the HHS report also found that “telehealth visits continued to be frequent even after in-person primary care visits resumed in May, indicating that the expansion of telehealth services is likely to be a more permanent feature of the healthcare delivery system.” Following on the noted success of telehealth visits in continuing to provide access to healthcare services to Medicare beneficiaries during the pandemic, the Order highlights the unique challenges faced by Americans living in rural communities, such as “limited transportation opportunities, shortages of healthcare workers, and an inability to fully benefit from technological and care-delivery innovations.” In seeking to address the health disparities afflicting rural Americans, the Order commands the following regulatory actions:

1. Within 30 days, the Secretary will announce a new Center for Medicare and Medicaid Innovation (CMMI) payment model to test innovative payment mechanisms to ensure that rural healthcare providers are able to provide the necessary level and quality of care.
2. Within 30 days, the Secretary and the Secretary of Agriculture shall coordinate with the Federal Communications Commission and other executive departments and agencies, as appropriate, to develop and implement a strategy to improve rural health by improving the physical and communications healthcare infrastructure available to rural Americans; a move that seeks to address significant technological access issues that prevent Medicare beneficiaries from accessing services via telehealth.
3. Within 30 days, the Secretary shall submit a report to the President addressing initiatives to:
 - Increase access to healthcare by rural Americans by eliminating regulatory burdens that limit access to health professionals; and
 - Develop specific efforts to improve health outcomes in rural communities, including reducing maternal mortality and morbidity and improving mental health.
4. Within 60 days, the Secretary shall review the following temporary measures put in place during the PHE, and shall propose a regulation to extend these measures, as appropriate, beyond the duration of the PHE:
 - the additional telehealth services offered to Medicare beneficiaries; and
 - the services, reporting, staffing, and supervision flexibilities offered to Medicare providers in rural areas.

The Order’s directives imply a possible mechanism for making telehealth changes in spite of the statutory confines of 1834(m): CMMI innovation models. Under SSA 1115A, HHS can waive **any provision** of the Medicare statute (SSA Title XVIII) and certain provisions of the Medicaid statute (Title XIX) in order to test new payment models that are data-driven and are likely to help fix deficits in care for defined populations and reduce expenses while maintaining or improving quality. Test programs must be ended or modified upon a finding that they worsen care quality or increase spending, but the statute does not set a time for evaluating them. Congress specifically named telehealth expansion as a possible area of experimentation, especially for Indian Health Services facilities and providers in medically underserved areas managing chronic conditions, but the statute is drafted to present these as representative examples, not limitations on CMMI payment models; the government may therefore go beyond the specific ideas proposed in the statute. The Order does not explicitly state that HHS will use the CMMI to test permanent telehealth expansions that go beyond SSA 1834(m), but it does instruct CMMI to experiment with payment models and flexibilities that serve rural providers and their patients. The CMMI statute arguably does not contemplate large-scale, permanent changes to statutory funding restrictions, but it forecloses judicial review. So if the current administration elects to pursue this route for enacting major changes to the telehealth funding landscape, changes made through CMMI could conceivably remain in effect for as long as there is an administration willing to keep them in place.

The Order also serves as a signal to Congress to take further action to permanently expand telehealth access in the Medicare program. Specifically, the Order directs CMS to do its part in expanding the types of telehealth services covered under Medicare, but permanent removal of additional coverage restrictions under 1834(m) will fall to Congress.

Notably, members of Congress have put forth a wave of new legislative proposals to expand Medicare telehealth

funding even after the PHE ends; just last week, Senator Lamar Alexander proposed sweeping changes in the Telehealth Modernization Act of 2020. While past legislative efforts have largely failed due to Congressional Budget Office (CBO) scoring that assigns high projected costs to Medicare telehealth expansion proposals, Secretary Azar noted that telehealth use during the pandemic may provide sufficient data to challenge historic CBO assumptions. If this proves true, it will be a game-changer for telehealth legislation.

DLA Piper continues to closely monitor federal and state governmental actions as this situation unfolds. For information on other ways COVID-19 is changing the healthcare industry and how your company can help serve patients, please contact your DLA Piper relationship partner or any member of our healthcare industry group. Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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