Momentum builds for permanent expansions in federal telehealth policy

Healthcare Alert

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DLA Piper attorneys continue to monitor signs that policymakers throughout the country may be prepared to support permanent increases in telehealth coverage following the ongoing pandemic of 2019 novel coronavirus disease (COVID-19) infections. This past week, additional legislative proposals and administrative initiatives suggested that the federal government in particular may be moving to make certain emergency fixes to the telehealth regulatory landscape permanent.

Telehealth technologies permit various forms of evaluation and treatment without the need for an in-person interaction between a patient and a clinician. COVID-19 has pushed healthcare providers to increase their reliance on telehealth, even for non-COVID-19-related encounters, as a way to reduce the risk of transmitting the virus from provider to patient or vice versa. As we have detailed in numerous prior updates, federal and state governments’ efforts to accommodate telehealth as a COVID-19 control measure have also helped to demonstrate telehealth’s other benefits, such as increased access to highly beneficial treatment for people living in healthcare shortage areas. Of course, the egalitarian promise of telehealth depends on ensuring that diverse and distant communities have access to reliable telecommunication networks and the chance to build comfort with new technologies.
One longstanding barrier to telehealth adoption has been Congress’s restrictive approach to reimbursement under the Medicare program. Section 1834(m) of the Social Security Act only permits coverage of “telehealth services” if the patient is in an underserved rural area AND physically travels to certain “originating site” facilities, with certain limited exceptions. Pre-COVID legislative attempts to clear these outmoded restrictions for the over 60 million elderly and disabled Americans on Medicare have repeatedly stalled, largely because the Congressional Budget Office (CBO) observed that increased access to Medicare-covered services would result in higher expenditures for the federal government. Notably, CBO scoring did not historically take into account potential cost-savings that could be realized due to increased preventative care visits and access to healthcare resources for some of the country’s most vulnerable individuals.

Earlier this year, Congress gave the Department of Health and Human Services (HHS) the power to waive the restrictions in Section 1834(m) on a temporary basis as part of HHS’s emergency waiver authority at Social Security Act Section 1135 – which depends on both an ongoing presidential declaration under the Stafford Act or National Emergencies Act and an ongoing public health emergency declaration from HHS. But this past week saw further rumblings from Congress and HHS that they are looking for telehealth expansions to continue beyond the present emergency. Permanent legislative changes would help dispel the uncertainty created by the Trump Administration’s repeated refusal to commit to extending the current formal public health emergency declaration, currently set to expire on July 25.

On July 16, US Representative Mike Thompson (a Democrat from California and a co-chair of the Congressional Telehealth Caucus) led a bipartisan group of House cosponsors in introducing the Protecting Access to Post-COVID-19 Telehealth, which would, among other things, decouple the HHS Secretary’s public health emergency waiver authority from the presidential emergency declaration and permanently erase various Medicare funding restrictions from Section 1834(m) beginning in January 2021. Meanwhile, the text from a June 25 legislative proposal from Representative Liz Cheney (the chair of the House Republican Conference) has recently become available on Congress.gov. Cheney’s Advancing Telehealth Beyond COVID–19 Act of 2020 would give HHS the power to waive Section 1834(m)’s applicability even in non-emergency periods. It would also modify the federal Civil Monetary Penalties Law’s beneficiary inducement provision (which prohibits transfers of value to Medicare and Medicaid beneficiaries that are likely to influence beneficiaries’ selection of providers or suppliers) to protect certain telehealth technology giveaways.

While Congressional action will be necessary to make the most important Medicare telehealth funding changes permanent, we are also encouraged to see that Administrator Seema Verma, the head of the Centers for Medicare and Medicaid Services (CMS), continues to express public support for long-term changes to the program. In an article for Health Affairs on July 15 (as summarized by Becker’s Hospital Review), Verma stated that CMS is currently assessing the value of various permanent changes to telehealth funding, with clinical safety controls, compensation considerations, and the need to guard against new forms of Medicare fraud guiding the analysis. HHS has also announced a ten-week peer-to-peer telehealth “learning community” beginning July 22. The fact that HHS and its partners are referring to the sessions as a “Telemedicine Hack” may suggest that the agency hopes this program will lead to breakthroughs in federal policy development.

As the clock ticks down this week on the current public health emergency declaration – and telehealth access hangs in the balance – we will be keeping a close eye on these and other initiatives.

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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