Telehealth update: COVID-19 prompts emergency Medicare coverage and other seismic shifts (United States)

Healthcare Alert

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By: Kristi Kung

As the US races to reduce community spread and flatten the curve of the coronavirus disease 2019 (COVID-19) pandemic, telehealth has been touted as critical to effectively addressing this national crisis. Yesterday, March 17, multiple federal agencies issued regulatory waivers and released additional funding to loosen the constraints on telehealth services and encourage widespread adoption.

The transmissibility of this novel coronavirus, exacerbated by delays in effective testing and monitoring, means that the frontline care providers are at risk of catching the virus from their patients and having to isolate themselves to avoid further spread. Telehealth − the use of telecommunications and virtual technology to deliver healthcare remotely − has the potential to increase access to critical services while minimizing healthcare worker exposure to contagion and alleviating strain on limited healthcare resources.

Centers for Medicare and Medicaid Services (CMS)

Under normal circumstances, the 44 million Americans who rely on the Medicare program for healthcare coverage − including seniors and people with certain disabilities, both of whom are especially vulnerable to COVID-19 − have limited access to telemedicine, due to a myriad of coverage restrictions under the Social Security Act. While CMS has worked to authorize some payments for limited telehealth-enabled services such as remote patient monitoring, key evaluation and management "visits" are typically only covered for patients who both live in rural areas **and** can travel to local facilities such as enrolled physicians' offices or critical access hospitals—completely defeating the potential epidemiological benefits of distancing through telehealth technology.

Fortunately, Congress's first major response to COVID-19, HR 6074, authorized the Secretary of Health and Human Services to waive both (i) the "originating site" requirements that prohibit most Medicare beneficiaries from getting covered telemedicine services from sites such as private residences or homeless shelters, and (ii) a regulatory prohibition that blocks coverage for mobile phones. CMS acted on this authority, now permitting Medicare beneficiaries to receive telehealth services in their homes. However, despite removing geographic and location barriers, CMS has not yet granted an expansion to the list of services eligible for reimbursement when delivered through telehealth.

In addition to Medicare, CMS noted that State Medicaid programs have the flexibility to allow for telehealth reimbursement and are not confined to Medicare's coverage criteria.

The relaxed telemedicine rules will apply nationwide and retroactively to March 6, the date HR 6074 was enacted. Key billing and coding guidelines are available here.

Department of Health and Human Services Office of the Inspector General (OIG)

Also on March 17, the OIG issued a notice stating that it will not pursue administrative sanctions against providers under the federal Anti-Kickback Statute or the Beneficiary Inducement Civil Monetary Penalties Law for reducing or waiving beneficiary cost-sharing for telehealth. With this new flexibility, providers not need charge Medicare and other federal healthcare program patients a copay for utilizing telehealth services.

US Drug Enforcement Administration (DEA)

The federal Ryan Haight Act requires healthcare providers to conduct an in-person examination before prescribing or otherwise dispensing controlled substances "by means of the Internet," except when engaged in the practice of telemedicine. However, the telemedicine exemption to the Ryan Haight Act is extremely narrow and outdated. For example, the telemedicine exception does not apply if the patient is at home, school, or work. Telehealth advocates have long encouraged the DEA to adopt a telemedicine special registration; however, this remains under development. On March 17, the DEA clarified that the public health emergency telemedicine exception under the Ryan Haight Act would apply to the COVID-19 pandemic, thereby allowing DEA-registered prescribers to issue prescriptions for controlled substances via telemedicine without a prior in-person evaluation, if the prescription is for a legitimate medical purpose, real-time two-way audio-video technology is used, and the practitioner is acting in accordance with state law.

Department of Health and Human Services Office for Civil Rights (OCR)

The OCR, the federal agency charged with authority and enforcement over HIPAA, issued a Notice of Enforcement Discretion stating that it would not seek to impose penalties on providers for noncompliance with the regulatory requirements under HIPAA in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency. More specifically, OCR expressly permitted the use of "any non-public facing remote communication product that is available to communicate with patients", including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype. However, OCR noted the "Facebook Live, Twitch, TikTok, and similar video communication applications are public facing, and should not be used in the provision of telehealth by covered health care providers."

Federal Communications Commission

The FCC is working with certain telecommunications companies to prevent disconnections for nonpayment and to increase funding for rural health connectivity initiatives, including providing the Rural Health Care Program with an additional $42.19 million in funding "to help ensure that healthcare providers have the resources they need to promote telehealth solutions for patients." In order to utilize vital telehealth services, patients and providers need access to quality broadband. Currently, up to twenty percent of the country is reliant upon a single Internet service provider. These initiatives by the FCC are designed to help ensure that patients can access the newly available clinical resources through

telehealth technology.

State Licensure

Professional licensing and discipline are traditionally matters of state law. The general rule is that, for a provider in one state to treat a patient in another state, the provider must be licensed in and abide by the professional practice rules of the state where the patient resides or is located at the time of treatment. Ordinarily, this fragmented approach creates barriers to practitioners' and entities' seeking to offer services across state lines. However, the Federation of State Medical Boards notes that many states are temporarily waiving their in-state licensure requirements or creating special emergency pathways to limited licensure in order to help in-state patients lawfully connect with as broad a pool of clinicians as possible. DLA Piper's health regulatory attorneys can help identify which states permit out-of-state treatment and under what circumstances in this rapidly changing landscape.

In addition to these agency updates, we have learned that the White House is working with the Consumer Technology Association (CTA) trade group to compile a public-facing list of companies that can facilitate direct-to-consumer telehealth treatment. Our understanding is that this resource is expected to be posted within the week.

DLA Piper continues to closely monitor federal and state waivers and other 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.

AUTHORS

Kristi Kung
Partner
Northern Virginia | T: +1 703 773 4000
Washington, DC | T: +1 202 799 4000
kristi.kung@dlapiper.com