March 18, 2020

A Day in Telehealth History: Access to Telehealth Services Expanded, Requirements to Facilitate Virtual Visits Relaxed in Response to Coronavirus

March 17, 2020, will be a day to remember in the history of telehealth in the U.S. Thanks to a slew of federal policy changes, it is now easier for providers to offer telehealth, more people can access telehealth services, and there are fewer restrictions and liability risks. While these policy changes are largely specific to this COVID-19 (commonly known as the coronavirus) emergency, the federal government is recognizing the value and virtue of telehealth, and providers can use this opportunity to scale up and demonstrate its successful use.

Summary

On March 17, 2020, the Centers for Medicare and Medicaid Services (CMS) temporarily expanded access to telehealth services covered by Medicare so that more beneficiaries can receive services from their doctors and other health care providers without having to travel to a health care facility. Discussed in detail below, these policy changes were made under CMS' 1135 waiver authority and the Coronavirus Preparedness and Response Supplemental Appropriations Act and will last for the duration of the COVID-19 Public Health Emergency (the "Public Health Emergency"). The goal is to permit Medicare beneficiaries to receive care in their homes during the COVID-19 pandemic.

Additionally, to facilitate the use of telehealth during the Public Health Emergency:

1. The Department of Health and Human Services (HHS) Office for Civil Rights (OCR) announced a policy not to enforce HIPAA's Privacy Rule requirement that covered entities use only secure methods of communication for telehealth visits.
2. The Drug Enforcement Administration (DEA) agreed that DEA-registered practitioners may prescribe controlled substances during telehealth visits without having a prior in-person medical evaluation as

otherwise required by the Ryan Haight Online Pharmacy Consumer Protection Act.

3. The Office of Inspector General (OIG) stated that it would not impose civil monetary penalties against any provider that waives cost-sharing amounts (i.e., co-pays or deductibles) in connection with telehealth visits.

Expansion of Telehealth for Medicare Beneficiaries

With claims starting March 6, 2020, Medicare will now pay for office, hospital and other visits furnished by doctors, nurse practitioners, physician assistants and other providers via telehealth regardless of the originating site of the patient.

- Without this waiver, fee-for-service Medicare reimbursement for telehealth is subject to restrictions found in Section 1834(m) of the Social Security Act, including the restriction that the patient present at a rural originating site. Under the waiver, the patient can have a telehealth visit using interactive, real-time audio-video in any health care facility or in their home.
- The services that qualify for reimbursement under this waiver are the same that were previously reimbursed under the 1834(m) restrictions, which for calendar year 2020 includes approximately 100 codes published by CMS.
- These telehealth visits are considered the same as in-person visits and are paid at the same rate as regular, in-person visits.
  HHS also announced a policy of enforcement discretion for the prior patient relationship requirement recently passed in the Coronavirus Preparedness and Response Supplemental Appropriations Act. HHS will not conduct audits to ensure that such a prior relationship existed for claims submitted during this Public Health Emergency. This is HHS' way of telling providers to "please use telehealth during this Public Health Emergency", which should ease providers' liability concerns.

CMS also reminded practitioners of the availability of reimbursement for other existing telehealth services, including virtual check-ins and e-visits in its waiver announcement. For more, see CMS' fact sheet and FAQs.

Relaxation of HIPAA Requirements for Telehealth Visits (i.e., Use Everyday Technology for Telehealth)

To further facilitate the use of telehealth services during the Public Health Emergency, OCR announced that it will exercise enforcement discretion and waive penalties for Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule violations against covered entities that serve patients in good faith through non-public facing audio or video communication products, including Apple FaceTime, Facebook Messenger video chat, Google

Hangouts video, or Skype. Public-facing products such as Facebook Live, Twitch and TikTok should not be used to provide telehealth. OCR also encourages providers to notify patients that such applications are not secure and to enable as many security measures as are available from the product.

The key takeaway is that providers and patients can use everyday technology to conduct telehealth visits during the pandemic.

Expansion of Telehealth for Prescribing of Controlled Substances

Similarly, the Drug Enforcement Administration (DEA) published guidance that, for so long as the Public Health Emergency remains in place, DEA-registered prescribers may issue prescriptions for controlled substances to patients using telemedicine without a prior in-person patient medical evaluation as otherwise required by the Ryan Haight Online Pharmacy Consumer Protection Act. To comply, a DEA-registered practitioner must use interactive, real-time audio-video telehealth (meaning asynchronous telehealth involving controlled substances is not allowed). And of course, the prescription must still be for a legitimate medical need and the practitioner must be practicing in accordance with other state and federal law.

Flexibility to Waive Cost-Sharing in Federal Health Programs

Finally, the Office of Inspector General (OIG) issued a Policy Statement to notify practitioners that they will not be subject to administrative sanctions for reducing or waiving any cost-sharing obligations (i.e., coinsurance and deductibles) owed by federal health care program beneficiaries for telehealth services during the Public Health Emergency.

Conclusion

These actions address many of the barriers that providers were facing in the effort to provide access to telehealth services during this Public Health Emergency. However, providers will undoubtedly face additional barriers that may need to be addressed at the federal and state levels as they scale up efforts in this new environment.

More specifically, while these federal waivers are helpful, practitioners still need to be mindful of state licensure and other requirements. In addition, we recommend that, to the extent practicable, providers obtain patient consent and advise patients of potential security risks prior to providing virtual care. Faegre Drinker's digital health professionals are available to help clients navigate this new normal and advocate for state and federal

policies to increase patient access to telehealth services during the coronavirus outbreak and beyond.

As the number of cases around the world grows, Faegre Drinker's Coronavirus Resource Center is available to help you understand and assess the legal, regulatory and commercial implications of COVID-19.

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March 24, 2020

Governor Pritzker Expands Access to Telehealth Services in Illinois

On March 19, 2020, Governor JB Pritzker issued an executive order (the Order) expanding access to telehealth services in the State of Illinois in response to his March 9, 2020 disaster proclamation arising out of the Trump Administration's COVID-19 Emergency Declaration. Pursuant to his Order, Governor Pritzker mandated that all health insurance issuers (Insurers) regulated by the Illinois Department of Insurance cover the cost of all telehealth services – including the use of telehealth to deliver behavioral health services – rendered by in-network providers to deliver any clinically appropriate, medically necessary covered services to health plan members.

Insurers may establish reasonable requirements for telehealth services, including those with respect to documentation and recordkeeping. However, such requirements cannot be more restrictive than those required by Medicaid for the same service.

Further, Insurers may not impose unnecessary, duplicative or unwarranted utilization review requirements, or impose treatment limitations that are more stringent than those required by Medicaid. In addition, Insurers are prohibited from imposing cost-sharing requirements (e.g., copayments, deductibles and coinsurance) for telehealth services provided by in-network providers. Insurers may charge high deductible health plan members who have not met their deductibles for telehealth services, unless they are considered preventive care services. Testing, treatment and vaccination for COVID-19 all fall within the scope of preventive care.

Pursuant to the Order, telehealth services may be provided by a variety of clinicians, including physicians, physician assistants, optometrists, APNs, clinical and prescribing psychologists, dentists, occupational and physical therapists, pharmacists, clinical social workers, speech language pathologists, audiologists, hearing instrument dispensers, and other mental health and substance use disorder treatment providers who are

licensed, registered, certified or authorized to practice in the State of Illinois.

The Order does not apply to excepted benefits under the Affordable Care Act (such as disability insurance, flexible spending accounts or Medicare supplemental insurance), but does apply to limited scope dental benefits, vision benefits, long-term care benefits, coverage for accidents, or coverage for only specific disease or illness.

To further facilitate the use of telehealth for behavioral health services, the Order also suspends the patient consent requirement and prohibition against disclosure of records provisions of the Illinois Mental Health and Developmental Disabilities Confidentiality Act as applied to telehealth services for the duration of the disaster proclamation. The Order also permits providers to use any non-public-facing telehealth technology to provide telehealth services to patients in need of mental health and developmental disabilities services.

For purposes of the Order, telehealth services include the provision of health care, psychiatry, mental health treatment, substance use disorder treatment and related services to a patient, regardless of location, through electronic or telephonic methods, such as telephone (landline or cellular); video technology commonly available on smart phones and other devices such as FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype; and videoconferencing, as well as any method within the meaning of telehealth services under the Illinois Insurance Code.

On the same day, Governor Prizker requested an 1135 Waiver from the federal Centers for Medicare and Medicaid Services to permit Illinois' Medicaid program to further expand access to telehealth services.

Please note, the Order does not suspend or otherwise supersede conflicting federal law. Thus, for example, while the Order permits the use of a standard telephone to provide telehealth services, Medicare will cover such services only if provided using a smart phone with real-time video capabilities.

As the number of cases around the world grows, Faegre Drinker's Coronavirus Resource Center is available to help you understand and assess the legal, regulatory and commercial implications of COVID-19.

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HEALTH INNOVATION ALLIANCE

Overview: Telehealth Provisions in Coronavirus Packages

During the COVID-19 pandemic, telehealth is a valuable tool in expanding access to testing and care in the home. It will help limit new infections while ensuring sick people receive the care they need. Telehealth will also help capacity issued by triaging patients who may have symptoms of the virus, but who do not require hospitalization. Finally, telehealth can help protect the health and safety of health workers by limiting needless exposure to infected patients.

Congress has enacted three laws to address the Coronavirus threat, and all three laws include provisions to expand the use and availability of telehealth services.

Coronavirus Supplemental (HR 6074)

- **$8.3 Billion**
- Signed into law 3/6
- Focus on response: vaccines, treatment, surveillance, testing and protective gear

Families First Coronavirus Response Act (HR 6201)

- **$3.4 Billion**
- Signed into law 3/18
- Free testing, paid leave and unemployment

CARES/Supplemental (HR 748)

$2 trillion COVID Package III:

- Signed into law 3/27
- $340 billion appropriation
- $1.7 trillion in stimulus and other policies
- Cash to individuals
- Corporate liquidity
- Payments to HC providers, PPE and vaccines
- Medicare extenders through 11/30/20

The table below outlines the changes to telehealth policy in all three laws.

The Coronavirus Preparedness and Response Supplemental Appropriations Act (H.R. 6074)

Section	Summary

DIVISION B—TELEHEALTH SERVICES DURING CERTAIN EMERGENCY PERIODS	• Allows the Secretary to waive certain Medicare restrictions on telehealth during the public emergency related to COVID-19 outbreak in a declared emergency area, to create flexibility including:
	  ○ Originating site and geographic restrictions: a patient may receive telehealth services at home
	  ○ Urban and rural restrictions: telehealth may be delivered across the U.S.
	• Includes modality restrictions allowing for telephone that "has audio and video capabilities that are used for two-way, real-time interactive communication"
	• Includes provider restrictions – the term 'qualified provider' means a health care provider who delivered care to that patient within the previous 3 years or is in the same practice (as determined by tax identification number) of a physician or practitioner who furnished such an item or service to such individual during such period.
	• Previous payer relationships don't count.

Families First Coronavirus Response Act (H.R. 6201)

Section	Summary
SEC. 6001. COVERAGE OF TESTING FOR COVID–19	• Requires group health plans and health insurance issuers offering group or individual health insurance coverage to provide coverage – without any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements – for: ○ (1) in vitro diagnostic products used to detect the virus that causes COVID-19 and ○ (2) items and services furnished to an individual during health care provider office visits (which **includes in-person visits and telehealth visits**), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product
SEC. 6010. CLARIFICATION RELATING TO SECRETARIAL AUTHORITY REGARDING MEDICARE TELEHEALTH SERVICES FURNISHED DURING COVID–19 EMERGENCY PERIOD.	Paragraph (3)(A) of section 1135(g) of the Social Security Act (42 U.S.C. 1320b–5(g)) is amended to read as follows: "(A) furnished to such individual, during the 3-year period ending on the date such telehealth service was furnished, an item or service that would be considered covered under title XVIII if furnished to an individual entitled to benefits or enrolled under such title; or".[1]

[1] This clarification relates back to the telehealth waiver authority and expanded coverage included in the Coronavirus Preparedness and Response Supplemental Appropriations Act (H.R. 6074).

SEC. 3212. TELEHEALTH NETWORK AND TELEHEALTH RESOURCE CENTERS GRANT PROGRAMS.	• Creates more flexibility in telehealth network and telehealth resource centers grant programs. In particular, including additional flexibilities for programs that address substance use disorders and for rural areas that may not otherwise meet the definition of "medically underserved" for the purposes of this section.
SEC. 3701. EXEMPTION FOR TELEHEALTH SERVICES.	• Allows first dollar coverage for telehealth under HSAs
SEC. 3703. INCREASING MEDICARE TELEHEALTH FLEXIBILITIES DURING EMERGENCY PERIOD.	• Deletes the modality restrictions (requiring use of a telephone that "has audio and video capabilities that are used for two-way, real-time interactive communication") that were included in the *Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020* (the first supplemental bill related to coronavirus), among other things, and generally allows for greater flexibility in the use of telehealth during emergency periods.
SEC. 3704. ENHANCING MEDICARE TELEHEALTH SERVICES FOR FEDERALLY QUALIFIED HEALTH CENTERS AND RURAL HEALTH CLINICS DURING EMERGENCY PERIOD.	• Expands availability of telehealth by reimbursing FQHCs and Rural health clinics for telehealth services.
SEC. 3705. TEMPORARY WAIVER OF REQUIREMENT FOR FACE-TO-FACE VISITS BETWEEN HOME DIALYSIS PATIENTS AND PHYSICIANS.	• Allows telehealth to be used in place of face-to-face physician visit to authorize dialysis. Will likely apply to private plans that provide coverage.
SEC. 3706. USE OF TELEHEALTH TO CONDUCT FACE-TO-FACE ENCOUNTER PRIOR TO	• Allows telehealth to be used in place of face-to-face for hospice care. Will likely apply to private plans that cover hospice.

RECERTIFICATION OF ELIGIBILITY FOR HOSPICE CARE DURING EMERGENCY PERIOD.	
SEC. 3707. ENCOURAGING USE OF TELECOMMUNICATIONS SYSTEMS FOR HOME HEALTH SERVICES FURNISHED DURING EMERGENCY PERIOD.	• Directs the Secretary of HHS to consider ways to encourage use of telecommunications for home health services, including remote patient monitoring, for services offered during emergency periods.

Note: This chart captures sections explicitly related to HIA priorities, namely telehealth, but other funding provided in this Act could also be used for telehealth or other HIA priorities if it relates to other Appropriations (see e.g., funding allocated to "CDC–Wide Activities and Program Support")

SPECIFIC APPROPRIATIONS FOR TELEHEALTH - Coronavirus Aid, Relief, and Economic Security Act (HR 748)

USDA D**ISTANCE LEARNING, TELEMEDICINE (DLT), AND BROADBAND PROGRAM** – $25 million The bill provides additional funding for the FCC's DLT grant program, which supports rural communities' access to telecommunications-enabled information, audio, and video equipment, as well as related advanced technologies for students, teachers, and medical professionals.

FCC TELEHEALTH INITIATIVES – $200 million. The bill provides $200,000,000 for the Federal Communications Commission to support the efforts of health care providers to address coronavirus by providing telecommunications services, information services, and devices necessary to enable the provision of telehealth services.

INDIAN HEALTH SERVICE – $1.032 billion to address critical response needs in Indian Country, along with the ability to transfer $125 million for facility needs. Funding provides for medical and equipment supplies; mobile triage units; surveillance; medicines; purchased and referred care; transportation; backfilling for public health service corps; and increased capacity for telehealth and other teleworking capacity.

HEALTH RESOURCES AND SERVICES ADMINISTRATION - $275 million to expand services and capacity for rural hospitals, telehealth, poison control centers, and the Ryan White HIV/AIDS program. Language is also included to allow Community Health Centers to use FY2020 funding to maintain or increase staffing and capacity to address the coronavirus.

VA MEDICAL SERVICES – $14.4 BILLION. Supports increased demand for healthcare services at VA facilities and through telehealth, including the purchase of medical equipment and supplies, testing kits, and personal protective equipment. Also enables VA to provide additional support for vulnerable veterans, including through programs to assist homeless or at-risk of becoming homeless veterans, as well as within VA-run nursing homes and community living centers.

VA INFORMATION TECHNOLOGY – $2.15 BILLION. Supports increased telework, telehealth, and call center capabilities to deliver healthcare services directly related to coronavirus and mitigate the risk of virus transmission. This includes the purchasing of devices, as well as enhanced system bandwidth and support.

VA TELEMENTAL HEALTH SERVICES FOR ISOLATED VETERANS – Authorizes VA to expand mental health services delivered via telehealth and enter into short-term agreements with telecommunication companies to provide veterans with temporary broadband services.

VA MODIFICATIONS TO VETERAN DIRECTED CARE PROGRAM – Temporarily waives the in-person home visit requirement to enroll and permits telephone and telehealth visits as an alternative. Prohibits suspension or disenrollment from the program during a public health emergency.

VA TELEHEALTH FOR CASE MANAGERS AND HOMELESS VETERANS – Ensures telehealth capabilities are available for case managers and homeless veterans participating in the HUD–VASH program.