COVID-19 Newsletter – Telehealth Roundup Updates

The novel coronavirus (*coronavirus* 2 or "SARS-CoV-2," which causes COVID-19) has spurred a rapid expansion of telehealth services in response to a public health emergency that demands minimal contact with all patients in order to curb the spread of the disease. In record numbers, healthcare professionals who have historically provided in-person services are having to quickly transition to telehealth for safety purposes, and in many instances state and federal authorities have facilitated this shift by making telehealth easier through a variety of means.

Below, we summarize key telehealth developments in response to COVID-19:

- Professional Licensure
- Privacy and Security
- Platforms and Patient Experience
- Reimbursement
- Guidance & Toolkits

Please note that this area has experienced rapid changes in the past few weeks and is expected to continue changing to meet the challenges of the current crisis. Providers are encouraged to refer to the applicable agency and payor guidance referenced below for details and remain cognizant of applicable laws and regulations and payor requirements.

Telehealth Updates (Last Updated 4/29/2020)

Professional Licensure

- A tenet of telehealth is that the "standard of care" should be the same whether the patient is seen in-person, through telehealth or other methods of electronically enabled health care. Implicit in this standard is that the provider's "scope of practice" should not change by virtue of using telehealth, nor should other duties associated with practicing medicine. While these expectations remain during the COVID-19 crisis, both state and federal authorities have loosened certain ancillary requirements linked to telehealth.
- On April 3, 2020, California Governor Gavin Newsom issued Executive Order N-43-20 (the "Order"), available here, which included the following:
  - **Temporary waiver of consent requirements.** The Order suspends the requirement that providers obtain and document patients' consent to telehealth. Under normal (*e.*, pre-COVID-19) circumstances, California providers must inform the patient about the use of telehealth and obtain verbal or written consent from the patient for the use of telehealth as an acceptable mode of delivering health care services and public health. The provider must also document the consent.
  - **Applicability to behavioral and mental health services, as well as services not related to COVID-19.** The Order also explicitly stated that the protections extend to telehealth used for behavioral and mental health services, in addition to medical, surgical, or other health care services. The protections also apply regardless of whether the telehealth services are related to COVID-19.

- The **Centers for Medicare & Medicaid Services (CMS)** issued several waivers expanding providers' ability to use and get reimbursed for telehealth.
  - **Telehealth facilitating professionals working at highest levels.** In April, CMS issued additional waivers to allow more practitioners to work at the highest level permitted by their license ("practicing at the top of their license") to assist in potential staffing shortages during the public health emergency, oftentimes via telemedicine, if appropriate. For example, certain providers may now conduct skilled nursing facility (SNF) visits via telehealth; and physicians at critical access hospitals (CAHs) may now provide supervision via telehealth rather than in-person.
  - Nelson Hardiman's client alert summarizes key components of this waiver.

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Privacy and Security

- **On March 17, 2020, the Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS)**, which enforces HIPAA, issued a notice of enforcement discretion regarding telehealth, available here.
    - Nelson Hardiman's client alert with Q&A regarding this OCR notice is available here.
    - **Enforcement Discretion Relating to the Good-Faith Provision of Telehealth Services.** In sum, under normal circumstances, HIPAA Rules require specific security safeguards for electronic PHI at rest and in transit, which would normally exclude many virtual conferencing platforms used widely nowadays for general purposes. Per its enforcement discretion, OCR says it will not impose penalties against covered health care providers during the COVID-19 public health emergency for noncompliance with these Rules in connection with the good-faith provision of telehealth using a "non-public facing remote communication product."
    - **What is Non-Public Facing?** OCR defines "non-public facing remote communication product" as one that by default allows only the intended parties to participate in the communication. It specifically named Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, WhatsApp video chat, and Skype as examples of non-public facing remote communication products. Meanwhile, it specifically prohibited Facebook Live, Twitch, TikTok, which are designed to be more open to the public
    - **Providers' Continuing Responsibilities.** Providers would remain responsible for costs associated with breach (if one were to occur) and for complying with state law and payor requirements. To maximize security, providers may consider using HIPAA-compliant video communication products and/or engaging with vendors willing to sign business associate agreements.
- The April 3 California Order also relaxed certain privacy and security laws so that more providers can furnish telehealth services without risk of being penalized.
    - The Order suspends the imposition of fines, penalties civil penalties, criminal penalties, and certain other potential liability associated with "inadvertent, unauthorized access disclosure of [patient] health information during the good faith provision of telehealth services."
    - The Order also extends the notification deadline for, and suspends penalties associated with, any breach associated with inadvertent, unauthorized access disclosure of [patient] health information during the good faith provision of telehealth services."

Platforms and Patient Experience

- **More Permissible Platforms**. OCR is exercising its enforcement discretion relating to the good-faith use of non-public facing telehealth platforms that might not have otherwise been in compliance with HIPAA Rules.
- **Patient and Provider Location**. Under normal circumstances, many payors typically impose requirements with respect to the "originating site" (i.e., where the patient is located) and the "distant site" (i.e., where the provider is located). Many of these payor requirements have been waived during the public health emergency. See "Reimbursement" section.
- **Expanded services covered.** CMS will now pay for more than 80 additional services when furnished via telehealth. These include emergency department visits, initial nursing facility and discharge visits, and home visits, which must be provided by a clinician that is allowed to provide telehealth. Providers can also evaluate beneficiaries who have audio phones only.

Reimbursement for Telehealth During the COVID-19 Crisis

The landscape for telehealth reimbursement has always been a difficult one to navigate, with varying and often contradictory coverage requirements from payor to payor and across many jurisdictions. With the urgently expanded need for telehealth services during the current national health crisis, the laws and payor policies surrounding reimbursement have been changing rapidly. While key differences remain from one payor to the next, the overall trend has been toward a relaxation of rules to make it easier for providers to get paid for their medically

necessary telehealth services. Below is a brief roundup of important developments on a federal level and in California concerning telehealth reimbursement, with links to additional helpful resources.

Regardless of which payor you are dealing with, it is important to make sure that state laws and regulations concerning the provision of telehealth services still apply. Therefore, ensure your telehealth services are compliant and that your documentation supports the codes being billed.

Medicare

- The Centers for Medicare and Medicaid Services (CMS) has significantly expanded Medicare beneficiary access to telehealth services. This expansion extends to all Medicare beneficiaries, both new and established patients, receiving a wide variety of services in any location – not just in rural areas or under other limited conditions, as was previously the case. The expansion is effective as of March 1, 2020 and will be in place for the duration of the public health emergency. Key expansions are discussed here and include:
  - Telehealth services furnished in any healthcare facility, as well as in the home, are eligible for coverage.
  - Medicare coverage will apply regardless of the location of the patient, so long as the provider is enrolled in Medicare and in compliance with any applicable state licensing or other requirements.
  - Telephonic / audio-only visits can be billed as a telephone visit code (99441-99443) or as a virtual check-in (G2012).
  - Office/outpatient evaluation and management (E/M) visits provided through telehealth can be selected based on the time associated with the E/M on the day of the encounter or on medical decision making, and do not require documentation of history and/or physical exam in the medical record. Further details are set forth in a recent a CMS interim rule.
- CMS has released several FAQs regarding coverage for telehealth during the COVID-19 crisis, including the Medicare Telehealth FAQs and CMS's COVID-19 Frequently Asked Questions (FAQs) on Medicare Fee-for-Service (FFS) Billing.
- CMS has published a list of services payable under the Medicare Physician Fee Schedule when furnished via telehealth. The AMA also has published a list of CPT codes and HCPCS codes that can be used to report telehealth services through Medicare and/or private payors.
- In guidance from Noridian (a Medicare Administrative Contractor), non-traditional professional services rendered via telehealth with dates of service on or after March 1, 2020, and for the duration of the public health emergency, should be billed with the same place of service (POS) code as normal, along with a modifier 95 to indicate that the service was actually rendered in a telehealth modality. Additional information can be found here.
- On March 10, 2020, CMS issued guidance to Medicare Advantage (MA) plans notifying them that they are required to provide what Medicare covers on a FFS basis, but the MA plans also have the flexibility to be more expansive than FFS in their coverage of telehealth services. However, MA plans are not required to cover more than FFS, and each MA plan can ultimately decide what it will cover.

Medi-Cal

California's Medicaid program ("Medi-Cal") has broad authority to allow providers and enrollees to use telehealth, including telephonic consultations. Additional flexibilities were obtained through the Department of Health Care Services' (DHCS) March 16, 2020 request to CMS pursuant to Section 1135 of the Social Security Act.

- During the crisis, the DHCS will reimburse Medi-Cal providers at the same rate for telehealth services as would be reimbursed if the service was rendered in-person, so long as the service is the same based on the provider's description of the service. If medically appropriate for the service, telephone services will be reimbursed the same as telehealth with a video modality. Telephonic visits qualify as synchronous telehealth under Medi-Cal's telehealth policy. Detailed information regarding Medi-Cal's telehealth policy is located here. Note that Medi-Cal has different requirements for FQHCs, RHCs and Tribal 638 clinics.
- Services rendered via telehealth should be billed using place of service, 02, telehealth, and the appropriate telehealth modifier must also be used. Telephonic visits qualify as synchronous telehealth under Medi-Cal's telehealth policy.
- Pursuant to a directive from DHCS to Medi-Cal managed care plans issued on March 18, 2020, a copy of which can be found here, Medi-Cal managed care plans must reimburse for telehealth services, including telephonic visits, at the same rate as those same services provided in person, so long as it is medically appropriate for the service to be furnished via telehealth. This order applies to Medi-Cal managed care plans that have a Knox Keene license. The Medi-Cal managed care plans are responsible for ensuring their delegated groups comply. This requirement also applies to county-organized systems.

Commercial Health Plans

Telehealth coverage varies among payers and plans. Nonetheless, California regulatory agencies have recently issued important directives to plans and insurers to help ensure that telehealth services will be reimbursed during the health crisis.

- ***HMOs and Blue Cross Blue Shield PPOs Regulated by the Department of Managed Health Care.*** In response to the COVID-19 crisis and the need for "social distancing," the Department of Managed Health Care (DMHC) has directed HMOs and certain PPOs that it regulates to reimburse for telehealth services, including telephonic visits, at the same rate as those services when provided in person so long as the telehealth service is medically appropriate. This directive is effective as of March 18, 2020. To comply with this directive, health plans may not limit use of telehealth to the plan's contracted third-party telehealth vendors. On April 7, 2020, DMHC issued additional guidance clarifying that providers should document and code telehealth services as if the encounters were in person, use "02" as the Place of Service, and use modifier "95" for synchronous telehealth or "GQ" for asynchronous services.

  DMHC has clarified the following additional issues:
  - If the healthcare provider's professional judgment is that the service can be effectively rendered using telehealth, then health plans may not exclude coverage or deny the service on the sole ground that the service was rendered via telehealth. Nor can plans require the provider to be approved/credentialed specifically for telehealth if the plan would have otherwise covered the service if provided in person.
  - However, plans are not required to authorize an out-of-network telehealth service if, when rendered in person, the service would not be covered as an out-of-network benefit.
  - Cost-sharing for a service furnished via telehealth must be the same as if the service is rendered in-person.
  - Plans are prohibited from placing limits on covered telehealth services unless such limits would also apply if the services were furnished in person.
- ***Health Insurers Regulated by the Department of Insurance.*** On March 30, 2020, the California Department of Insurance (CDI) issued a notice to health insurance companies under its regulatory jurisdiction to provide increased telehealth access during the COVID-19 emergency. The CDI's guidance to health insurers largely mirrors the requirements of the DMHC's All Plan Letter discussed above. In short, insurers are directed to reimburse for a telehealth service, whether rendered telephonically or via video, at the same rate as when the service is provided in-person. The requirement applies regardless of the location of the patient (e.g., home, nursing facility, physician office, etc.) and providers may provide telehealth services from their own homes. The CDI notice indicated that an insurer would not be meeting its requirement to provide an appropriate network, thus triggering its obligation to provide out-of-network services, in the event that the insurer failed to provide functional network availability through telehealth. In addition, insurers cannot impose greater cost-sharing requirements for telehealth than the cost-sharing requirements for the service if rendered in person.
- ***Payor Telehealth Policies.*** Providers are strongly encouraged to contact the commercial payors they work with to determine how payors are expanding access and coverage for telehealth during the COVID-19 crisis. Below are links to helpful information from some of the major payors.
  - Aetna
  - Anthem
  - Blue Shield
  - Cigna
  - Health Net
  - Magellan
  - United Behavioral Health (Optum)
  - United HealthCare
- ***Self-Funded ERISA Plans.*** Self-funded employer-sponsored group health plans regulated by the Department of Labor pursuant to the Employee Retirement Income Security Act (ERISA) are not subject to the directives by the DMHC and CDI. The types of benefits are within the discretion of the plan sponsor, and telehealth may or may not be addressed in the plan as a covered benefit. Self-funded plans may decide to cover telehealth only if provided through a contracted telehealth vendor. Nonetheless, because many self-funded plans are administered by large health insurers and have access to the insurer's network of providers, the trend will likely be towards telehealth coverage by the majority of self-funded plans. Providers are encouraged to contact the plan or its administrator to learn in advance whether the self-funded plan will cover their telehealth services prior to rendering them to plan enrollees.

Workers' Compensation

On April 13, 2020, the California Division of Workers' Compensation (DWC) gave notice of reimbursement for

telehealth services provided to injured workers on or after April 15, 2020, at the same rate as they would for the same services provided in person. DWC will be covering the same telehealth services as those being allowed by CMS. DWC's announcement provides billing and coding guidance for telehealth services rendered to injured workers.

Guidance & Tool Kits

CMS Develops "Toolkit" to Facilitate States' Use of Telehealth in Medicaid and CHIP

- The Centers for Medicare & Medicaid Services (CMS) has developed a "toolkit" to help states expand their telehealth coverage under Medicaid and the Children's Health Insurance Program (CHIP). Specifically, the document seeks to identify policy topics that could impede expansion by the states—which enjoy federal flexibility to cover telehealth through Medicaid—and that should be addressed by states to facilitate more widespread adoption of telehealth services. These topics include eligible patient populations, coverage and reimbursement policies, technology requirements, and pediatric considerations.

- Medicaid and CHIP programs are jointly administered by the state and federal governments and together provide health coverage for over 71 million Americans, including 35 million children. In a statement, CMS Administrator Seema Verma urged states to use the toolkit to ensure that Medicaid patients, particularly children, could continue to receive care from the safety of their homes.

- CMS Issued COVID-19 toolkit
- CMS press release

FDA Guidance Encourages Remote Review of Pathology Slides During PHE

- The Food & Drug Administration (FDA) has issued guidance seeking to expand the availability of devices for remote reviewing and reporting of scanned digital images of pathology slides ("digital pathology slides"), with the goal of reducing healthcare personnel exposure to the novel coronavirus. Broadly speaking, digital pathology devices have not been cleared for home use and have been limited to use in clinical laboratories, hospitals, and other healthcare settings. However, the FDA has stated it will relax enforcement relating to digital pathology devices of certain types that are intended for use in remote settings.
- The FDA's detailed guidance on its enforcement policy
- Notably, CMS had earlier issued a notice of enforcement discretion to ensure pathologists may review pathology slides from remote locations, subject to certain criteria.

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