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Telehealth Flexibility: Key Regulatory Changes that Providers Should Know

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While providers struggle to provide health care to their patients amid the coronavirus contagion concerns, recent regulatory and reimbursement changes will help ease the path to the provision of healthcare via telehealth.

On March 6, 2020, President Donald Trump signed into law an $8.3 billion emergency coronavirus disease 2019 ("COVID-19") response funding package. In addition to providing funding for the development of treatments and public health funding for prevention, preparedness, and response, the bill authorizes the U.S. Secretary of Health and Human Services, Alex Azar (referred to herein as the "Secretary"), to waive Medicare restrictions on the provision of services via telehealth during this public health emergency.

Greater utilization of telehealth during the COVID-19 outbreak will reduce providers' and patients' exposure to the virus in health care facilities. Telehealth is especially useful for mild cases of illness that can be managed at the patient's home, thereby decreasing the volume of individuals seeking care in facilities. To further facilitate the increased utilization of telehealth, the Centers for Disease Control's interim guidance for healthcare facilities notes that healthcare providers can communicate with patients by telephone if formal telehealth systems are not available. This allows providers to have greater flexibility when telehealth technology providers lack the bandwidth to accommodate this increase in telehealth utilization or are otherwise unavailable.

On March 17, 2020, President Trump and Seema Verma, CMS Administrator, announced that they are relaxing requirements imposed by the Health Insurance Portability and Accountability Act ("HIPAA") by permitting providers to use their mobile devices (FaceTime and Skype)—which normally may not fully comply with HIPAA requirements—to see patients. The Office for Civil Rights ("OCR") will exercise its enforcement discretion, and "will not impose penalties for noncompliance with the regulatory requirements…in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency." Specifically, the COVID-19 waivers are available on a temporary and emergency basis for Medicare telehealth coverage so beneficiaries can receive a

wider range of services from their doctor without traveling to a health care facility. Clinicians can bill immediately for dates of services starting March 6, 2020. Telehealth services are paid under the Physician Fee Schedule at the same amount as in-person services. Medicare coinsurance and deductibles still apply for these services. In its announcement today, CMS states that Medicaid already provides a great deal of flexibility to states that wish to use telehealth services in their programs. No federal approval is needed for state Medicaid programs to reimburse providers for telehealth services in the same manner or at the same rate that states pay for face-to-face visits.

In regards to Medicaid reimbursement policies for telehealth, the policies vary from state-to-state. State policy changes in response to COVID-19 are still under development. Similarly, private insurers' coverage of telehealth varies by payer and plan. Certain private insurers have announced plans to offer $0 copayments for telehealth visits and to expand access to telehealth for enrollees.

On March 17, 2020, the Office of Inspector General ("OIG") released a policy statement to notify providers that they will not be subject to administrative sanctions for reducing or waiving any cost-sharing obligations Federal health care program beneficiaries may owe for telehealth services furnished during the COVID-19 public health emergency declaration period. Notably, the OIG's policy statement applies to *all* telehealth services—not just telehealth services provided in connection with the diagnosis or treatment of COVID-19. This is significant for providers who are new to the telehealth space and do not have a process in place to collect co-payments. However, it is important to note that this is a temporary waiver, not a permanent change, and providers will need to address the cost-sharing obligations in the future.

In response to the COVID-19 outbreak, some states have encouraged providers and health plans to increase utilization of telehealth.

Florida

Florida's laws already offered a level of protection for patients in need of emergency services. In accordance with sections 627.64194, 627.662, and 641.513, Florida Statutes, and section 2719A of the Public Health Service Act, insurers must cover emergency services for an emergency medical condition at the in-network level regardless of which provider performs the services. Additionally, when consumers receive emergency services from a health care provider that does not participate in the issuer's provider network, Florida law directs providers to ensure that consumers incur no greater out-of-pocket costs for the emergency services as they would have incurred with a participating provider.

On March 6, 2020, Florida's Office of Insurance Regulation (OIR) issued Informational Memorandum OIR-20-01M which is aimed at removing actual or perceived barriers to testing for COVID-19. The memorandum advises that consumers could be reluctant to seek testing or treatment due to other anticipated costs. The memorandum directs commercial payors to consider all practicable options to reduce the barriers of cost-sharing for testing and treatment of COVID-19 during the public health emergency.

Florida was the first state to submit a waiver request to CMS to enable the state to, among other things, waive prior authorization requirements and streamline provider enrollment processes to ensure access to care for beneficiaries. To date, Florida has made no COVID-19-related updates specific to telehealth coverage by Medicaid-Managed Care.

Texas

On March 11, 2020, the Texas Department of Insurance issued a bulletin that strongly encourages insurers to consider waiving consumer cost-sharing to facilitate the expanded use of telehealth. To date, Texas has made no COVID-19-related updates specific to telehealth coverage by Medicaid-Managed Care.

While we await details on the waiver of geographic restrictions on telehealth services covered by Medicare, it is important to note that most states' laws require providers be licensed in the state in which they are providing services. Acknowledging this requirement as a barrier to providing services for COVID-19, the Federation of State Medical Boards issued a press release to remind state medical boards and health departments of its Physician Data Center resource, which enables states to instantly verify licensure and disciplinary history for physicians and physician assistants nationwide. Use of this tool will expedite the practice of medicine across state lines, but the fastest option for cross-state practice would be for states to temporarily waive their license requirements for the duration of the public health emergency. Many states' laws provide for an exception to the in-state licensing requirement for physicians and other providers in emergency situations, although oftentimes "emergency" is not defined. However, as of March 16, 2020, at least eight states have expressly waived certain provider licensing requirements or delegated such authority to the applicable regulatory agencies (Arizona, California, Florida, Louisiana, Mississippi, North Carolina, Tennessee, and Washington).

Finally, the Drug Enforcement Administration has waived the requirement that providers conduct an in-person evaluation of a patient prior to issuing prescriptions for controlled substances to patients, provided the following requirements are met:

- The prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice
- The telehealth communication is conducted using an audio-visual, real-time, two-way interactive communication system.
- The practitioner is acting in accordance with applicable Federal and State law.

This requirement will be waived for as long as the Secretary's designation of a public health emergency remains in effect.

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