

Telehealth Update: CMS Proposed CY 2021 Payment Policies, Extension of the Public Health Emergency, Increasing Access after COVID-19, and the Coronavirus Stimulus Package

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On August 4, CMS posted a proposed rule on CY 2021 Payment Policies, which included important updates about the expansion of Medicare covered telehealth services due to the COVID-19 pandemic. This follows on the heels of Secretary of Health and Human Services Alex Azar's renewal of the federal public health emergency ("PHE") on July 23. The PHE, which was initially declared in January, has been extended through October 21, 2020, unless the Secretary declares that the PHE has ended or renews it for additional 90 day periods.

As previously covered [here](#), a significant number telehealth waivers on the federal and state level are tied to the PHE. The most significant CMS waivers include:

- Allowing the provision of certain Medicare covered services via audio-only technology;
- Expansion of the types of professionals who may furnish distant site telehealth services; and
- Expansion of the list of Medicare covered telehealth services and modification of the process to add new services through sub-regulatory guidance.

As discussed in the [proposed rule](#), CMS has reviewed the telehealth services that were added for the duration of the PHE and determined that a number of services should be added to the Medicare physician fee schedule on a permanent basis. The full list of proposed additions to the Medicare Telehealth Services List is available [here](#). The rule also proposes expanding certain of the telehealth waivers through the end of the calendar year in which the PHE ends. Finally, CMS's proposal includes provisions to allow CMS to gather information about the utilization of telehealth services during the PHE, with the goal of making permanent changes to telehealth requirements.

OCR's enforcement discretion around HIPAA requirements, which allows telehealth providers to use non-HIPAA compliant technology, is also tied to the PHE. The relaxation of HIPAA requirements has removed the barrier to providing telehealth services for many providers, although all providers should

take steps to ensure that all state requirements related to the delivery of telehealth services are met, and that protected health information remains secured.

Although some state telehealth waivers and emergency regulations are also tied to the PHE, many are based on the individual states' emergency declarations. As [previously discussed](#), we have also seen some recent movement towards making the changes in telehealth requirements permanent. For example, New York recently amended its telehealth statute, N.Y. Pub Health Law § 2999-CC, to specifically allow for coverage of audio-only telehealth services under the states' Medicaid program. Changes like this are essential in improving access to telehealth services during the pandemic and beyond.

While the Senate and the House are still negotiating the next coronavirus stimulus package, both chambers have proposed provisions aimed at increasing access to telehealth services. The HEROES act, which was passed by the House in May, includes direct funding and other provisions aimed at increasing telehealth access and infrastructure. The Senate's proposed plan, which was outlined by Senate Republican leadership last week, would extend the CMS telehealth waivers through December 31, 2021 or through the end of the PHE, whichever is later. The Senate bill also expands access to telehealth by allowing employers to offer telehealth benefits to employees who are not working full time or otherwise do not qualify for employer coverage.

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