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2023 Telemedicine & Digital Health Trends

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Medicare telehealth post-Public Health Emergency (PHE): With the COVID-19 PHE concluding on May 11, 2023, many of the telehealth flexibilities the Centers for Medicare & Medicaid Services (CMS) implemented during the PHE will sunset at varying times. For example: CMS will continue paying for telephone Evaluation and Management (E/M) visits (via CPT codes 99441–99443) at the same rate as in-person visits through October 9, 2023; while other flexibilities (such as billing for telehealth services regardless of patient location; audio-only telehealth services; and an expanded list of eligible telehealth providers) will be available through December 31, 2024. Though such flexibilities are unlikely to be available during the same period in hospital outpatient departments. As a result, providers and facilities who have relied on Medicare's telehealth flexibilities as a key component of their care model these past three years must now re-assess their offerings and adjust operations to comply with the post-PHE landscape.

Prescribing controlled substances: In 2023, telemedicine prescribing of controlled substances will drastically change when the COVID-19 PHE expires on May 11, 2023. Since the start of the PHE in March 2020, the Drug Enforcement Administration (DEA) has waived the federal Ryan Haight Act's in-person requirement, allowing practitioners to prescribe controlled substances via real-time audio-video telemedicine. DEA also issued a separate waiver that allowed practitioners to prescribe buprenorphine, a schedule III controlled substance, via telemedicine (including audio-only telemedicine) for the treatment of opioid use disorder (OUD) without a prior in-person exam. To further increase access to buprenorphine treatment, the DATA-2000 waiver (or X-waiver), which was previously required to prescribe buprenorphine, was removed in December 2022. DEA has recently released two proposed rules interpreting the Ryan Haight Act, but if enacted as drafted, the rules would require some sort of in-person interaction to prescribe controlled substances via telemedicine (although not necessarily a **prior** in-person interaction).

Online ad trackers: In light of heightened scrutiny related to use of online tracking technologies in the health care space, including recent Health and Human Services (HHS) guidance and Federal Trade Commission (FTC) enforcement action, digital health companies will need to carefully consider (i) how the data derived from analytic and tracking technologies via its website or mobile application is regulated; and (ii) the legal requirements the company must comply with before using such technologies to process data which may be considered HIPAA protected health information or otherwise personally identifiable.

State law practice standards and modalities: After passing telehealth statutes and rules in response to the pandemic, we anticipate states will hone in on modifications to telehealth modalities required for appropriate standards of care in 2023. For the most part, we anticipate further adoption of store-and-forward communication – as recently demonstrated by New Hampshire, which now allows use of asynchronous modalities, provided that the physician meets certain enumerated requirements (e.g., confirming the patient's identity). Some states may also clarify that internet prescribing prohibitions do not extend to dynamic/adaptive questionnaires by using language like the telehealth laws of Maine and New Jersey, which limit the states' internet prescribing prohibitions to "static" questionnaires. Overall, look for changes on the horizon of allowable telehealth modalities.

Regulatory changes impacting remote monitoring services: While Medicare reimbursement for remote physiologic monitoring and remote therapeutic monitoring has served as a catalyst for the industry's growth, a number of policy changes around the corner in 2023 will impact the industry. For example, Medicare Administrative Contractors (MACs) are considering publishing a local coverage determination (LCD) which could place restrictions and parameters around reimbursement; after May 11, providers can no longer extend blanket waivers of co-pays and must start collecting them from patients receiving remote physiologic monitoring (RPM) or remote therapeutic monitoring (RTM) services will once again be limited to established patients; and the 2024 proposed physician fee schedule, to be released in July, likely will contain additional changes to RPM and/or RTM from CMS. Thus, continue to monitor for regulatory and legislative changes that affect or improve remote monitoring services.

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