Published on *The National Law Review* https://natlawreview.com

Behavioral Health Law Ledger | December 2024

Article By:

Julie A. Sullivan

Tyler Strobel

Welcome to the Ledger
The December 2024 issue of Greenberg Traurig's quarterly Behavioral Health Law Ledger details two behavioral health legal developments: a new CMS regulation proposing limits on behavioral health cost-sharing for Medicare Advantage patients, and the DEA and SAMHSA's third extension of COVID-19 telehealth flexibilities for prescribing controlled substances. These updates reflect ongoing efforts to improve access to mental health and substance use disorder (SUD) services.

CMS Publishes Regulation Limiting Behavioral Health Cost-Sharing for Medicare Advantage Patients

On Dec. 10, 2024, the Centers for Medicare & Medicaid Services (CMS) published its "Medicare and Medicaid Programs; Contract Year 2026 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicare Cost Plan Program, and Programs of All-Inclusive Care for the Elderly" (the Proposed Rule), which, in part, proposes to limit the cost-sharing amounts that Medicare Advantage (MA) patients who receive behavioral health services pay.

CMS proposes that MA plans' in-network cost-sharing for mental health and substance use disorder (SUD) services, collectively referred to as behavioral health services, be no greater than traditional Medicare's cost-sharing for these services. According to a CMS factsheet, these changes are intended to "strike an appropriate balance between individual affordability and minimizing disruption to MA enrollees' access to care and coverage options." The proposed compliance deadline is Jan. 1, 2026.

CMS proposes the following cost-sharing standards for MA patients seeking behavioral health services:

- A 20% coinsurance limit for mental health specialty services, psychiatric services, partial hospitalization/intensive outpatient services, and outpatient substance abuse services.

–	This represents a 10–30% reduction in existing coinsurance requirements, which are generally at 30–50% coinsurance rates now.
•	0% of cost-sharing permitted for opioid treatment program services.
–	The enrollee pays 50% coinsurance for these services under the current standard.
•	A 100% limit for estimated Medicare fee-for-service (FFS) cost-sharing for inpatient hospital psychiatric services.
–	The current standard for these services is 100–125% Medicare FFS cost-sharing, depending on the plan's maximum out-of-pocket type.

CMS also clarifies that "the extent to which organizations may shift costs to services utilized by certain groups of enrollees is limited by statutory and regulatory requirements that ensure beneficiaries can access needed health services regardless of their health condition." Accordingly, MA plans may face additional federal regulatory scrutiny should they shift additional cost-sharing obligations to other MA patients.

The Proposed Rule seeks comments on multiple matters, including:

- Whether the deadline should be Jan. 1, 2026, or Jan. 1, 2027;
- Whether there should be a transition period for existing contracts compliant with certain existing standards;
- If there should be a transition period, how long that period should be; and
- What impact the Proposed Rule may have on MA plans' ability to satisfy existing cost-sharing regulations.

Comments on the Proposed Rule are due Jan. 27, 2025.

DEA and SAMHSA Again Extend COVID-19 Telehealth Flexibilities Around Prescribing Controlled Substances

On Nov. 19, 2024, the Drug Enforcement Administration (DEA) and the Substance Abuse and Mental Health Services Administration (SAMHSA) published the "Third Temporary Extension of COVID-19 Telemedicine Flexibilities for Prescription of Controlled Medications" (Third Temporary Rule), extending once again the telehealth flexibilities originally adopted during the COVID-19 Public Health Emergency (PHE) that ended May 11, 2023. The Third Temporary Rule takes effect Jan. 1, 2025, and extends all telehealth flexibilities adopted during the PHE through Dec. 31, 2025. Importantly, the Third Temporary Rule further enables DEA-registered providers to prescribe certain controlled medications to patients without first having an in-person evaluation as required under

the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (known as the Ryan Haight Act).

For context, as first reported in the June 2023 Behavioral Health Law Ledger, DEA, in concert with the U.S. Department of Health and Human Services (HHS), published the "Temporary Extension of COVID-19 Telemedicine Flexibilities for Prescription of Controlled Medications" (First Temporary Rule), which extended the flexibilities established during the PHE around in-person medical evaluation for telehealth prescription. The First Temporary Rule enabled DEA-registered providers to prescribe certain controlled medications to patients without first having an in-person evaluation until Nov. 11, 2024.

As reported in the October 2023 Behavioral Health Law Ledger, DEA and SAMHSA published the "Second Temporary Extension of COVID-19 Telemedicine Flexibilities for Prescription pf Controlled Medications" on Oct. 10, 2023 (Second Temporary Rule), authorizing DEA-registered practitioners to prescribe schedule II–V controlled medications via telemedicine through Dec. 31, 2024, regardless of when the practitioner-patient telehealth relationship was formed. The Third Temporary Rule extends the flexibilities granted under the First and Second Temporary Rules through Dec. 31, 2025.

Many behavioral health treatment plans involve prescribing controlled substances, and the Third Temporary Rule extends access to tele-psychiatric services for patients who need controlled medications to address their mental and behavioral health conditions. Given the increasing reliance on telehealth and tele-psychiatric care across the United States, and especially in rural and tribal communities and incarcerated populations, DEA and SAMHSA may publish a new rule in the coming year. The Third Temporary Rule extends the prescribing flexibilities to provide DEA and SAMHSA additional time to promulgate new regulations.

Let's Stay in Touch

GT's Behavioral Health Law Ledger keeps behavioral health and integrated health providers current on behavioral health legal and regulatory developments. Each quarter we highlight recent legal developments, including but not limited to audit risks, significant litigation, enforcement actions, and changes to behavioral-health-related laws or regulations such as health privacy, confidentiality, and/or security issues, consent issues, data-sharing allowances, and other cutting-edge arrangements and issues facing behavioral and integrated health care providers.

National Law Review, Volume XIV, Number 351

Source URL:https://natlawreview.com/article/behavioral-health-law-ledger-december-2024