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

Update on Telemedicine Parity Laws

Article By:

Health Care Practice at Covington & Burling

We have followed (here and here) the adoption of the Interstate Medical Licensure Compact ("IMLC") by various states and the subsequent formation of a commission under the IMLC. We believe that the IMLC presents one promising avenue for the proliferation of telemedicine. In this post, we explore another initiative designed to encourage the development of telemedicine; parity laws.

Telemedicine parity laws require reimbursement for telemedicine services in the same manner and at the same reimbursement amount as for analogous in-person medical treatment. According to the American Telemedicine Association, 7 States have proposed or pending parity legislation, 31 States have already enacted some kind of parity law and 48 States have implemented parity in their Medicaid programs through regulation or legislation.

While these laws have spread quickly, there are many important distinctions among them. Some of these distinctions are worth careful consideration. For example, some States have adopted laws or policies that apply only to Medicaid. Other States have passed legislation that binds private payers as well.

There are plenty of advocates on both sides of the private payer issue. Many telemedicine proponents argue that parity legislation ought to apply to private payers because parity requirements will spur development of cheaper and more effective delivery of services. Critics point out that market forces make such legislation unnecessary; if telemedicine is actually more effective, private payers would have their own incentives to pay as much or more for it, and if telemedicine services are not as effective but are attractive mainly for their cost-saving potential, private payers should be able to adjust the reimbursement and reap the savings accordingly. While this fight continues to rage, most States have concluded that parity, at least with respect to Medicaid, makes sense.

Some States have also adopted separate requirements for obtaining informed patient consent (Michigan is set to become the most recent). Since telemedicine is a relatively new way for patients to obtain care, some States have mandated that patients receive information about what to expect prior to treatment. Proponents of these laws describe them in terms of consumer protection and laud the transparency that they create. Critics tend to argue that state-wide disclosure requirements stifle innovation by implementing a one-size-fits-all regime that places telemedicine at a competitive disadvantage to in-person care, which does not have to meet additional informed consent

requirements. They argue that creating this kind of advantage for in-person care might inappropriately slow the implementation of telemedicine solutions.

In March, Florida inched toward telemedicine parity by creating the Telehealth Advisory Council to recommend ways to “increase the use of accessibility of services provided by telehealth.” The Council, which has already begun to hold meetings, will base its recommendations on research conducted by the Agency for Health Care Administration and other regulators into the types, prevalence, cost savings, and reimbursement practices of telemedicine services. While Florida created a council to analyze the issue before enacting substantive legislation, many states adopted legislation without studying the issue or studied it more informally. Florida’s approach is not entirely new, as Indiana completed a one-year pilot program before enacting permanent legislation this year.

States also vary in their methods of regulation. Some States have treated the regulation of telemedicine as an element of preexisting medical regulations, while others have conceptualized it as wholly new and requiring its own regulatory paradigm. For example, while Indiana empowered its existing State Licensing Board to develop regulations to implement the legislation, Idaho created a new Telehealth Council for the same purpose. This example illustrates the difficult balance States will need to create as they integrate telemedicine regulation with preexisting practice rules *and* try to address the wholly new problems and opportunities that it presents.

Jack Lund, a law clerk at Covington Burling's heath practice authored this post.

National Law Review, Volume VI, Number 341