COVID-19: CMS Expands Medicare Coverage for Telehealth Services Amid Public Health Emergency

March 20, 2020

In recent years, the use of telehealth services—electronic technology to support remote clinical healthcare and other healthcare delivery functions—has increased significantly as it is generally cost effective and expands access to care in locations lacking a sufficient number of healthcare providers. The high rate of growth has occurred even though Medicare imposed significant limitations on the provision of care via telehealth for its beneficiaries. Now, in light of the public health crisis caused by the coronavirus known as COVID-19, the federal government has relaxed many of those limitations in order to facilitate social distancing and to free up space in medical facilities for COVID-19 patients.

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Pre-crisis CMS Rules Governing Telehealth. Prior the recent emergency, the Centers for Medicare and Medicaid Services ("CMS") rules provided that a beneficiary could receive coverage for telehealth services only if, among other things, a beneficiary lived in a rural area and travelled to a local medical facility to receive services from a physician in a remote location. Furthermore, according to CMS, a hospital that provided telehealth services free of charge was potentially in violation of the Anti-Kickback Statute ("AKS").

CMS began attempting to expand access to telehealth last year. At that time, CMS engaged in rulemaking pursuant to its statutory authority with the aim of expanding the provision of virtual care to provide more flexibility for patients and providers. Medicare began to cover "virtual check-ins," or patient-initiated, brief consultations with healthcare providers via phone, video chat or online patient portals. Medicare Part B also covers e-visits, or non-face-to-face communications patients initiate with healthcare providers through online portals.

On March 13, 2020, President Trump Declared a National Emergency in Light of the COVID-19 Outbreak. In this declaration[1], the President authorized the Secretary of the Department of Health and Human Services ("HHS") to exercise his authority under Section 1135 of the Social Security Act to modify certain requirements of Medicare, Medicaid and the State Children's Health Insurance Programs ("SCHIP") in light of the public health emergency. The federal government has subsequently used this declaration to support a variety of regulatory changes that should significantly expand the provision of telehealth.

The Expansion of Medicare Coverage for Telehealth. On March 17, 2020, CMS announced that it will now allow Medicare to reimburse providers for telehealth services provided to Medicare beneficiaries across the country.[2] Beneficiaries will no longer have to travel to remote facilities to receive these services and can receive care remotely from their homes while "social distancing."

Medicare will now cover various services—provided remotely—including common office visits, mental health counseling and preventive health screenings provided by physicians, nurse practitioners, clinical psychologists, licensed clinical social workers and other professionals, subject to limitations imposed by state law. To be eligible for coverage, the provider must utilize interactive audio and video telecommunication technology that allows for real-time communication between the patient and the provider's distant location. Telehealth services will be paid the same as in-person services under the Physician Fee Schedule. Medicare coinsurance and deductibles still apply, but the HHS Office of Inspector General ("OIG") has instituted flexibility for providers who may wish to reduce or waive these cost-sharing arrangements. Specifically, the OIG has announced that it will not pursue sanctions for arrangements that meet the following conditions: (i) the physician or provider reduces or waives cost-sharing obligations for telehealth services delivered consistent with then-applicable coverage and payment rules; and (ii) the telehealth services are provided during the period of the COVID-19 public health emergency.[3] Therefore, hospitals that abide by these regulations can provide telehealth services at reduced cost or for free without running afoul of the AKS.

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1 The White House, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), *available at* https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

2 The new CMS rules are retroactive to March 6, 2020.

3 HHS OIG, Policy Statement Regarding Physicians & Other Practitioners that Reduce or Waive Amounts Owed by Federal Health Care Program Beneficiaries for Telehealth Services During the 2019 Novel Coronavirus (COVID-19) Outbreak (March 17, 2020), *available at* https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/policy-telehealth-2020.pdf.

Relaxation of Rules Governing Technology That Can Be Used to Provide Telehealth Services. On March 17, 2020, the HHS Office for Civil Rights ("OCR") announced that it will use its enforcement discretion and waive penalties for HIPAA violations against healthcare providers serving patients in good faith using telehealth technology platforms throughout the duration of the COVID-19 public health emergency.[4] The OCR noted that some available technology platforms may not fully comply with the HIPAA rules, but OCR will not impose penalties for noncompliance for healthcare providers using such platforms in good faith.

Under OCR's announcement, healthcare providers may use any non-public-facing remote communication product to communicate remotely with patients, potentially including applications such as FaceTime or Skype. This extends to the use of telehealth for reasons beyond services related to the diagnosis or treatment of conditions related to COVID-19. Notwithstanding this announcement, providers should think carefully before using technology that would otherwise not be HIPAA compliant and ensure that providers institute appropriate protections for patient privacy.

Compliance with Physician Licensing Requirements. On March 13, 2020, HHS Secretary Alex M. Azar II announced that beginning March 15, 2020, HHS would waive the requirement that out-of-state healthcare providers be licensed in the state where they provide healthcare services. Absent fraud or abuse, a physician that holds an equivalent license from another state and is not affirmatively barred from practice will be able to provide services in a state in which he or she does not hold an active license.[5]

However, this waiver is limited to licensure requirements related to participation and payment in federal healthcare programs. State law still governs whether a healthcare provider may provide professional services in that state without holding an active license from that state's medical board. In the current public health crisis, several states have begun to ease their licensing restrictions. Amidst such changes, it is important for providers to pay close attention to states' changing requirements and the exact provisions and limitations of any instituted waivers.

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[4] Office for Civil Rights of the Department of Health & Human Services, Notice of Enforcement Discretion for Telehealth Remote Communications during the COVID-19 Nationwide Public Health Emergency (March 17, 2020), *available at* https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html.

[5] U.S. Dep't of Health & Human Services, Waiver or Modification of Requirements Under Section 1135 of the Social Security act (March 13, 2020), *available at* https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx; *see also* CMS, COVID-19 Emergency Declaration Health Care Providers Fact Sheet (March 13, 2020), *available at* https://www.cms.gov/files/document/covid19-emergency-declaration-health-care-providers-fact-sheet.pdf.

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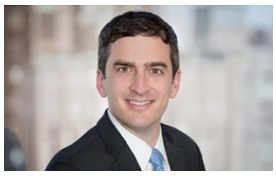

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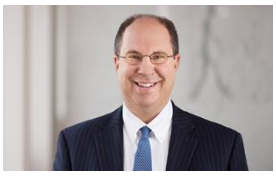

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