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A Health Care Law Update

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The Expiration of the COVID-19 Public Health Emergency: Part II – Impact on the Provision of Medical Services via Telehealth

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As announced by the White House on January 30, 2023, the public health emergency (PHE) is set to end on May 11, 2023. The end of the PHE also brings an end to several flexibilities that were implemented that impact telehealth services, including flexibilities involving the Health Insurance Portability and Accountability Act (HIPAA), the U.S. Drug Enforcement Administration (DEA), state waivers, options for cross-state services, and Medicare and Medicaid coverage.

Key Things Providers Should Know about the Provision of Medical Services via Telehealth Post-PHE

HIPAA

The U.S. Department of Health and Human Services Office of Civil Rights (OCR) had issued a Policy Statement that it would exercise enforcement discretion and would refrain from imposing penalties on covered health care providers for non-compliance with HIPAA requirements in connection with the good faith provision of medical services via telehealth during the PHE. This enforcement discretion applied to medical services provided via telehealth for any reason, regardless of whether the health care provider was diagnosing or treating health conditions related to COVID-19.

The provision of telehealth services includes “non-public facing” remote communication products, which allow only the intended parties to participate in the communication. For example, Apple FaceTime, Google Hangouts video, Zoom or Skype. During the PHE, the OCR also did not impose penalties on covered health care providers for failure to enter into a Business Associate Agreement with video communication vendors.

OCR enforcement discretion will end effective May 11, 2023.

The OCR has issued guidance on how HIPAA rules will permit covered health care providers to use audio-remote communication technologies even after such enforcement discretion is no longer in effect. The guidance ensures that patients can continue to benefit

from audio-only telehealth services while improving public confidence that covered health care providers are protecting the privacy and security of patients' health information. Covered health care providers should apply reasonable safeguards to protect the privacy of protected health information. The covered health care provider should provide the telehealth services in a private setting, use a lower voice, and verify the identity of the patient.

Controlled Substances

Generally, providers must have at least one in-person medical evaluation of a patient before prescribing controlled substances. During the PHE, the DEA waived the requirement to have at least one in-person visit as long as the prescription was prescribed (1) for a legitimate purpose, (2) using real-time, two-way interactive audio-video communications, and (3) in accordance with applicable state and federal laws.

On February 24, 2023, the DEA announced proposed rules to extend certain flexibilities and create permanent flexibilities for prescribing controlled substances via telemedicine.

Under the DEA's proposed rule, the DEA will allow providers who established telemedicine relationships during the PHE to continue to prescribe Schedule II-V drugs for 180 days from the final rule (i.e., November 7, 2023).

Following the PHE, eligible providers can prescribe a 30-day supply of the following controlled substances without an in-person visit or referral from a medical provider that conducted an in-person visit:

1. Non-narcotic Schedule III-V controlled substances; and
2. Buprenorphine for the treatment of opioid use disorders.

The provider must note on the face of the prescription that it was prescribed using telemedicine. After the 30-day supply has been prescribed, the provider cannot issue any more telemedicine prescriptions for the patient until the patient receives an in-person examination. The patient may be examined in-person by the telemedicine provider, via a 3-party exam with the telemedicine provider and an in-person provider, or the patient may go to a different DEA-registered provider who will send the telemedicine provider a qualifying telemedicine referral for the patient.

Discontinued Medicare Reimbursement

During the PHE, CMS provided reimbursement for remote patient monitoring (RPM) services for both new and existing patients. Commencing May 11, 2023, CMS will only reimburse for RPM services provided to existing patients. The provider must conduct a new patient initiating visit before rendering RPM services to a new patient. Even after the PHE ends, the new patient initiating visit can still be conducted via telehealth.

Temporary Medicare Reimbursement Changes

The following changes to Medicare remain in place through December 31, 2024:

1. Federally Qualified Health Centers (FQHCs) and Rural Health Clinics (RHCs) can serve as a distant site provider for non-behavioral/ mental telehealth services;
2. Medicare patients can continue to receive telehealth services authorized in the 2023 Medicare Physician Fee Schedule in their home;
3. There are no geographic restrictions for originating sites for non-behavioral/ mental telehealth services and some of those services can be delivered using audio-only communication platforms;
4. For behavioral/ mental health services, an in-person visit within six months of the initial visit and annually thereafter, is not required; and
5. Telehealth services can also be provided by a physical therapist, occupational therapist, speech language pathologist or audiologist.

Permanent Medicare Reimbursement Changes

Medicare patients can receive telehealth services for behavioral and mental health care in their home. There are no geographic restrictions for the originating site for behavioral/ mental telehealth services. Behavioral/ mental telehealth services can be delivered using audio-only communication platforms. FQHCs and RHCs can serve as distant site providers for behavioral/ mental telehealth services.

Conclusion

Many providers relied on the telehealth flexibilities established during the PHE. However, despite some recent updates in regulations, the end of the PHE results in fewer flexibilities and more restrictions in some instances. The regulatory landscape will need to continue to change and incorporate additional flexibilities to support the future of telehealth.

Bodman PLC can provide guidance on this matter and others and provide practical advice to meet your needs. To discuss these or any other legal issues affecting your organization, please contact Annalise Lekas Surnow at (313) 392-1059 alekas@bodmanlaw.com or Brandon Dalziel at (313) 393-7507 or bdalziel@bodmanlaw.com. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.