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Telehealth and COVID-19

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Federal Action. To promote the use of telehealth in response to Coronavirus, the federal government took several significant steps this week:

- Medicare dramatically expanded the telehealth services for which it will pay.
- HHS suspended HIPAA security rule requirements that may have otherwise limited the technology used for telehealth visits. As a result, providers are free to use non-public facing applications such as FaceTime, Skype, Facebook Messenger, Google Hangouts, etc., to conduct telehealth visits. They should not use public-facing applications such as Facebook Live, Twitch, TikTok, etc.
- HHS suspended the HIPAA rule that would require the distribution of a Notice of Privacy Practices at the time of service.
- The DEA now allows registered practitioners to issue prescriptions for all schedule II-V controlled substances to patients for whom they have not conducted an in-person medical evaluation, provided all of the following conditions are met: (i) the prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice; (ii) the telemedicine communication is conducted using an audio-visual, real-time, two-way interactive communication system; and (iii) the practitioner is acting in accordance with applicable federal and state laws.

State Action. Importantly, the federal actions do not remove state law limits on telehealth. Many states impose licensure, technology, consent, or other procedural requirements. Unless waived by state agencies, these state laws must also be considered before launching telehealth services.

For example, Idaho statutes and regulations impose specific requirements for telehealth services. (See, e.g., Idaho Code § 54-5701 *et seq.*; IDAPA 22.01.05.201 *et seq.*). However, on March 13, 2020, Governor Little issued a proclamation that, among other things, authorized state agencies “to temporarily exercise enforcement discretion, implement temporary rules, and waive licensing and related requirements to maximize access to health care services and provider support in response to COVID-19.” On March 18, 2020, the Idaho Board of Medicine issued a proclamation that suspended a number of rules restricting telehealth. Specifically,

- The Board will now issue temporary licenses to retired and inactive physicians, physician assistants, and respiratory therapists who have actively practiced within the last 5 years and have held a license to practice in good standing from Idaho or another state at the time of retirement or inactivity.
- The Board encourages all physicians, physician assistants, and

respiratory therapists to utilize telemedicine, so as to avoid unnecessary patient travel both in-state and out of state.

- The Board will not enforce any statute, rule or regulation that would require physicians or physician assistants to personally examine patients prior to the issuance of a prescription or the administration of a medication, including controlled substances, in compliance with federal law, so long as the applicable community standard of care is met.
- Out-of-state physicians, physician assistants, and respiratory therapists may practice in Idaho, including utilizing telemedicine when treating patients in Idaho, without the necessity of securing a license to practice in the state, provided the out-of-state physician, physician assistant, or respiratory therapist holds an unrestricted license to practice in the state in which the physician, physician assistant, or respiratory therapist practices and currently is not the subject of an investigation or disciplinary proceeding.

(<https://bom.idaho.gov/BOMPortal/Home.aspx>). These actions will remain in effect until Governor Little lifts the emergency.

Private Payers. Absent state laws to the contrary, whether private payers will pay for the telehealth services generally depends on the payer contracts. Accordingly, just because a provider may render services via telehealth does not necessarily mean that the provider will be paid for such services.

Suggested Action. Providers choosing to engage in telehealth should still ensure the care is appropriate. For example:

- The provider should ensure that telehealth is an appropriate method for evaluating and/or treating the patient. Although it may turn out that the extraordinary circumstances surrounding COVID-19 justify a different standard, providers should assume that the same standard of care that exists for in-person treatment would apply to the telehealth visit.
- The provider should obtain and document the patient's informed consent for the telehealth services. To be truly informed, the provider should explain the risks and benefits associated with providing the care via telehealth along with any other information reasonably necessary to obtain effective consent.
- The provider should develop a process to document the telehealth provided and maintain appropriate records relevant to the care provided.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.

For questions regarding this update, please contact:

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