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Idaho's New Virtual Care [Telehealth] Access Act

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Idaho's new Virtual Care Access Act (the "Act") amends Idaho's existing law to make it easier to render telehealth in Idaho effective July 1, 2023. The requirements of the new Act are summarized below.

Virtual Care. The Act applies to the rendering of "virtual care," which is defined as "technology-enabled health care services in which the patient and provider are not in the same location," and encompasses "a wide variety of synchronous and asynchronous care delivery modalities enabled by technology, such as telemedicine, telehealth, m-health, e-consults, e-visits, video visits, remote patient monitoring, and similar technologies." (I.C. § 54-5703(5)). "Health care services" means

- (a) the assessment, diagnosis, consultation, treatment, and remote monitoring of a patient;
- (b) Transfer of medical data;
- (c) Patient and professional health-related education;
- (d) Public health services; and
- (e) Health administration.

(*Id.* at § 54-5703(1)). "Providers" of health care services means "any health care provider who is licensed or required to be licensed under [Idaho law] or, if located outside of Idaho, would be required to be licensed under [under Idaho law] for the purposes of diagnosing or treating physical or behavioral health conditions." (*Id.* at § 54-5703(2)).

Idaho Law Applies. Importantly, "[v]irtual care is considered to be rendered at the physical location of the patient." (I.C. § 54-5703(5)). Accordingly, "[a] provider delivering health care services via virtual care [to a patient in Idaho] must at all times act within the scope of the provider's license and according to all applicable laws and rules," including but not limited to Idaho's licensing statutes. (I.C. § 54-5703(4)).

Licensure. Prior to rendering virtual care, "a provider must obtain a license from the applicable [Idaho] licensing board" except that the Act creates several new and important exceptions to the licensure requirement:

[An Idaho] license is not required for virtual care when a provider licensed

and in good standing in another state or jurisdiction of the United States:

(a) Has established a patient-provider relationship with a person who is in Idaho temporarily for business, work, education, vacation, or other reasons and such person requires health care services from the provider;

(b) Has established a patient-provider relationship with a person and provides temporary or short-term follow-up health care services to such person to ensure continuity of care;

(c) Is employed by or contracted with an Idaho facility or hospital to provide care services for which the provider has been privileged and credentialed;

(d) Renders health care services in a time of disaster and provides follow-up health care services to ensure continuity of care;

(e) Provides health care services in preparation for a scheduled in-person care visit; or

(f) Consults with or refers a patient to an Idaho licensed provider.

(I.C. § 54-5713). These licensing exceptions are perhaps the most significant changes in the new Act.

Standard of Care. Providers rendering virtual care must comply with “the Idaho community standard of care that applies in an in-person setting.” (I.C. § 54-5706; see *also id.* at § 54-5704). In other words, there is no special “virtual care” standard that differs from the in-person standard of care, and providers must consider whether their virtual care satisfies the in-person standard of care. “Treatment based solely on a static online questionnaire does not constitute an acceptable standard of care.” (*Id.* at § 54-5706; see *also* I.C. § 54-1733(3)).

Provider-Patient Relationship. To render virtual care, a provider must first establish a provider patient relationship with the patient except as otherwise provided below. (I.C. § 54-5705). “A provider-patient relationship may be established by virtual care technologies, provided that the applicable Idaho community standard of care is satisfied.” (*Id.*). Unlike the prior statute, the Act does not require that the provider-patient relationship be established through any specific form of technology. The virtual care provider need not have an established provider-patient relationship in the

following circumstances:

(1) “[T]he patient has a provider-patient relationship with another provider in the provider group.” (*Id.* at § 54-5705). “Provider group’ means any group of licensed providers who have access to shared patient medical records and are organized to provide team-based multidisciplinary care to patients.” (*Id.* at § 54-5703(3)).

(2) “[T]he provider is covering calls for a provider with an established relationship with the patient.” (*Id.* at § 54-5705).

(3) The circumstances in which I.C. § 54-1733 allows a provider to prescribe drugs without an established provider-patient relationship, including but not limited to:

(a) Writing initial admission orders for a newly hospitalized patient;

(b) Writing a prescription drug order for a patient of another prescriber for whom the prescriber is taking call;

(c) Writing a prescription drug order for a patient examined by a physician assistant, advanced practice registered nurse or other licensed practitioner with whom the prescriber has a supervisory or collaborative relationship;

(d) Writing a prescription drug order for a medication on a short-term basis for a new patient prior to the patient's first appointment;

...

(f) In emergency situations where the life or health of the patient is in imminent danger.

(*Id.* at §§ 54-5705 and 54-1733(2)).

Evaluation and Treatment. When delivering virtual care (including prescribing drugs or medical devices), the provider must “obtain and document a patient's relevant clinical history and current symptoms to establish the diagnosis and identify the underlying conditions and contraindications to the treatment recommended.” (I.C. § 54-5706). In addition to satisfying the in-person standard of care, the provider must practice “in a manner consistent with the provider's scope of practice” under Idaho law. (*Id.*).

Prescriptions. Under the Act, a provider may prescribe drugs and medical devices via virtual care if (i) there is an established provider-patient relationship that satisfies the requirements discussed above; (ii) the

prescriptions are within the scope of the provider's license; (iii) the prescription is issued for a legitimate medical purpose; and (iv) the prescriptions comply with all other applicable state and federal laws, rules and regulations, including federal laws applicable to controlled substances. (I.C. § 54-5707(1)). The Act amends I.C. § 54-1733: under the amended statute, prescriptions for legend drugs require “a prescriber-patient relationship which includes a documented patient evaluation adequate to establish diagnoses, if applicable, and identify underlying conditions and/or contraindications to the treatment”; however, consistent with the Act, the prescriber-patient relationship may be established through virtual care technologies to the extent consistent with the applicable Idaho standard of care. (*Id.* at § 54-1733(1)).

Informed Consent. As with any other care, the provider must obtain the “patient's informed consent for the use of virtual care ... as required by any applicable law.” (I.C. § 54-5708). Under Idaho's Medical Consent Act, consent or refusal of care is valid

if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting the need for, the nature of, and the significant risks ordinarily attendant upon such a person receiving such care, as to permit the giving or withholding of such consent to be a reasonably informed decision. Any such consent shall be deemed ... so informed if the health care provider to whom it is given or by whom it is secured has made such disclosures and given such advice respecting pertinent facts and considerations as would ordinarily be made and given under the same or similar circumstances...

(*Id.* at § 39-4506). Providers should evaluate whether the applicable standard requires disclosure of such matters as the limitations of virtual care, possible technical disruption during virtual care, and similar factors specific to virtual care.

Continuity of Care. The provider delivering virtual care or a provider from the same provider group must be available to render appropriate follow-up care or provide information to the patient so the patient may obtain such care. (I.C. § 54-5709). Patients receiving virtual care must be given a method to contact the provider of record. (*Id.*).

Referral to Other Services. When medically indicated, the virtual care provider must refer the patient to other care providers, including emergency resources. (I.C. § 54-5710). Consequently, virtual care providers must be familiar with relevant referral resources in the patient's service area.

Medical Records. Virtual care providers must document the patient's virtual care in the patient's medical record consistent with the same standards for equivalent in-person services. (I.C. § 54-5711). All virtual care records must be maintained in compliance with applicable state and federal laws, rules and regulations, including HIPAA and HITECH. (*Id.*). The records must be accessible to the patient and, if permitted by the patient, to other providers, consistent with applicable laws, rules and regulations. (*Id.*).

Enforcement. Providers who fail to comply with the Act or other applicable state and federal laws, rules and regulations are subject to adverse action by relevant Idaho licensing boards. (I.C. § 54-5712). By providing virtual care to an Idaho patient, a provider exempted from Idaho licensure under the limited circumstances cited above still

consents to the applicable Idaho laws, rules, and regulations governing the provider's profession, including [the Act] and the Idaho community standard of care, the jurisdiction in Idaho courts, the jurisdiction of the [Idaho Division of Occupational and Professional Licenses], and the jurisdiction of the applicable licensing board regulating the provider's profession, including the [D]ivision's and licensing board's complaint, investigation, and hearing process and ability to seek injunctions and impose civil penalties and fines.

(*Id.* at § 54-5713). Venue for any civil or administrative action against out-of-state providers shall be the county in which the patient resides or other applicable Idaho county. (*Id.* at § 54-5712). Aside from such administrative penalties, failure to comply with Act and applicable licensing rules could also subject the provider to criminal penalties for practicing without a license as well as potential malpractice, loss of malpractice coverage, and reimbursement problems. (See, e.g., *id.* at § 54-1804).

Conclusion. Although the Act will make it easier to render virtual care to Idaho patients, providers—especially out-of-state providers who are not licensed in Idaho must still—must still ensure compliance with the Act as well as other federal and state laws, rules and regulations. Among other things, they must ensure the scope of their virtual care fits within the rules or exceptions for Idaho licensure and is provided consistent with the Idaho in-person standard of care. Failure to do so could have serious civil and criminal consequences.

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