

Telehealth and telemedicine: Surveying the regulatory landscape

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Health care providers are increasing their use of telehealth and telemedicine in conjunction with the evolving developments in technology and health care delivery systems to improve patient access and quality of care. Telehealth has transformed how health care is provided to and accessed by patients.

Health care providers are increasingly relying on telehealth. As the use of telehealth continues to expand, health care providers, third-party payors and practitioners must carefully structure and negotiate agreements to ensure regulatory compliance, navigate risks that are inherent in implementing telemedicine practices, provide quality care and minimize liability.

Telehealth regulations vary from state to state. Many states have updated or adopted new state laws to require private insurers to cover services provided through telemedicine if they cover and reimburse those same services when they are provided in person.

Generally, these state “parity” laws require health insurers to treat telehealth services and in-person services in a similar manner when it comes to coverage and reimbursement.

State laws governing telehealth will continue to expand and evolve as technology affects access to health care and the provision of patient care. Currently, there are no uniform telehealth regulations other than the Medicare and Medicaid coverage guidelines and regulations, and no federal telehealth statutes or regulations have been promulgated.

Most of the telehealth regulations have been promulgated and enforced on a state level due to scope of licensure and reimbursement considerations.

This expert analysis will analyze the state and federal regulations that govern the provision of telehealth and telemedicine.

TELEHEALTH LAWS AND REGULATIONS

Proposed laws and rules related to telehealth will continue to expand coverage, and many national insurers have implemented online medicine by adding access to approved telehealth networks for their insureds.

The provision of online medicine and related telehealth services by health care providers for the most part is subject to the same regulatory and liability issues that “brick and mortar” providers face.

Issues regarding interstate care, violations of the Health Insurance Portability and Accountability Act, and kickbacks — as well as issues relating to inappropriate prescribing for drugs, medical devices and durable medical equipment — are all key considerations for health care providers who decide to provide telehealth services.

State laws governing telehealth will continue to expand and evolve as technology affects access to health care and the provision of patient care.

Health care providers entering into agreements to provide online health care must be aware of the regulatory and liability risks associated with telehealth and address the patient consent, fraud and abuse, licensing and HIPAA hurdles.

MEDICARE COVERAGE FOR TELEHEALTH

Social Security Act Section 1834(m), as implemented by 42 C.F.R. § 410.78, defines the conditions for payment for telehealth services under Medicare. The act requires that a patient be present at a rural, clinical originating site to receive care via telehealth.¹

Medicare reimbursement for telehealth is available only at clinical sites in rural areas, and patients seeking care in metropolitan areas are unable to access these services.

In 2015 the Centers for Medicare and Medicaid Service added additional telehealth coverage. CMS released the final rule Oct. 31, 2014.

The rule added seven telehealth billing codes, including codes for psychotherapy, prolonged office visits and annual wellness visits conducted through electronic means.

CMS also added language to authorize payment for remote patient monitoring for chronic conditions. Prior to 2015, Medicare did not pay separately for these services. Instead, it bundled them into “evaluation and management” codes.

CMS has reimbursed providers for remote patient face-to-face services via live video conferencing requirements when the eligible beneficiary in the originating site is located outside a metropolitan statistical area for eligible medical services and the telehealth is provided by an eligible provider (a physician, nurse practitioner and/or a physician assistant) at an eligible facility.

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If these requirements are met, the practitioner is reimbursed in the same amount as the current fee schedule, and the nonmetro facility is eligible to receive a facility fee. However, Medicare reimbursement for telehealth continues to be available only at clinical sites in rural areas.

CMS restricts telehealth services to beneficiaries that live in counties outside an MSA and within a health professional shortage area as designated by the federal government.

Medicare does not cover home health services provided via telehealth.² Medicare reimbursement is not permitted for any covered home health services paid under the home health prospective payment system.³

In addition, Medicare does not reimburse for remote non-face-to-face services because such services are not considered to be telehealth by CMS and are covered as on-site services.⁴ An example of remote non-face-to-face services is an interpretation of an electrocardiogram that has been transmitted via telephone.

MEDICAID COVERAGE FOR TELEHEALTH

Telehealth providers who receive payment from Medicaid for telehealth services should take note of a newly announced project to review state Medicaid payments for telemedicine and other remote services.

CMS’ Office of Inspector General has initiated a project called Medicaid Services Delivered Using Telecommunication Systems. A description of the project is included in the OIG’s November 2017 work plan update.⁵

The OIG notes the “significant increase in [Medicaid] claims for telehealth, telemedicine and telemonitoring services” and says it expects the trend to continue. The increase in telehealth-related Medicaid claims and payment has

triggered the OIG’s focus in this area. The OIG is expected to issue a report related to the project in 2019. The OIG describes its new telemedicine coverage as follows:

Medicaid pays for telemedicine, telehealth and telemonitoring services delivered through a range of interactive video, audio or data transmission (telecommunications). Medicaid programs are seeing a significant increase in claims for these services and it is anticipated that this trend will continue. We will determine whether selected state Medicaid payments for services delivered using telecommunication systems were allowable in accord with Medicaid requirements.

Medicaid requirements applicable to telehealth differ from state to state, and the coverage, coding and documentation rules are not always easy to find. Most telehealth rules and requirements are not found in state regulations but rather in policy manuals and transmittals.

Medicaid providers should also continue to monitor the ongoing OIG project for any updates that may provide guidance relating to the provision of telehealth to Medicaid patients.

STATE TELEHEALTH REGULATIONS

Many states have new laws requiring private insurers to cover services provided through telemedicine, if they cover and reimburse those same services when they are provided in person. Generally, these “parity” state laws require health insurers to cover and provide reimbursement for services provided via telehealth in a comparable manner to how the payer would for the same services provided in person.⁶

Telehealth regulations vary from state to state, and each state must regulate issues related to establishment of physician/patient relationship; patient consent and disclosures; scope of practice; licensure; recordkeeping and information access; clinical standards; payment practices’ coordination of care; and prescription standards.

Here are some examples of current state telehealth regulations.

Arizona

“‘Telemedicine’ (a) means the interactive use of audio, video or other electronic media for the purpose of diagnosis, consultation or treatment. (b) does not include the sole use of an audio-only telephone, a video-only system, a facsimile machine, instant messages or electronic mail.” Ariz. Rev. Stat. Ann. § 20-1406.05.

“‘Telemedicine’ means the practice of health care delivery, diagnosis, consultation and treatment and the transfer of medical data through interactive audio, video or data communications that occur in the physical presence of the

patient, including audio or video communications sent to a health care provider for diagnostic or treatment consultation.” Ariz. Rev. Stat. Ann. § 36-3601.

Colorado

“Telehealth’ means a mode of delivery of health care services through telecommunication systems, including information, electronic, and communication technologies, to facilitate the assessment, diagnosis, consultation, treatment, education and care management of a resident’s health care when the resident and practitioner are located at different sites. Telehealth includes telemedicine.”⁶ CCR 1011-1:5-2.

“Telemedicine” means the delivery of medical services and any diagnosis, consultation or treatment using interactive audio, interactive video or interactive data communication.” Colo. Rev. Stat. Ann. § 12-36-102.5.

Connecticut

“Telehealth’ means the mode of delivering health care or other health services via information and communication technologies to facilitate the diagnosis, consultation and treatment, education, care management and self-management of a patient’s physical and mental health, and includes (A) interaction between the patient at the originating site and the telehealth provider at a distant site, and (B) synchronous interactions, asynchronous store and forward transfers or remote patient monitoring. Telehealth does not include the use of facsimile, audio-only telephone, texting or electronic mail.” Conn. Gen. Stat. Ann. § 19a-906.

“Telemedicine’ means the use of interactive audio, interactive video or interactive data communication in the delivery of medical advice, diagnosis, care or treatment, and includes the types of services described in subsection (d) of section 20-9 and 42 CFR 410.78(a)(3). ‘Telemedicine’ does not include the use of facsimile or audio-only telephone.” Conn. Gen. Stat. Ann. § 17b-245c(1).

Delaware

“Telehealth’ means the use of information and communications technologies consisting of telephones, remote patient monitoring devices or other electronic means which support clinical health care, provider consultation, patient and professional health-related education, public health, health administration, and other services as described in regulation.” Del. Code Ann. tit. 18, § 3370(a)(4).

“Telemedicine’ means a form of telehealth which is the delivery of clinical health-care services by means of real time 2-way audio, visual, or other telecommunications or electronic communications, including the application of secure video conferencing or store and forward transfer technology to provide or support health-care delivery, which facilitate the assessment, diagnosis, consultation, treatment,

education, care management and self-management of a patient’s health care by a health care provider practicing within his or her scope of practice as would be practiced in-person with a patient, and legally allowed to practice in the state, while such patient is at an originating site and the health-care provider is at a distant site.” Del. Code Ann. tit. 18, § 3370(a)(5).

Hawaii

“Telehealth’ means health care services provided through telecommunications technology by a health care professional who is at a location other than where the covered person is located.” Haw. Rev. Stat. Ann. § 431:26-101.

“Telehealth’ means the use of telecommunications to encompass four modalities: store and forward technologies, remote monitoring, live consultation, and mobile health; and which shall include but not be limited to real-time video conferencing-based communication, secure interactive and non-interactive web-based communication, and secure asynchronous information exchange, to transmit patient medical information, including diagnostic-quality digital images and laboratory results for medical interpretation and diagnosis, for the purposes of: delivering enhanced health care services and information while a patient is at an originating site and the physician is at a distant site; establishing a physician-patient relationship; evaluating a patient; or treating a patient.” Haw. Rev. Stat. Ann. § 453-1.3(j).

Illinois

“Telehealth services’ means the delivery of covered health care services by way of an interactive telecommunications system.” 215 Ill. Comp. Stat. Ann. 5/356z.22(a).

“Telehealth’ means the evaluation, diagnosis, or interpretation of electronically transmitted patient-specific data between a remote location and a licensed health care professional that generates interaction or treatment recommendations. ‘Telehealth’ includes “telemedicine and the delivery of health care services provided by way of an interactive telecommunications system.” 225 Ill. Comp. Stat. Ann. 150/5.

For the purposes of the Medical Practice Act, “telemedicine’ means the performance of any of activities listed in Section 49, including, but not limited to, rendering written or oral opinions concerning diagnosis or treatment of a patient in Illinois by a person in a different location than the patient as a result of transmission of individual patient data by telephonic, electronic, or other means of communication. ‘Telemedicine’ does not include the following: (1) periodic consultations between a person licensed under this act and a person outside of the state of Illinois; (2) a second opinion provided to a person licensed under this act; (3) diagnosis or

treatment services provided to a patient in Illinois following care or treatment originally provided to the patient in the state in which the provider is licensed to practice medicine; and (4) health care services provided to an existing patient while the person licensed under this act or patient is traveling.” 225 Ill. Comp. Stat. Ann. 60/49.5.

Indiana

“‘Telemedicine,’ for purposes of Ind. Code Ann. § 16-36-1, means a specific method of delivery of services, including medical exams and consultations and behavioral health evaluations and treatment, including those for substance abuse, using videoconferencing equipment to allow a provider to render an examination or other service to a patient at a distant location. The term does not include the use of the following: (1) a telephone transmitter for transtelephonic monitoring. (2) a telephone or any other means of communication for the consultation from one provider to another provider.” Ind. Code Ann. § 16-18-2-348.5.

“‘Telehealth services’ means the use of telecommunications and information technology to provide access to health assessment, diagnosis, intervention, consultation, supervision, and information across a distance.” Ind. Code Ann. § 12-15-5-11.

“‘Telemedicine services’ means health care services delivered by use of interactive audio, video, or other electronic media, including the following: (1) medical exams and consultations, (2) behavioral health, including substance abuse evaluations and treatment.” Ind. Code Ann. § 27-13-1-34.

“‘Telemedicine’ means the delivery of health care services using electronic communications and information technology, including: (1) secure videoconferencing; (2) interactive audio-using store and forward technology; or (3) remote patient monitoring technology; between a provider in one (1) location and a patient in another location. ... The term does not include the use of the following: (1) Audio-only communication. (2) A telephone call. (3) Electronic mail. (4) An instant messaging conversation. (5) Facsimile. (6) Internet questionnaire. (7) Telephone consultation. (8) Internet consultation.” Ind. Code Ann. § 25-1-9.5-6(a).

Montana

“‘Practice of medicine’ means the diagnosis, treatment, or correction of or the attempt to or the holding of oneself out as being able to diagnose, treat, or correct human conditions, ailments, diseases, injuries, or infirmities, whether physical or mental, by any means, methods, devices, or instrumentalities, including electronic and technological means such as telemedicine. If a person who does not possess a license to practice medicine in this state under this chapter and who is not exempt from the licensing

requirements of this chapter performs acts constituting the practice of medicine, the person is practicing medicine in violation of this chapter.” Mont. Code Ann. § 37-3-102(12).

“‘Telemedicine’ means the practice of medicine using interactive electronic communications, information technology, or other means between a licensee in one location and a patient in another location with or without an intervening health care provider. Telemedicine typically involves the application of secure videoconferencing or store-and-forward technology, as defined in Mont. Code Ann. § 33-22-138. ... The term does not mean an audio-only telephone conversation, an e-mail or instant messaging conversation, or a message sent by facsimile transmission.” Mont. Code Ann. § 37-3-102(13)(a).

Tennessee

“‘Telehealth’ or ‘telemedicine’ means, notwithstanding any restriction imposed by Tenn. Code Ann. § 56-7-1002, the use of real-time audio, video, or other electronic media and telecommunications technologies that enable interaction between the healthcare provider and the patient, or also store-and-forward telemedicine services, as defined by Tenn. Code Ann. § 56-7-1002(a), for the purpose of diagnosis, consultation, or treatment of a patient in another location where there may be no in-person exchange.” Tenn. Code Ann. § 63-1-155(a)(2).

“‘Telehealth’ (A) Means the use of real-time, interactive audio, video telecommunications or electronic technology, or store-and-forward telemedicine services by a healthcare services provider to deliver healthcare services to a patient within the scope of practice of the healthcare services provider when: (i) Such provider is at a qualified site other than the site where the patient is located; and (ii) The patient is at a qualified site, at a school clinic staffed by a healthcare services provider and equipped to engage in the telecommunications described in this section, or at a public elementary or secondary school staffed by a healthcare services provider and equipped to engage in the telecommunications described in this section; and (B) Does not include: (i) An audio-only conversation; (ii) An electronic mail message; or (iii) A facsimile transmission.” Tenn. Code Ann. § 56-7-1002(a)(6).

Texas

“Telehealth service — A health service, other than a telemedicine medical service, delivered by a licensed or certified health professional acting within the scope of the health professional’s license or certification who does not perform a telemedicine medical service and that requires the use of advanced telecommunications technology, other than telephone or facsimile technology, including: (A) compressed digital interactive video, audio, or data transmission; (B) clinical data transmission using computer

imaging by way of still-image capture and store and forward; and (C) other technology that facilitates access to health care services or medical specialty expertise.” 1 Tex. Admin. Code Ann. § 354.1430(10).

“Telemedicine medical service — A health care service, initiated by a physician who is licensed to practice medicine in Texas under Title 3, Subtitle B of the Occupations Code or provided by a health professional acting under physician delegation and supervision, that is provided for purposes of patient assessment by a health professional, diagnosis or consultation by a physician, or treatment, or for the transfer of medical data, and that requires the use of advanced telecommunications technology, other than telephone or facsimile technology, including: (A) compressed digital interactive video, audio, or data transmission; (B) clinical data transmission using computer imaging by way of still-image capture and store and forward; and (C) other technology that facilitates access to health care services or medical specialty expertise.” 1 Tex. Admin. Code Ann. § 354.1430(11).

The above-cited state regulations show there is a broad spectrum of definitions relating to telemedicine and telehealth services. Of course, these definitions impact the health care provider’s scope of practice, licensure and reimbursement for such services.

Delaware, Illinois, Montana and Texas state regulations specifically require that the telemedicine and/or telehealth services be provided by a health care professional who is licensed to practice by each of these respective states.

The other states’ telehealth regulations do not specifically state that the telemedicine and telehealth services must be provided by a licensed health care professional in the state where such services are delivered.

Illinois, Montana and Texas cross-reference and incorporate the corresponding state licensure regulations into their telehealth state regulations.

Connecticut, Illinois, Indiana, Montana and Tennessee also define what is not considered to be telehealth or telemedicine. The exclusions specifically include an audio-only conversation; an electronic mail message; a facsimile transmission; an instant messaging conversation; an internet questionnaire; a telephone consultation; an internet consultation; periodic consultations between a person licensed in the state and a person outside of the state; a second opinion provided to a person licensed in the state; diagnosis or treatment services provided to a patient in the state following care or treatment originally provided to the patient in the state in which the provider is licensed to practice medicine; and health care services provided to an existing patient while the person licensed under the practice act or while the patient is traveling.

CONCLUSION

Physicians who provide telehealth are subject to licensure regulations in the state(s) where the physicians are located and licensed and the state in which the patient is physically located at the time of the consult.

Depending upon the technology platform and the professional services being provided, the provision of telehealth could result in a physician practicing medicine in all 50 states. Regarding medical practice licensure and related rules, it is generally accepted that the law that governs the consult is the law of the state where the patient is located at the time of the consult.

Some states specifically address these issues in the state law or related guidance, while others indirectly address the medical practice rules by including diagnosing and rendering treatment through electronic or other means as part of the practice of medicine. Other state rules are silent as to this issue.

Some states allow an unlicensed physician to practice medicine in peer-to-peer consultation with a physician licensed in the state; the local physician who is licensed in the state retains the ultimate authority over treatment and diagnosis. Other exceptions include bordering state licensure, endorsement, special telehealth licenses and follow-up care.

Given the scope of practice, licensure, state board disciplinary actions, and malpractice considerations, physicians should carefully navigate the provision of professional services through telehealth and ensure regulatory compliance to avoid licensure and state board disciplinary actions.

Navigating telehealth requirements for licensing, scope of practice and reimbursement can be challenging for health care providers and patients. Evolving technology and health care delivery systems will continue to expand and increase the use of telehealth.

CMS, Medicaid and private insurers have undertaken many measures to provide telehealth, and the regulatory landscape regarding telehealth is continuing to change and evolve.

NOTES

¹ “(m) Payment for Telehealth Services. (1) In general. — The Secretary shall pay for telehealth services that are furnished via a telecommunications system by a physician (as defined in Section 1861(r)) or a practitioner (described in Section 1842(b)(18)(C)) to an eligible telehealth individual enrolled under this part notwithstanding that the individual physician or practitioner providing the telehealth service is not at the same location as the beneficiary. For purposes of the preceding sentence, in the case of any Federal telemedicine demonstration program conducted in Alaska or Hawaii, the term ‘telecommunications system’ includes store-and-forward technologies that provide for the asynchronous transmission of health care information in single or multimedia formats. (2) Payment amount. (A) Distant site. — The Secretary shall pay to a physician or practitioner located at a distant site that furnishes a telehealth service to an eligible

telehealth individual an amount equal to the amount that such physician or practitioner would have been paid under this title had such service been furnished without the use of a telecommunications system. (B) Facility fee for originating site. — With respect to a telehealth service, subject to Section 1833(a)(1)(U), there shall be paid to the originating site a facility fee equal to: (i) for the period beginning on October 1, 2001, and ending on December 31, 2001, and for 2002, \$20; and (ii) for a subsequent year, the facility fee specified in clause (i) or this clause for the preceding year increased by the percentage increase in the MEI (as defined in Section 1842(i)(3)) for such subsequent year. (A) Distant site. — The Secretary shall pay to a physician or practitioner located at a distant site that furnishes a telehealth service to an eligible telehealth individual an amount equal to the amount that such physician or practitioner would have been paid under this title had such service been furnished without the use of a telecommunications system. (B) Facility fee for originating site. — With respect to a telehealth service, subject to Section 1833(a)(1)(U), there shall be paid to the originating site a facility fee equal to (i) for the period beginning on October 1, 2001, and ending on December 31, 2001, and for 2002, \$20; and (ii) for a subsequent year, the facility fee specified in clause (i) or this clause for the preceding year increased by the percentage increase in the MEI (as defined in Section 1842(i)(3)) for such subsequent year.”

² <https://bit.ly/2pyd1xt>

³ <https://bit.ly/1Mugeav>

⁴ <https://bit.ly/2zrdqOm>

⁵ <https://bit.ly/2pwweWT>

⁶ H.R.2550 – Medicare Telehealth Parity Act of 2017, 115th Cong. (2017-2018).

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