Legal Developments for Telehealth Amid COVID-19

April 2020

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Overview

- Temporary expansions of coverage for telehealth, and relaxed enforcement of related requirements for
  - Medicare
  - Medicaid (Medi-Cal)
  - Health Plans and Insurers
  - Self-Funded ERISA Plans
- Temporary relaxations of federal anti-fraud, waste, and abuse rules relating to cost-sharing for telehealth

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Overview (cont'd)

- Temporary relaxation of rules regarding practice across state lines & patient consent
- Additional opportunities from Federal funding
- Temporary relaxation of certain HIPAA requirements for telehealth
- Challenges and opportunities after the emergency ends

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Changes to Medicare Coverage - Policy

- CMS March 17, 2020 statement describes an "urgency to expand the use of technology to help people who need routine care, and keep vulnerable beneficiaries and beneficiaries with mild symptoms in their homes while maintaining access to the care they need. . . . It is imperative during this public health emergency that patients avoid travel, when possible, to physicians' offices, hospitals, and other health care facilities where they could risk their own or others' exposure to further illness."
- Some changes to rules; other changes to enforcement choices.
- All are described as temporary, but does that make sense for all?

Changes to Medicare Coverage - 1

- Medicare will pay for professional office, hospital, and other visits furnished via telehealth, including services provided to a patient who is in any health care facility or at home
- Require use of interactive audio and video telecommunications system that permits real-time communication between the distant site and the patient (at home or elsewhere)
- Telehealth visits are considered for purposes of payment the same as in-person visits and shall be paid at the same rate as in-person visits.

Changes to Medicare Coverage - 2

- Requirement that telehealth patient have a prior established relationship with the practitioner remains, but HHS will not conduct audits to ensure that such a relationship existed for Medicare claims submitted during the current public health emergency
- Medicare coinsurance and deductibles still apply, and routine waivers of cost-sharing remains generally prohibited under rules regarding fraud, waste, and abuse, but Office of Inspector General will exercise enforcement discretion for providers who reduce or waive cost-sharing for telehealth visits, but . . . .

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Changes to Medicare Coverage - 3

- Expanded coverage not limited to COVID-19 testing, diagnosis, or treatment
- Expanded coverage applies in addition to existing coverage for virtual check-ins and e-visits
- Services may be provided by physicians, nurse practitioners, physician assistants, nurse midwives, certified nurse anesthetists, clinical psychologists, clinical social workers, registered dietitians, and nutrition professionals
- That flexibility does not extend to virtual check-ins and e-visits

Changes to Medicare Coverage - 4

- Changes took effect as of March 6, 2020, and are to remain in effect through the end of the Public Health Emergency declared by the Secretary of HHS on January 30, 2020 ("COVID-19 Public Health Emergency")
- Common telehealth services will include
  - 99201-99215 (Office and other outpatient visits)
  - G0425-G0427 (Telehealth consultations, emergency department or initial treatment)
  - G0406-G0408 (Follow-up inpatient telehealth consultations furnished to beneficiaries in hospitals or SNFs)
  - Complete list: https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes

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Changes to Medicare Coverage - 5

- Medicare Advantage plans are to provide the same coverage as FFS Medicare
- On April 9, 2020, CMS announced temporary suspension of a number of supervision, licensure, and certification requirements that permit doctors to directly care for patients in specified settings through telehealth (*i.e.*, via telephone, radio, or online communication) across state lines (*e.g.*, without being licensed in the state in which the patient is located)

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Changes to Medicare Coverage - 6

- Flexibility is limited to settings such as critical access hospitals, rural health clinics, federally qualified health centers, skilled nursing facilities, home health agencies, and hospice.
- This is part of a relaxation of a number of rules that do not affect telehealth, and still must be reconciled with state regulation of interstate practice

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Changes to Medicaid Coverage - 1

- Each state Medicaid program may expand its coverage for services provided through telehealth
- CMS announced that states wishing to expand telehealth need not file an amendment to their State Medicaid Plans to do so

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Changes to Medicaid Coverage - 2

- California Department of Health Care Services announced on March 24, 2020 that the general rule is that services provided by telehealth will be payable, if properly coded, if the treating health care practitioner at the distant site believes that the Medi-Cal benefits or services being provided are clinically appropriate based upon evidence-based medicine and/or best practices to be delivered via telehealth, subject to oral or written consent by the beneficiary.

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Changes to Medicaid Coverage - 3

- What’s not OK:
  - Benefits or services that are performed in an operating room or while the patient is under anesthesia
  - Benefits or services that require direct visualization or instrumentation of bodily structures
  - Benefits or services that involve sampling of tissue or insertion/removal of medical devices
  - Benefits or services that otherwise require the in-person presence of the patient for any reason

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Changes to Medicaid Coverage - 4

- General Rule: Unless otherwise agreed to by the Managed Care Plans ("MCP") and provider, DHCS and MCPs must reimburse Medi-Cal providers at the same rate, whether a service is provided in-person or through telehealth, if the service is the same regardless of the modality of delivery, as determined by the provider's description of the service on the claim. DHCS and MCPs must provide the same amount of reimbursement for a service rendered via telephone or virtual communication, as they would if the service is rendered via video, provided the modality by which the service is rendered (telephone versus video) is medically appropriate for the member

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Changes to Commercial Payment – California Health Plans

- On April 7, 2020, California Department of Managed Health Care expanded period order to all Knox-Keene plans to pay health care providers the same rate, whether a service is provided in-person or through telehealth, “if the service is the same regardless of the modality of delivery, as determined by the provider’s description of the service on the claim.”
- Note limit upon plan’s ability to re-classify the service
- Services provided by telehealth may not have higher cost-sharing than services provided in-person

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Changes to Commercial Payment – California Health Plans (cont'd)

- Payment is to be the same for service provided by telephone as if provided by video, if the modality used is medically appropriate
- Applies to all services, not only those related to testing, diagnosis, or treatment of COVID-19

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Changes to Commercial Payment – California Insurance

- On March 30, 2020, California Department of Insurance ordered insurers to provide increased access to medically necessary health care without requiring patients to visit providers in person, when clinically appropriate
- Not limited to COVID-19 related services
- All network providers should be allowed to use "all available and appropriate modes of telehealth delivery."

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Changes to Commercial Payment – California Insurance (cont'd)

- Payment rates are to "mirror" payment rates for equivalent office visit.
- DOI calls upon insurers to encourage telehealth, *i.e.*, "Telehealth services delivered by in-network providers should replace in-person visits whenever possible and clinically appropriate."

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Changes to Commercial Payment – Self-Funded Plans

- No regulatory framework equivalent to state regulation of health plans and insurance
- Therefore, a narrower approach
- Families First Coronavirus Response Act requires all employer-sponsored health plans (commonly referred to as "ERISA plans") to cover all costs for diagnostic testing services related to COVID-19, including but not limited to telehealth services

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Changes to Commercial Payment – Self-Funded Plans (cont'd)

- "All costs" means no cost-sharing, but the reach of this rule is narrower
- "All costs" does not include costs of treatment for COVID-19 related conditions
- Does not apply to non-COVID-19 related services

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Other California Changes to Payment and Practice

- California Division of Workers' Compensation ("DWC") announced broader coverage for telehealth services provided to injured workers (generally following Medicare's approach)
- California Governor Newsom's April 3 Executive Order announced various relaxations of state laws, including
  - Need to document patient's verbal or written consent to telehealth
  - Limiting bases for government enforcement and civil suits arising from privacy and security breaches
  - Extending reporting timeframes for reports of data breaches (under California law, not HIPAA)

Additional Opportunities – CARES Act Reimbursement

- The Coronavirus Aid, Relief, and Economic Security ("CARES") Act appropriates $100 billion to the "Public Health and Social Services Emergency Fund" to reimburse "eligible health care providers" for COVID-19 related health care expenses and lost revenues
- Secretary of HHS has broad discretion
- Funds are not to be used to reimburse expenses or losses that have been or are eligible for reimbursement by other sources (*e.g.*, Medicare payments)

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Additional Opportunities – CARES Act Reimbursement (cont'd)

- First $30 billion took form of distributions to hospitals based upon prior Medicare payments; consider all those left out
- Consider developing case for reimbursement of unusual expense associated with developing and implementing telehealth capacity

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Additional Opportunities – FCC Telehealth Program

- The CARES Act also appropriated $200 million to the COVID-19 Telehealth Program, under which health care providers may apply for funding to pay for:
  - Telecommunications services and broadband connectivity services
  - Information services, *i.e.*, remote patient monitoring platforms, store & forward systems, platforms and services for synchronous video consultation
  - Internet connected devices & equipment

Additional Opportunities – FCC Telehealth Program (cont'd)

- Program requires registration with Federal Communications Commission
- Limited eligibility pool includes post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools; local government agencies; community health centers; nonprofit hospitals, rural health clinics, and skilled nursing facilities

HIPAA Enforcement Discretion - 1

- HHS Office of Civil Rights will exercise enforcement discretion not to impose penalties for HIPAA violations against health care providers in connection with good faith provision of communications technologies that do not fully comply with the HIPAA Security Rule
- HIPAA Security Rule generally requires covered entities to provide secure means of electronic transmission
- Under temporary rules, health care providers may use any "non-public facing remote [audio or video] communication product that is available to communicate with patients."

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HIPAA Enforcement Discretion - 2

- Applies to all communications, not only those related to the testing, diagnosis, or treatment of conditions related to COVID-19.
- What's OK, *i.e.*, non-public facing: Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype
- What's NOT OK, *i.e.*, public facing: Facebook Live, Twitch, TikTok, or similar

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HIPAA Enforcement Discretion - 3

- Providers are nevertheless encouraged to seek telecommunications technology vendors that do comply with HIPAA, *i.e.*, can enter into a business associate agreement (“BAA”)
- OCR will not seek penalties against covered entities that do not obtain BAAs with vendors consistent with this guidance
- Changes took effect when announced on March 20, 2020 and are to remain in effect thorough the end of the COVID-19 Public Health Emergency

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Challenges and Opportunities After the Emergency Ends

- By their terms, most regulatory and enforcement changes will end with the end of the COVID-19 Public Health Emergency
- Which of these changes will demonstrate the case for lasting changes?
  - A path to “re-opening” the country
  - Showing the convenience and efficacy of telehealth
  - Addressing continuing needs emphasized during the emergency
  - Acting to improve access and address inequalities

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Challenges and Opportunities After the Emergency Ends (cont'd)

- Good candidates for extension should include payment rules, and perhaps rules limiting practice across state lines
- Less persuasive candidates include relaxation of HIPAA security requirements and continuing federal grants and/or subsidies
- Rate parity and cost-sharing waivers present significant political & policy issues

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Wrap Up and Questions

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THANK YOU

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