

## Compliance Today – August 2020

# Telemedicine and the coronavirus crisis: Key legal issues for providers to consider

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The novel coronavirus disease (COVID-19) has affected all areas of life and healthcare delivery.

While healthcare organizations and governments are working to contain the spread, the focus is on minimizing exposure to the virus with state- and nationwide lockdowns. With increased restrictions on movement, healthcare providers are considering the implementation of telemedicine platforms. These systems are ideally suited for coordinating care for potentially infected patients, or those with possible exposure to COVID-19, while minimizing exposure.

While the federal government has encouraged doctors to consult seniors with Medicare through Skype or FaceTime,<sup>[1]</sup> “[h]ospitals are setting up chatbots, symptom checkers and telemedicine tools virtually overnight.”<sup>[2]</sup> These technologies are helping providers triage patients while ensuring minimal exposure for everyone. Some providers have almost entirely transitioned to virtual consults, with many offering training sessions on telemedicine for those who have not integrated the technology into their practice.

Federal and state regulations have recently been changed to encourage greater adoption of telemedicine services.<sup>[3]</sup>

While hospitals are increasingly looking at implementing new telemedicine systems,<sup>[4]</sup> they must evaluate and comply with many regulatory, legal, and contracting standards.

### How is telemedicine suited to handle COVID-19?

In outbreaks such as this one, it is natural for a large number of individuals who are symptomatic or are concerned about their exposure to seek guidance and reassurance from healthcare providers. However, this can lead to overcrowding of primary care units and emergency departments, where the risk of exposure is high.

Telemedicine enables healthcare providers to remotely and safely interview, triage, examine, and monitor patients. This prevents overcrowding of facilities, ensures patients have access to quality care, and minimizes exposure for providers.

The Centers for Disease Control and Prevention and state health agencies have endorsed the implementation of telemedicine,<sup>[5]</sup> given its ability to meet the unique situational needs brought on by the pandemic.

Digital platforms also help create real-time situational awareness of the pandemic while supporting the coordination of research activities related to treatment strategies and vaccine development.

### The regulatory and legal landscape

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Regulations related to telemedicine have been progressing over the years. At both state and federal levels, the scope of regulations has been expanded significantly to enable the use of telemedicine platforms for healthcare delivery.

These changes are related to:

- Improvements of reimbursement,<sup>[6]</sup>
- Relaxation of technology specifications,<sup>[7]</sup>
- New approaches to credentialing and licensure,<sup>[8]</sup> and
- Relaxation with respect to supervision requirements for nonphysician providers.<sup>[9]</sup>

On March 13, 2020, the Department of Health & Human Services issued a notification on the relaxation of stringent requirements with respect to:<sup>[10]</sup>

- “Certain conditions of participation, certification requirements, program participation or similar requirements for individual health care providers,” healthcare providers, and facilities;
- Licensing requirements for physicians to provide services in different states if they have an equivalent license in another state;
- “Sanctions under section 1867 of the Act (the Emergency Medical Treatment and Labor Act, or EMTALA) for the direction or relocation of an individual to another location” for medical screening as necessary for treatment of COVID-19; and
- Sanctions and penalties related to noncompliance of certain Health Insurance Portability and Accountability Act privacy regulations that mandate requirements:
  - “to obtain a patient’s agreement to speak with family members or friends or to honor a patient’s request to opt out of the facility directory,”
  - “to distribute a notice of privacy practices,” and
  - “the patient’s right to request privacy restrictions or confidential communications.”

## Reimbursement

Medicaid and Medicare have increasingly expanded reimbursement for telemedicine services to include a wider range of patient care situations.<sup>[11]</sup> Medicare Advantage and many states have adopted private payer legislation for telemedicine services.<sup>[12]</sup>

Industry stakeholders have sought a waiver of restrictions on reimbursement in lieu of the COVID-19 crisis in a letter addressed to congressional leaders on February 28, 2020.

On March 6, 2020, the federal Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020 was signed into law.<sup>[13]</sup> While authorizing federal spending for COVID-19, the act enables the Department of Health & Human Services to temporarily waive some Medicare requirements for providing telehealth services.

Prior to this act, the Centers for Medicare & Medicaid Services reimbursed only a limited number of telehealth

services offered to Medicare beneficiaries. These were subject to criteria specified in 42 U.S.C. § 1395m.<sup>[14]</sup> “Generally, the patient receiving telehealth services [had to] be located at one of eight ‘originating sites’, which include hospitals, physicians’ offices, and rural health clinics.” Additionally, these sites had to “meet certain geographic requirements which have essentially limited the availability of telehealth to patients in rural areas.”

With the increasing spread of COVID-19, lawmakers have expanded access to telehealth by relaxing the stringent requirements.

## Technology requirements

To encourage telemedicine adoption, lawmakers have also relaxed technology requirements in telemedicine.<sup>[15]</sup> There are “emergency exceptions” in several states that facilitate the easing of stringent telemedicine standards and technology requirements, which can effectively meet COVID-19 needs. Many states have modified laws related to nonphysician supervision. To address the challenge of licensing physicians in all states where patient care is accessed, the Interstate Medical Licensure Compact has expedited licensing and credentialing.<sup>[16]</sup> The compact’s objective is improving access to healthcare by enabling people in rural and underserved areas to connect with practitioners.

Physicians’ existing information submitted in their state of principal license is leveraged to expedite the licensing application process. The state of principal license conducts a new background check and verifies physician’s information before the compact can grant a license.

The Centers for Medicare & Medicaid Services also encourages “credentialing by proxy,” where telemedicine providers obtain credentialing based upon the provider’s credentials at the home institution.<sup>[17]</sup>

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