

CORONAVIRUS

INFORMATION & UPDATES

March 19, 2020

HHS Announces Expanded Medicare Telehealth Coverage

On March 17, 2020, the U.S. Department of Health and Human Services (“HHS”) announced major changes to Medicare telehealth coverage during the COVID-19 public health emergency—permitting patients to receive telehealth in their homes, via FaceTime and other apps, with no cost-sharing. The authority for HHS waiver authority was granted by Congress on March 6, 2020;¹ CMS has announced that the new coverage provisions will be available for services provided on or after that date.² This Alert summarizes these changes, and includes a table at the end comparing them with Medicare’s pre-existing telehealth requirements.

Locational Changes. Normally, Medicare telehealth is only available in rural areas, and the patient must travel to a facility (e.g., a hospital or physician office). Under the waiver, these requirements (known as “originating site” requirements) are waived, permitting patients to receive telehealth in their homes. Though the law requires providers to have a prior relationship with a patient to take advantage of the waiver, CMS has announced that it will not audit this requirement for the purposes of coverage.³

Equipment Waivers. Additionally, Medicare will cover, during the emergency, telehealth provided via telephones that have audio and video capabilities that are used for two-way, real-time interactive communication (normally, telephones are prohibited). This includes Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Skype, or similar non-public facing applications. To support the use of these apps, the Office for Civil Rights at HHS (“OCR”) has announced that it will not penalize providers for using these apps.⁴ Under normal circumstances, the use of these methods of communications may not comply with HIPAA privacy and security rules, and is therefore subject to penalties by OCR, which enforces HIPAA requirements.⁵ OCR also named a few “public-facing” apps (Facebook Live, Twitch, TikTok) as ones that should not be used. Additionally, providers are still encouraged to notify patients that third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.⁶

¹ Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (P.L. 116-123), passed March 6, 2020. It adds telehealth to other long-standing authorities of the Secretary of the Department of Health and Human Services (HHS) to implement certain waivers during public health emergencies (commonly called “1135 Waiver” authority). On March 13, the Secretary issued a [notice](#) to implement and authorize all waivers under the 1135 Waiver authority, retroactive to March 1, 2020; though this notice did not mention the new telehealth authority, a March 17 HHS [press release](#) referenced expanded telehealth coverage, suggesting that the intent is to implement the telehealth waiver as well.

² Centers for Medicare & Medicaid Services, Medicare Telemedicine Health Care Provider Fact Sheet, dated March 17, 2020, available at <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>.

³ *Id.*

⁴ OCR, Notification of Enforcement Discretion for telehealth remote communications during the COVID-19 nationwide public health emergency, dated March 17, 2020, available at <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>.

⁵ OCR enforces regulations issued under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as amended by the Health Information Technology for Economic and Clinical Health (HITECH) Act, that protect the privacy and security of protected health information.

⁶ *Id.*

CORONAVIRUS

INFORMATION & UPDATES

Cost-Sharing Waivers. Finally, the HHS Office of Inspector General (“OIG”) announced that it will not penalize providers for reducing or waiving cost-sharing for telehealth services.⁷ Under normal circumstances, reducing or waiving Medicare beneficiary cost-sharing would implicate federal fraud and abuse laws.

The waivers do not affect state law requirements (such as requirements that physicians be licensed in the state where the patient is located), or private malpractice insurance coverage (though for qualified providers furnishing FDA-cleared or approved diagnostics or treatments, the Secretary’s Declaration under the Public Readiness and Emergency Preparedness Act provide liability protections.)⁸

Altogether, these actions reflect a significant expansion of telehealth for Medicare beneficiaries during the period of this public health emergency. As mentioned, below is a table comparing current Medicare telehealth requirements and coverage during COVID-19:

Medicare Telehealth Coverage: Changes During COVID-19 Public Health Emergency:⁹

The chart below describes actions taken by HHS to increase Medicare telehealth coverage during COVID-19; although these actions do not affect state law or malpractice coverage, the Secretary’s [Declaration](#) provides certain liability protection for qualified health care professionals providing FDA-approved diagnostics or treatments for COVID-19.

Medicare Telehealth Coverage Requirements		Coverage Under COVID-19 ¹⁰
What is a Medicare telehealth service?	Medicare telehealth services include services such as professional consultations, office visits, and office psychiatry services, provided via telehealth; CMS publishes annually a list of HCPCS codes that can be billed.	No change—waivers are not limited to specific services; they apply regardless of whether they are directly related to COVID-19.
What cost-sharing is there for Medicare	Medicare coinsurance and copays apply.	Coinsurance and copays apply, and physicians are not required to waive them, but HHS will not sanction providers that reduce or waive cost-sharing (normally,

⁷ OIG, OIG Policy Statement Regarding Physicians and Other Practitioners That Reduce or Waive Amounts Owed by Federal Health Care Program Beneficiaries for Telehealth Services During the 2019 Novel Coronavirus (COVID-19) Outbreak *available at* <https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/policy-telehealth-2020.pdf>.

⁸ Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198 (March 17, 2020) *available at* <https://www.govinfo.gov/content/pkg/FR-2020-03-17/pdf/2020-05484.pdf>.

⁹ This chart focuses on Medicare Part B (fee-for-service) reimbursement. State Medicaid plans, Medicare Advantage plans and CMMI models may have different coverage policies.

¹⁰ Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (P.L. 116-123), passed March 6, 2020. It adds telehealth to other long-standing authorities of the Secretary of the Department of Health and Human Services (HHS) to implement certain waivers during public health emergencies (commonly called “1135 Waiver” authority). On March 13, the Secretary issued a [notice](#) to implement and authorize all waivers under the 1135 Waiver authority, retroactive to March 1, 2020; though this notice did not mention the new telehealth authority, a March 17 HHS [press release](#) referenced expanded telehealth coverage, suggesting that the intent is to implement the telehealth waiver as well. Also on March 17, 2020, Centers for Medicare & Medicaid Services (CMS), Office for Civil Rights at HHS (OCR) and the HHS Office of Inspector General (OIG) each announced policy changes relevant to telehealth under COVID-19 that are addressed in this chart.

CORONAVIRUS

INFORMATION & UPDATES

telehealth services?		reducing or waiving cost-sharing would implicate federal fraud and abuse laws).
What geographic restrictions are there for Medicare telehealth services?	<p>For most services, the beneficiary must be in a rural area, defined as a health professional shortage area or a county that is not a Metropolitan Statistical Area.</p> <p>Exceptions to this rule are for certain places in Alaska and Hawaii and certain services—ESRD, acute stroke or substance use.</p>	All geographic restrictions waived. Services covered regardless of the state or locality in which the beneficiary resides.
What other location restrictions are there for Medicare telehealth services?	<p>For most services, the patient must go to one of nine facility locations, called the “originating site”: a physician office, hospital, critical access hospital, skilled nursing facility, rural health clinic, federally qualified health center, community mental health center, renal dialysis center, hospital or critical access hospital-based renal dialysis center. The originating site facility receives a fee for hosting the patient.</p> <p>Telehealth at home is available for ESRD and substance abuse, and there is also an exception for acute stroke services (which can be delivered at a mobile stroke unit), but no originating site facility fees are paid in these cases.</p>	All location/originating site requirements waived (but still no facility payment if the originating site is a patient’s home as opposed to a facility).
Who can provide a Medicare telehealth service?	A physician or practitioner located at a so-called “distant site” licensed to furnish the service under state law.	<p>Locational licensing requirements for the physician or practitioner waived (if physician or practitioner has any state license, may provide service in any state), but:</p> <ul style="list-style-type: none"> • No effect on state licensure (states may still restrict practice of out-of-state physician or practitioner); • Waiver authority applies only where existing patient relationship has existed for at least three years, but CMS has stated it will not audit this requirement;¹¹ and

¹¹ Centers for Medicare & Medicaid Services, Medicare Telemedicine Health Care Provider Fact Sheet, dated March 17, 2020, available at <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>.

CORONAVIRUS

INFORMATION & UPDATES

		<ul style="list-style-type: none"> No effect on malpractice coverage limitations (although Secretary’s Declaration shields from liability those providing FDA-cleared or approved diagnostics or treatments).
When the patient is located at a hospital or CAH, what are the privileging and credentialing requirements?	<p>When the patient’s originating site is a hospital or critical access hospital (CAH), Medicare requires:</p> <ul style="list-style-type: none"> That the distant-site physician or practitioner be at a hospital or “distant site telemedicine entity” that has certain medical staff credentialing and privileging processes; A written agreement with the distant-site entity; That the distant-site physician or practitioner hold a license from the state in which the patient is located; and Certain information sharing between the originating site and distant site. 	<p>As noted above, locational licensing requirements for the physician or practitioner waived (if physician or practitioner has any state license, may provide service in any state), but:</p> <ul style="list-style-type: none"> No effect on state licensure (states may still restrict practice of out-of-state physician or practitioner); Waiver authority applies only where existing patient relationship has existed for at least three years, but CMS has stated it will not audit this requirement;¹² and No effect on malpractice coverage limitations (although Secretary’s Declaration shields from liability those providing FDA-cleared or approved diagnostics or treatments). <p>No change to other requirements. Individual hospitals and CAHs may seek an 1135 waiver from CMS for privileging and credentialing requirements.</p>
What technology must be used to furnish the service?	<p>An “interactive telecommunications system,” meaning multimedia communications equipment that includes, at a minimum, audio and video equipment permitting two-way, real-time interactive communication between the patient and the physician or practitioner. Telephones, facsimile machines, and electronic mail systems do not meet this definition.</p> <p>(Exceptions apply for certain programs in Alaska and Hawaii.)</p>	<p>Prohibition on use of a telephone waived, but only if the telephone has “audio and video capabilities that are used for two-way, real-time interactive communication.”</p> <p>This can include Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype or other non-public facing apps. (Normally, use of these apps would be subject to HIPAA penalties as they may not comply with HIPAA privacy and security rules.) However, providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.</p>

¹² *Id.*

CORONAVIRUS

INFORMATION & UPDATES



Other Virtual Services		
<p>What other virtual services does Medicare cover?</p>	<p>Apart from Medicare telehealth services (as described above), Medicare reimburses for certain other services that are furnished remotely using communications technology, primarily:</p> <ul style="list-style-type: none"> • Virtual check-ins, short patient-initiated communications (by an established patient) with a health care practitioner, which can be conducted with a broader range of communication methods than telehealth services; • E-visits, non-face-to-face patient-initiated communications (by an established patient) with a health care practitioner through an online patient portal; and • Remote evaluations, evaluation by a health care practitioner of recorded video and/or images submitted by an established patient, including interpretation and follow-up with the patient (which may be by phone call, audio/video communication, secure text messaging, email, or patient portal communication) within 24 business hours. 	<p>No change; these services continue to be available under normal coverage policies.</p>