Telehealth Following the End of the Public Health Emergency

Client Alert
6.2.2023

Telehealth went from the back burner of most health care delivery organizations to the front burner almost overnight during the Public Health Emergency (PHE). This change in delivery was assisted by the changes in reimbursement for these remote services and practitioners and patients becoming more comfortable with their use. Now that the PHE has come to an end, what will happen to the use and reimbursement for telehealth services? What enforcement mechanisms will be used against those who may have misused the more liberal payment for telehealth services? Will telehealth services be a part of the future of health care delivery, or will practitioners and patients abandon its usage? This Alert will address these questions and provide some insight.

Telehealth is Not Going Away

Congress passed an extension of certain flexibilities in the Consolidated Appropriations Act of 2023. The following waivers will continue until December 31, 2024:

1. FQHCs/Rural Health Clinics may continue as distant site providers for non-behavioral/mental telehealth services;
2. Medicare patients can continue to receive services at any site, including their home;
3. Continued coverage of audio-only telehealth services;
4. Qualified occupational and physical therapists, speech pathologists and audiologists can provide telehealth services;
5. Delayed a provision requiring in office visits every 6 months for diagnosis, evaluation and treatment of mental health disorders; and
6. No geographic restrictions for an originating site for non-behavioral/mental health services.

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Through December 31, 2023 providers can bill for telehealth as if it were in-person and receive the same reimbursement as an in-person visit. The telehealth list of services added in the Medicare Telehealth Services list during the PHE will remain on the list through the end of 2023.

Providers may still prescribe controlled substances based on a virtual treatment relationship. The DEA has affirmed that providers can prescribe controlled substances after an evaluation using telehealth, and there are some extensions through November 11, 2023 and November 11, 2024 as noted below. The DEA announced that it is considering proposed rules allowing Schedule III-V controlled substances and buprenorphine to continue to be prescribed via telehealth in certain circumstances. There is a push to expand the permission to Schedule II controlled substances.

Variations by State

CMS has developed a State Medicaid & CHIP Toolkit and a supplement that identifies for states the policy topics that should be addressed to facilitate the adoption of telehealth.[1]

Michigan, as well as other states, has legislation pending that may affect access to and Medicaid reimbursement for telehealth, and addressing audio only vs. video services.

Private Insurance

Coverage for telehealth services will vary by insurance company. Private insurance companies may impose cost sharing, prior authorization or other forms of medical management.

HIPAA

During the PHE the HHS Office for Civil Rights (OCR) stated it would exercise enforcement discretion and not impose penalties for noncompliance with HIPAA Rules against covered health providers. Providers using remote technology could use these without risk of penalty imposed by OCR. This notice expired May 11, 2023 but allowed for a 90-day transition period for practitioners to make operational changes. This transition period will end on August 9, 2023.

State laws are still inconsistent, but there is support in many professional circles to expand the use of interstate licensure compacts as well as further state laws regulating and supporting telehealth.

Updated Guidance from SAMHSA

In April 2023 SAMHSA issued updated guidance including an exemption from the unsupervised take home medication requirements of 42 C.F.R. §8.12(3). This updated guidance will remain in effect for one year from the end of the PHE ending, or until HHS publishes final rules revising 42 C.F.R. part 8. A notice of proposed rulemaking has been published entitled “Medications for Treatment of Opioid Use Disorder” (87 FR 77330).

DEA and SAMHSA have issued a temporary rule extending the controlled substance telemedicine flexibilities through November 11, 2023. Further, for established patient relationships via telemedicine before November 11, 2023 practitioners may continue prescribing controlled medications without an in-person medical evaluation and without regard to whether the practitioner is registered with DEA in the state in which patient is located until November 11, 2024.

Scrutiny at Federal and State Level

The DOJ is prioritizing investigations and prosecutions of fraudulent telemedicine schemes. There is a Special Fraud Alert from the Office of Inspector General indicating increased scrutiny for startups and telehealth prescribers. Further, there was a July 2022 announcement of coordinated action by the DOJ and OIG to combat telemedicine fraud.

The Special Fraud Alert cautions practitioners to be wary of telemedicine companies that have one or more of certain suspect characteristics:

1. The patients were identified or recruited by the telemedicine company, telemarketing company, sales agent, recruiters, call center, health fair and/or through internet, television, or social media, advertising for free or low out-of-pocket items or services.
2. The practitioner is unable to meaningfully assess a patient because of insufficient contact to assure medical necessity.
3. The telemedicine company compensates the practitioner based on volume of items or services ordered or prescribed.
4. The telemedicine company only furnishes items or services to Federal health care program beneficiaries and does not accept insurance from other payees.
5. The telemedicine company claims to only furnish items and services to individuals who are not Federal health care program beneficiaries but may in fact bill Federal health care programs.
6. The telemedicine company only furnishes one product in a single class of products such as DME, genetic testing, diabetic supplies or various prescription creams – potentially restricting a practitioner's treating options to a predetermined course of treatment.
7. The telemedicine company does not expect follow up with purported patients nor does it provide information to the practitioners so that follow up can occur.

What To Do Now

1. If policies on telehealth have not been developed by the provider, they should be now. Further, be prepared to change those policies based on further revisions to the telehealth rules as changes are adopted by the federal and state governments.
2. Train staff for usage of telehealth.
3. Watch for further Alerts on OIG audit activity and investigations in this area.

4. Evaluate and adopt effective methodologies for blending in-person and virtual care delivery.
5. Be prepared for scrutiny by regulators and review and update compliance policies.
6. Watch for the results of research on telemedicine patient outcomes and its impact on the standard of care and of course future regulation and legislation.
7. Use caution when dealing with a telehealth company.

Conclusion

Although the above is not exhaustive regarding the changes to telehealth, we can conclude that the use of telehealth services is not going away. If you would like to discuss a specific question, please contact your healthcare attorney at Butzel.

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[1] A corresponding Medicaid & CHIP Telehealth Toolkit Checklist for states has also been produced to serve as a tool for states to assess telehealth in their state.