



# Regulations and Payment Rules on Telehealth Ease During COVID-19

PROVIDES OPPORTUNITY TO BUILD ON EXISTING TECHNOLOGIES

By Lori Beam, JD

In normal times, telehealth systems offer tremendous benefits to both health care professionals and patients. And now what we are learning from increased use of telehealth services during the COVID-19 crisis is creating opportunities to build on our existing technologies to improve the U.S. health care system.

Telehealth systems are ideal for outbreak responses because they help triage low-acuity patients, mitigate overcrowding of hospitals and clinics, prevent unnecessary human exposure, and deliver timely quality care. Telehealth systems also help meet our everyday health care needs by enabling effective delivery of health care services to patients of all ages in all geographic locations, right when and where they are needed.

As described in the most recent issue of *Kansas City Medicine*, health care providers in Missouri and Kansas currently offer a broad range of services through telemedicine, such as primary/specialty care, psychiatry/psychology services and chronic care management. Patient populations served include seniors, millennials, school districts and urban and rural residents.

Health care providers planning to use telehealth platforms to deliver clinical services in Missouri, Kansas and other states face a myriad of federal and state legal and regulatory challenges. These include rules concerning state licensure, in-person exams, Medicare and Medicaid reimbursement, state prohibitions against the corporate practice of medicine, privacy and security of health and financial data,

medical records documentation, and fraud and abuse.

## FEDERAL

In response to calls for broadening access to telehealth services during the COVID-19 outbreak, several federal agencies began taking action in the early stages of the pandemic:

- **Payment Policies**—The Centers for Medicare & Medicaid Services (CMS) and Health and Human Services Office of Civil Rights (OCR) exercised the waiver authority granted under the Coronavirus Preparedness and Response Supplemental Appropriations Act to expand payment policies for telemedicine services and relax certain federal privacy regulations. CMS’s Medicare Telemedicine Health Care Provider Fact Sheet<sup>1</sup> explains the new payment policies effective for the duration of the COVID-19 emergency.
- **Privacy Rule**—OCR issued its COVID-19 and HIPAA emergency response notice<sup>2</sup> and related tools explaining how HIPAA’s privacy rule would apply in certain telehealth situations.
- **Controlled Substances**—The U.S. Drug Enforcement Agency exercised its emergency authority to relax the normal in-person medical evaluation condition to prescription authority.

Based on these waivers and guidance, during the COVID-19 emergency:

## Medicare

- Will pay for telehealth services furnished to beneficiaries in all areas of the country in all settings at the same rate as regular, in-person visits.
- Will not require the existence of a prior patient-physician relationship for claims submitted during the emergency.
- Physicians may inform patients of the availability of telehealth options, but patients must initiate the services.

## OCR

- Will exercise enforcement discretion and not impose penalties for noncompliance with HIPAA during the good faith provision of telehealth services. However, states still have the authority to enforce their own health privacy and security laws.
- Lists several popular apps and products that can be used and encourages providers to notify patients of potential privacy risks of using the apps.
- Requires that public-facing communication vehicles such as Facebook Live, Twitch and TikTok should never be used to provide telehealth.

## DEA

- Registered practitioners may issue prescriptions for controlled substances for patients without requiring an in-person medical evaluation if they 1) issue the prescription for a legitimate medical purpose in the usual course of their practice, 2) conduct the

telemedicine communication using an audio-visual, real-time, two-way interactive communication system, and 3) act in accordance with applicable federal and state law. However, state laws on prescription authority still apply unless the state specifically acted to waive its corresponding requirements.

**STATE**

Many state governors and legislatures have considered—and some have followed up on—these federal actions to relax their own requirements impacting telehealth.

Through Executive Order 20-08<sup>3</sup>, Kansas made the following temporary changes:

- Encourages physician use of telemedicine to reduce patient travel.
  - Allows out-of-state physicians to use telemedicine when treating patients in Kansas without physician licensure in Kansas if they (1) give written notice to the Kansas Board of Healing Arts and (2) hold an unrestricted physician license in their state of practice and (3) are not subject to investigation or disciplinary proceeding.
  - Authorizes the Kansas Board of Healing Arts to extend the same loosening of licensing requirements to other health care professionals it regulates.
  - Waives the requirement that physicians conduct an in-person exam before issuing a prescription or ordering administration of medication including controlled substances.
- Missouri proposed, but did not adopt HB 2566. The bill would have:
- Allowed health care providers not licensed in Missouri to provide telehealth services to patients in Missouri if they:
- + Hold an active, unrestricted license for a health care profession in

- another state, territory or D.C.
- + Have never held a license subject to discipline by a licensing agency (excluding any related to nonpayment of fees related to the license).
- + Have never had a controlled substance license or permit suspended or revoked by a state or the DEA.
- + Comply with existing professional liability insurance requirements.
- Exception: Health plans are not required to reimburse health providers for telehealth services if the provider is not licensed in Missouri.

**HEALTH PLANS**

Several health plans—including Aetna, Cigna and Blue Cross and Blue Shield—announced they are making telehealth more widely available or are offering free telehealth services for some period of time. Vice President Mike Pence also announced a commitment from health plans to cover telehealth services, though no details were provided.

**RESOURCES**

Various medical associations are offering key resources for helping providers adopt and furnish telehealth services during the COVID-19 crisis:

- The American Medical Association launched the *Telemedicine Implementation Playbook*<sup>4</sup> aimed at helping clinicians figure out best practices covering everything from policy and coding to implementation.
- The American Psychiatry Association issued guidance on telepsychiatry and COVID-19<sup>5</sup> that includes best practices and a toolkit.

These collaborative efforts during a crisis demonstrate our overall capacity to improve quality and access to care. This

includes the work of public health officials, legislators, insurance companies, medical associations, telehealth companies, physicians and other providers, technology innovators and policy think tanks.

Once the COVID-19 emergency passes, we should continue to:

- Evaluate how telehealth services were implemented during the emergency.
- Encourage legislative action to remove hurdles while ensuring quality and ethical delivery of care.
- Make recommendations for expanded telehealth services.

Through collaborative efforts of government officials at the state and federal levels along with advocates in the health care community, we can look forward to improving and expanding the delivery of telehealth services during both emergency and nonemergency times. That will ensure a healthier future for all of us. ☺

*Lori Beam is an attorney at Seigfried Bingham where she is a member of the firm's Health Law practice group. Contact her at lbeam@sb-kc.com or (816) 421-4460.*

*\* This article is general in nature and does not constitute legal advice. Readers with legal questions should consult with an attorney prior to making any legal decisions.*

**REFERENCES**

1. Medicare Telemedicine Health Care Provider Fact Sheet. Centers for Medicare and Medicaid Services. March 17, 2020. <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>
2. COVID-19 and HIPAA Emergency Response Notice. HHS Office of Civil Rights. March 27, 2020. <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/index.html>
3. Kansas Executive Order 20-08. March 20, 2020. <https://governor.kansas.gov/wp-content/uploads/2020/03/E.O.-20-08.pdf>
4. AMA quick guide to telemedicine in practice. AMA. March 26, 2020. <https://www.ama-assn.org/system/files/2020-04/ama-telehealth-playbook.pdf>
5. Telepsychiatry and COVID-19. American Psychiatry Association. May 1, 2020. <https://www.psychiatry.org/psychiatrists/practice/telepsychiatry/blog/apa-resources-on-telepsychiatry-and-covid-19>