

## Issued Guidance Regarding Telehealth Waivers During the COVID-19 Pandemic

Updated: May 1, 2020



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## Introduction

This document describes guidance issued during, or in response to, the COVID-19 crisis which impacts the provision of medical treatment via technological means (generally referred to as “telehealth” or “telemedicine”). It is not intended as overall guidance on legal issues related to telehealth, but instead as a resource for navigating changes that have occurred due to the pandemic. Some items listed are limited in scope or duration.

Further, the guidance and regulation of telehealth matters is changing rapidly. We will periodically update this document on our [website](#), as appropriate, to include additional developments. This document is not intended as legal advice. It is important to obtain specific legal advice as to individual facts and circumstances prior to taking any action based on the guidance described.

## Quick Reference Chart

Jurisdiction	Guidance Issued
Federal	<p>Centers for Medicare &amp; Medicaid Services (CMS)</p> <ul style="list-style-type: none"> <li>• Geographic limitations for reimbursement waived</li> <li>• Waiver of requirement that out-of-state provider be licensed in state where providing telehealth</li> <li>• Waiver of Section 1135 of Social Security Act to allow a person's home to be an eligible originating site to receive telehealth services under Medicare</li> </ul> <p>Drug Enforcement Administration (DEA)</p> <ul style="list-style-type: none"> <li>• Requirement for in-person visit for prescription drugs waived</li> </ul> <p>Department of Health and Human Services (HHS)</p> <ul style="list-style-type: none"> <li>• HIPAA requirements for telemedicine technology loosened</li> <li>• Enforcement discretion for use of non-compliant communication technology</li> <li>• Physicians permitted to waive co-pays or other cost sharing</li> </ul> <p>Internal Revenue Service (IRS)</p> <ul style="list-style-type: none"> <li>• Telemedicine coverage will not impact insurance coverage for purposes of participation in a Health Savings Account</li> </ul> <p>Federal Communications Commission (FCC)</p> <ul style="list-style-type: none"> <li>• Separate funding program available for long term adoption of telemedicine services</li> </ul> <p>The Coronavirus Aid, Relief, and Economic Security Act (the <a href="#">CARES Act</a>)</p> <ul style="list-style-type: none"> <li>• HHS to provide further guidance on sharing Personal Health Information (PHI) related to COVID-19</li> </ul>
Delaware	<ul style="list-style-type: none"> <li>• Medicaid coverage requirements loosened</li> <li>• Medicaid coverage parity for most services</li> </ul>
Massachusetts	<ul style="list-style-type: none"> <li>• Medicaid reimbursement at same rates</li> <li>• Payment parity</li> </ul>
New Jersey	<ul style="list-style-type: none"> <li>• Medicaid coverage requirements loosened</li> <li>• Medicaid parity for most services</li> <li>• Immunity for good-faith treatment provided via telehealth</li> </ul>
New York	<ul style="list-style-type: none"> <li>• Medicaid coverage requirements loosened</li> <li>• Co-pays waived</li> <li>• Certain telephone visits permitted</li> <li>• Immunity for good-faith treatment, apparently including telehealth</li> </ul>
Pennsylvania	<ul style="list-style-type: none"> <li>• Medicaid coverage requirements loosened</li> <li>• Medicaid parity for most services</li> <li>• Certain telephone visits permitted</li> </ul>
Rhode Island	<ul style="list-style-type: none"> <li>• Medicaid reimbursing for covered services</li> <li>• Permitting telephone only services</li> </ul>

## Federal Summary

### Centers for Medicare & Medicaid Service (CMS)

The [Coronavirus Preparedness and Response Supplemental Appropriations Act](#), as signed into law by the President on March 6, 2020, includes a provision allowing the HHS Secretary to waive certain Medicare telehealth payment requirements during the Public Health Emergency (PHE) declared by the Secretary on January 31, 2020 to allow beneficiaries in all areas of the country to receive telehealth services, including in their homes. Under the waiver, limitations on where Medicare patients are eligible for telehealth will be removed during the emergency. In particular, patients outside of rural areas and patients in their homes will be eligible for telehealth services, effective for services starting March 6, 2020.

[Physician supervision](#) is allowable in certain circumstances without the requirement of a physical presence of the physician and an [allowance of physician's instructions](#) to be carried out by a nurse practitioner, a physician's assistant or a clinical nurse specialist. Further waivers regarding training and experience are deferred to state authorities.

The CMS maintains a [list of services](#) that are normally furnished in-person that may be furnished via Medicare telehealth, including radiation management, physical therapy evaluations, as well as emergency department visits.<sup>1</sup> These services are described by Healthcare Common Procedure Coding System (HCPCS) codes and paid under the Physician Fee Schedule. Under the emergency declaration and waivers, these services may be provided to patients by professionals regardless of patient location.

[Additional CMS waivers](#) include:

- the waiver of the requirement that out-of-state providers be licensed where providing telehealth services;
- the waiver of Section 1135 of the Social Security Act to allow a person's home to be an eligible originating site to receive telehealth services under Medicare;<sup>2</sup>
- the requirement to have a nurse conduct onsite visits every two weeks to supervise a home health aide;
- the requirement that hospice aides receive 12 hours of in-service training in a 12-month period
- making it easier for hospitals and critical access hospitals to furnish telemedicine services to their patients through an agreement with an off-site hospital
- the waiver of limitations on the types of clinical practitioners that can furnish Medicare telehealth services which now allows physical therapists, occupational therapists and speech language pathologists to provide telehealth services;
- hospitals may bill for services furnished remotely by hospital-based practitioners to Medicare patients registered as hospital outpatients, including when the patient is at home when the home is serving as a temporary provider-based department of the hospital;

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<sup>1</sup> Additional services are [being considered](#) to be added to the list, such as diabetes prevention programs.

<sup>2</sup> Note that state law would still govern state provision of professional services.

- hospitals may bill as the originating site for telehealth services furnished by hospital-based practitioners to Medicare patients registered as hospital outpatients, including when the patient is located at home;
- expanding allowance of audio-only telephone services to include behavioral health and patient education services
- new telehealth services will now be added to the list of Medicare services on a sub-regulatory basis rather than only through CMS' rulemaking process; and
- the waiver of video requirement for certain telephone evaluation and management services since some Medicare beneficiaries don't have access to interactive audio-video technology.

### **Drug Enforcement Agency (DEA)**

DEA-registered practitioners are now allowed to begin [issuing prescriptions for controlled substances](#) to patients for whom they have not conducted an in-person medical evaluation.

### **Department of Health & Human Services Office of Civil Rights (HHS-OCR)**

During the COVID-19 national emergency, which also constitutes a nationwide PHE, covered healthcare providers subject to HIPAA rules may seek to communicate with patients, and provide telehealth services, through remote communications technologies. Some of these technologies, and the manner in which they are used by HIPAA-covered healthcare providers, may not fully comply with the requirements of the HIPAA rules.

The HHS-OCR will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under HIPAA rules against covered healthcare providers in connection with the good faith provision of telehealth during the COVID-19 nationwide PHE. This notification is effective immediately.

### **Department of Health & Human Services Office of the Inspector General (HHS-OIG)**

The HHS-OIG is now allowing broad flexibility for physicians to [reduce or waive Medicare beneficiary cost-sharing](#) for telehealth and other non-face-to-face services. The HHS-OIG also announced the [relaxation of administrative enforcement](#) of the anti-kickback statute and monetary penalties.

### **Internal Revenue Service (IRS)**

The CARES Act provides temporary relief from the "first dollar coverage" rules applicable to Health Savings Account (HSA) coverage. A [high-deductible health plan](#) may provide coverage for telemedicine services without exhausting the deductible and without impacting an individual's eligibility to make contributions (or have contributions made on their behalf) to a HSA. The relief only applies to plan years which begin prior to January 1, 2022.

### **Federal Communications Commission (FCC)**

The FCC has made \$200 million available under the "[COVID-19 Telehealth Program](#)" to fund efforts by medical providers to use telemedicine to combat the pandemic. Funds may be used by providers to

[purchase telecommunications, broadband connectivity and devices](#) necessary for providing telehealth services. Applications to the FCC are being processed on a rolling basis.

Additionally, \$100 million was made available by the FCC over the next three years under the “[Connected Care Pilot Program](#).” This program is intended to assist with costs of implementing telehealth solutions on a long-term basis (*i.e.*, not solely related to COVID-19), emphasizing low income areas, veterans and geographic areas lacking access to healthcare.

## State Summaries

### Delaware

Any provisions that require medical care to be provided in a specific location are suspended. [Telehealth services](#) may be provided through a variety of platforms, including telephone, FaceTime, etc.). Medicaid will reimburse for all covered services, permit services provided by telephone and waive requirements that the patient be in state at the time of services.

### Massachusetts

[Telemedicine coverage is expanded](#) to include:

- payment parity with in-person services;
- telephone-only;
- removing cost-sharing for COVID-19 services;
- removing prior authorization for COVID-19 services;
- specifying in-network providers as part of telemedicine network; and
- [Medicaid reimbursement](#) for all covered services at face-to-face rates.

### New Jersey

The New Jersey Department of Banking and Insurance (DOBI) has [asked all health insurance plans](#) to:

- review their telemedicine and telehealth networks to ensure network adequacy;
- cover, without cost-sharing, services or supplies delivered or obtained via telemedicine or telehealth;
- encourage their network providers to utilize telemedicine or telehealth services wherever possible and clinically appropriate;
- allow audio-only, including the establishment of the patient-physician relationship;
- payment same as in-person services;
- not require a physician to be licensed in the state as long as they adhere to other requirements; and
- not to impose prior authorization on medical necessary treatment provided via telehealth.

The New Jersey Department of Human Services released the following [guidelines](#):

- Medicaid reimbursing for any appropriate, medically necessary service at face-to-face rates;
- waiving site or service requirements;
- waiving technology requirements (e.g. allowing audio-only); and
- waiving requirement of existing patient-physician relationship.

New Jersey [Senate Bill No. 2333](#) includes immunity for physicians providing good-faith treatment through telehealth.



### **New York**

The New York Department of Health released a [state Medicaid update](#) that includes:

- reimbursement for covered services;
- waiving co-pays for all telemedicine services and imposing no limits on originating sites; and
- allowing telephone use for Medicaid telephone allowed for established patients or the guardian of an established patient.

New York [Senate Bill No. 7506](#) includes immunity for good faith medical treatment (which includes lawfully provided telehealth services)

### **Pennsylvania**

The Pennsylvania [Department of Human Services](#) has allowed Medicaid reimbursement for covered services at face-to-face rates and services by telephone allowed, when appropriate.

### **Rhode Island**

Rhode Island's Executive [Office of Health and Human Services](#) allows [Medicaid reimbursement for covered services, permitting telephone-only services](#).

## Additional References

### CMS

1. Medicare Telehealth [Frequently Asked Questions](#) (FAQs)
2. COVID-19 [Emergency Declaration Blanket Waivers](#) for Health Care Providers
3. [State Medicaid & CHIP Telehealth Toolkit](#)

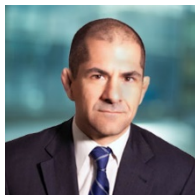
### DEA

1. [How to Prescribe Controlled Substances to Patients During the COVID-19 Public Health Emergency](#)

### HHS

1. [FAQ on Telehealth and HIPAA](#) during the COVID-19 nationwide public health emergency
2. [Notification of Enforcement Discretion](#) Regarding COVID-19 Community-Based Testing Sites (CBTS) During the COVID-19 Nationwide Public Health Emergency
3. [Notification of Enforcement Discretion](#) under HIPAA to Allow Uses and Disclosures of Protected Health Information by Business Associates for Public Health and Health Oversight Activities in Response to COVID-19
4. OCR Issues [Bulletin](#) on Civil Rights Laws and HIPAA Flexibilities That Apply During the COVID-19 Emergency
5. OCR Issues [Guidance](#) to Help Ensure First Responders and Others Receive Protected Health Information about Individuals Exposed to COVID-19
6. OCR Issues [Guidance](#) on Telehealth Remote Communications Following Its Notification of Enforcement Discretion
7. [Notification of Enforcement Discretion](#) for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency
8. OCR Announces [Notification of Enforcement Discretion](#) for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency
9. Telehealth regulatory [tracking](#)

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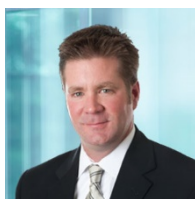
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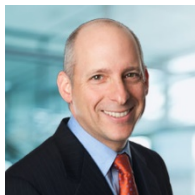
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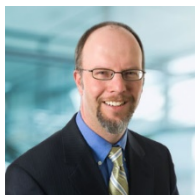
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