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Leveraging Telemedicine During the COVID-19 Public Health Emergency

Leveraging telemedicine technologies has become an important way to protect yourself, your patients and your workforce from COVID-19. The Department of Health and Human Services (HHS) Secretary Alex Azar declared a public health emergency on January 31, 2020 and President Trump declared a national emergency on March 13, 2020, which enabled various federal agencies to waive existing legal restrictions to address the spread of COVID-19. Several agencies have issued statements explaining which laws or requirements are waived under this authority for telemedicine, including the Drug Enforcement Administration (DEA), the Centers for Medicare and Medicaid Services (CMS), the Office of Inspector General (OIG), the Office for Civil Rights (OCR) and the Substance Abuse and Mental Health Services Administration (SAMHSA).

Similarly, at the state level, Governor Eric Holcomb issued Executive Order 20-02 on March 6, 2020, which declared that a public health emergency exists throughout the State of Indiana due to COVID-19, authorizing him to suspend state laws and regulatory requirements to address the emergency. Since the declaration of the public health emergency, Governor Holcomb has announced additional regulatory steps to respond to the emergency, some of which are found in Executive Order 20-05, and Executive Order 20-12 and Executive Order 20-13.

Both the state and federal governments are constantly issuing new guidance due to the rapidly evolving nature of the public health emergency. Although there are still some gaps and gray areas relating to the delivery of telemedicine services in light of existing laws and the guidance issued, state and federal officials and agencies have generally recognized that the need for telemedicine exists, and that flexibility is required given the current public health emergency. This document will be updated as more information and resources become available.

It is also important to note that, despite the public health emergency, telemedicine providers are still subject to the same standards of appropriate practice for health care services provided at an in-person setting. You should contact your medical malpractice

carrier for specific risk management advice and to ensure telemedicine is covered under your policy before beginning your telemedicine practice.

Note: This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney regarding any specific legal questions you may have concerning your situation.

General

What is telemedicine?

Under Indiana law, “telemedicine” is defined as the delivery of health care services to a patient using electronic communications and information technology with either secure video conferencing, interactive audio using “store and forward” technology or remote patient monitoring technology. **See Ind. Code § 25-1-9.5-6**. Audio-only communications, including telephone calls, are also a permitted method of communication for certain professionals using telemedicine for certain activities during the public health emergency under Gov. Holcomb’s Executive Order 20-13 (more details below).

Who can provide telemedicine services in Indiana?

Licensed physicians, licensed physician assistants with prescriptive authority, licensed advanced practice registered nurses with prescriptive authority, licensed optometrists and licensed podiatrists are authorized to provide telemedicine services in Indiana. **See Ind. Code § 25-1-9.5-4**. Gov. Eric Holcomb’s Executive Order 20-05 also added licensed mental health professionals to the list of professionals authorized to provide telemedicine services in Indiana. In addition, pursuant to Executive Order 20-13, physical therapists, occupational therapists and speech therapists are permitted to practice telemedicine using secure videoconferencing, interactive audio using “storandforward” technology or remote patient monitoring technology, but they cannot use audio-only modalities to provide telemedicine services.

What forms of technology does Indiana allow for the provision of telemedicine services?

Indiana law allows the provision of telemedicine by secure videoconferencing, interactive audio using “store and forward” technology and remote patient monitoring technology. **See Ind. Code § 25-1-9.5-6**. Audio-only communications, including telephone calls, are also temporarily permitted forms of communication for certain

professionals using telemedicine for certain activities, given the public health emergency. **See Executive Order 20-13**.

Can I see new patients through telemedicine?

Yes, provided you establish a proper patient-provider relationship, which must at least include the following: Obtaining the patient’s name and contact information; stating your name and provider type; obtaining the informed consent of the patient; obtaining the patient’s medical history and other information necessary for a diagnosis; discussing the patient’s diagnosis and treatment options (including when it is advisable to seek in-person care); issuing instructions for follow-up care; and providing a telemedicine visit summary to the patient, including any prescription information. **See Ind. Code § 25-1-9.5-7**.

Am I required to create a medical record for the telemedicine encounter?

Yes, Indiana law requires you to create and maintain a medical record for the patient. In addition, if the patient consents, you must notify the patient’s primary care provider of any prescriptions issued if you have obtained the contact information for the primary care provider. You do not need to send the medical record to the patient’s primary care provider if you are using an electronic health record system that the patient’s primary care provider is authorized to access. **See Ind. Code § 25-1-9.5-7**.

Can I write a prescription for a controlled substance via telemedicine?

Yes, based on Executive Order 20-13 and guidance posted by the Medical Licensing Board of Indiana, if the conditions below are met, a prescription for a schedule II-V controlled substance can temporarily be prescribed through telemedicine due to the public health emergency:

- The prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of their professional practice;
- The initial telemedicine communication is conducted using an audio-visual, real-time, two-way interactive communication system; and
- All other applicable federal and state laws are followed.

Guidance from the Medical Licensing Board further provides that, “[o]nce a prescriber has conducted an in-person medical evaluation or has conducted an evaluation using an audio-visual, real-time, two-way interactive communication system for the initial prescription[,] further health consultation may be done via audio-only or audio-visual telecommunication, as long as other applicable state and federal laws are followed.”

See Executive Order 20-13, guidance from the Medical Licensing Board of Indiana and DEA Telemedicine Prescribing Decision Tree.

Can I practice telemedicine in Indiana while located in another state?

Yes, but note the following:

- A prescriber physically located in Indiana who predominantly practices in Indiana can see patients located in Indiana through telemedicine without taking additional steps.
- A prescriber located outside of Indiana must register with the Indiana Professional Licensing Agency by visiting <https://www.in.gov/pla/>.

See **Executive Order 20-13**.

Do I need an Indiana license to practice telemedicine in Indiana?

Ordinarily yes, but that requirement has temporarily been waived for certain categories of health care professionals under Gov. Holcomb's [Executive Order 20-05](#) and [Executive Order 20-13](#), including certain retired health care professionals, medical students, residents, and out-of-state health care professionals. More details are available in sections 2 and 3 of [Executive Order 20-13](#) and at <https://www.in.gov/pla/>.

Can I see out-of-state patients via telemedicine if I am not licensed in the state where the patient is located?

It depends on the state. Visit <https://www.fsmb.org/advocacy/covid-19/> for current information from the Federation of State Medical Boards on licensing waivers issued as a result of the public health emergency. Physicians should also check with their medical malpractice carrier to ensure coverage extends to any out-of-state health care services.

Medicare

What changes to Medicare telemedicine services coverage have been announced?

CMS announced sweeping changes to certain Medicare policies that allow for Medicare coverage for more services in more locations, expand the providers eligible to offer telemedicine services, and allow for more forms of technology to deliver these services. The changes are effective March 6, 2020, and continue for as long as the federal public health declaration is in effect. [Medicare's Telemedicine Health Care Fact Sheet](#) provides an overview of the changes. CMS announced additional changes on March 30, 2020, and an overview of those changes is available in Medicare's [Additional Background: Sweeping Regulatory Changes Fact Sheet](#).

Who can provide telemedicine services to Medicare recipients?

Medicare allows a number of providers to offer telemedicine services, but the Medicare coverage policies do not override state law on the types of providers permitted to

practice telemedicine. As a result, the following providers are able to provide telemedicine services pursuant to Medicare guidance and Indiana law during the public health emergency: Licensed physicians, licensed physician assistants with prescriptive authority, licensed advanced practice registered nurses with prescriptive authority, licensed optometrists, licensed podiatrists and licensed mental health care professionals. **See Medicare’s Telemedicine Health Care Fact Sheet, Ind. Code § 25-1-9.5-4 and Executive Order 20-05.**

What types of services will Medicare cover?

Medicare will currently cover three types of virtual services: Telehealth visits, virtual check-ins and e-visits.

- **“Telehealth visits”** include office, hospital visits and other services that typically occur in person. The provider must use an interactive audio and video telecommunications system that permits real-time communication between the distant site and the patient at home.
- **“Virtual check-ins”** include a brief communication between a provider and a patient. (CMS has stated that it expects these check-ins to be initiated by the patient.) These can be provided to established or new patients, and the communication cannot relate to a medical service provided in the past seven days and cannot lead to a medical visit within the next 24 hours. The patient must verbally consent to receive virtual check-in services. Virtual check-ins are not limited to rural setting or certain locations. Doctors and certain practitioners may bill for these virtual check-in services, which CMS has stated can be furnished through several communication technology modalities, including telephone.
- **“E-visits”** are non-face-to-face services initiated by the patient through an online portal that requires clinical decision-making that would normally have occurred in the office. These services can only be submitted for reimbursement when the billing practice has an established relationship with the patient. E-visits are not limited to rural setting or certain locations.

See Medicare’s Telemedicine Health Care Fact Sheet and Medicare’s Additional Background: Sweeping Changes Fact Sheet.

Will Medicare cover telemedicine services rendered to a patient while the patient is in their home?

Yes, effective for services starting March 6, 2020, and for the duration of the federal COVID-19 public health emergency, Medicare will make payment for Medicare telemedicine services furnished to beneficiaries in any health care facility and in their home, as described above.

What kinds of technologies can Medicare providers use to deliver telemedicine services?

“Telehealth visits” require an interactive audio and video telecommunications system. However, CMS guidance provides that “virtual check-ins” and “e-visits” do not require an audio and video interaction with a practitioner. More on the modalities of communication can be found in [Medicare’s Telemedicine Health Care Fact Sheet](#).

Can I waive copayments or other cost-sharing requirements for Medicare telemedicine visits?

Yes, but you are not required to do so. The OIG issued a [Policy Statement](#) on March 17, 2020, that addressed this issue. The OIG stated that it will not enforce federal fraud and abuse laws during the federal public health emergency for waiving or reducing a Medicare beneficiary’s cost-sharing obligations (i.e., coinsurance and deductibles) for telemedicine services consistent with then-applicable coverage and payment rules. The OIG stated that nothing in the Policy Statement otherwise affects a physician’s or other practitioner’s responsibility to bill only for services performed and to comply with legal authorities related to proper billing, claims submission, cost reporting or related conduct. It should be noted that the OIG reserves the right to reconsider, modify or terminate the Policy Statement.

[Indiana Medicaid and Other Indiana Health Coverage Programs](#)

In [Executive Order 20-05](#) and [Executive Order 20-13](#), Gov. Holcomb directed the Indiana Family and Social Services Administration (FSSA) to enact certain changes to Medicaid telemedicine policies to expand the availability of these services during the state’s COVID-19 emergency. The FSSA published an informational bulletin on March 19, 2020, (BT202022) entitled [IHCP issues telemedicine billing guidance for providers during COVID-19 outbreak](#).

What changes to telemedicine did Gov Holcomb announce?

The Governor directed FSSA to suspend all telehealth/telemedicine requirements for face-to-face encounters for health care services and prescribing.

How long are those changes in effect?

The IHCP Bulletin (BT202022) states these changes are effective March 1, 2020, and will remain in effect through the duration of Gov. Holcomb’s public health emergency declaration.

What telemedicine services will Indiana Medicaid cover?

The policy change applies to most telemedicine services, including covered mental health services and Medicaid home and community-based services. This policy change will not apply to services that require physical interaction, such as surgical procedures, radiology, laboratory services, anesthesia services, audiological services and chiropractor services. FSSA’s informational bulletin, BT202022, states that telemedicine services are not limited to its accepted code sets. Claims for services not listed in the published code sets must include a valid procedure code and include the modifier GT, indicating that the services were furnished through interactive audio and video telecommunication systems.

Do the Medicaid telemedicine changes apply to Medicaid Managed Care programs?

Yes. The Medicaid telemedicine policy changes apply to Medicaid fee-for-service and managed care programs such as Hoosier Healthwise, Hoosier Care Connect and the Healthy Indiana Plan (Medicaid expansion).

What kinds of platforms can I use to deliver Medicaid telemedicine services?

The Medicaid bulletin states that telemedicine services may be provided using any technology that allows for real-time, interactive consultation between the provider and the patient (e.g., computers, phones or television monitors). The policy states that it includes voice-only communication (such as a phone call) but does not include the use of non-voice communication, such as emails or text messages. FSSA has confirmed it is interpreting Gov. Holcomb’s Executive Order 20-05 to temporarily treat telephone calls as a permissible form of telemedicine and Gov. Holcomb’s Executive Order 20-13 also allows for audio-only communications, including telephone calls, to be used as a form of telemedicine during the public health emergency. **See the Medicaid Bulletin.**

Do changes to Medicaid telemedicine apply to private insurance?

The changes to Medicaid coverage do not apply to private insurance coverage of telemedicine. In Executive Order 20-13, however, Gov. Holcomb directed the Indiana Department of Insurance to request health insurers to provide coverage for expanded telemedicine services rendered pursuant to Executive Orders issued during the public health emergency. Many commercial payers have issued statements or guidance on billing for telemedicine services (see “Coding” section below) and ISMA continues to

advocate for payment parity for telemedicine services so reimbursement is consistent with in-person visits for the duration of the public health emergency.

Privacy and Security Considerations

How do federal and state privacy and security laws, such as HIPAA, fit into the provision of telemedicine services?

The federal government has stated its intent is to make telemedicine as widely available to the public as possible during the public health emergency. The OCR (which enforces HIPAA) issued a Notification of Enforcement Discretion for telehealth remote communications during the COVID-19 nationwide public health emergency on March 17, 2020, which applies to health care providers who provide telemedicine services during the public health emergency. On March 20, 2020, OCR also issued FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency to further clarify its position.

This guidance from OCR states that health care providers will not be subject to penalties for violations of the HIPAA Privacy, Security and Breach Notification Rules that occur in the good faith provision of telemedicine services during the public health emergency. The guidance further states that providers can use any non-public-facing remote communication product that is available to communicate with patients. The OCR gave examples of acceptable forms of technology for telemedicine, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, WhatsApp video chat or Skype. The OCR will not allow Facebook Live, Twitch, TikTok, Slack and similar video communication applications. In addition to using acceptable forms of technology, providers should also use private locations, and patients should not receive telehealth services in public or semi-public settings, absent patient consent or exigent circumstances.

While these are acceptable forms of technology for the OCR, providers continue to be bound by Indiana law, which requires “secure” forms of video technology; Gov. Holcomb has not expressly waived these requirements. We will update this FAQ as we learn more. **See Ind. Code § 25-1-9.5-6**. Providers should also be mindful of Indiana’s Disclosure of Security Breach law, which is still in effect. **See Ind. Code §§ 24-4.9-1, et seq.**

If a provider is subject to 42 CFR Part 2 due to their provision of substance use disorder treatment, diagnosis, or referral services, the provider should also review the Substance Abuse and Mental Health Services Administration’s (SAMHSA) COVID-19 Public Health Emergency Response and 42 CFR Part 2 Guidance.

Coding

How do I code for telemedicine services?

Medicare's Telemedicine Health Care Fact Sheet contains detailed information regarding billing Medicare for virtual services. In addition, see ISMA's COVID-19 resources page for additional coding information relevant to telemedicine, including coding information for commercial payers.