



March 18, 2020

# UPDATE: CMS Expands Coronavirus Telehealth Benefits and OCR Promises Enforcement Discretion

In Brownstein's [March 9, 2020, client alert](#), we reported that the Coronavirus Preparedness and Response Supplemental Appropriations Act ("Act") permitted the Secretary of the United States Department of Health and Human Services ("HHS") to relax Medicare restrictions on telehealth. On March 17, 2020, the Centers for Medicare and Medicaid Services ("CMS") **announced** that it is taking up Congress's charge and expanding Medicare's telehealth benefits until the current public health emergency declared by the HHS Secretary ends. The HHS Office for Civil Rights ("OCR") has now **announced** changes to its approach to the Health Insurance Portability and Accountability Act ("HIPAA") during this emergency.

It is vital that, when possible for the foreseeable future, patients avoid unnecessary travel to physicians' offices, clinics, hospitals or other health care facilities where they could risk their own or others' exposure to COVID-19. These changes will help protect Medicare beneficiaries, who will be able to receive care remotely and will not need to risk going to a health care facility in person to receive care. Beneficiaries will be able to receive various services through telehealth, including regular office visits, mental health services and preventive health screenings. Clinicians can bill immediately for dates of service starting March 6, 2020, and the telehealth services are to be paid at the same rates as in-person services.

The following changes were announced:

## **No need for established physician-patient relationship with patient**

HHS announced that it would exercise enforcement discretion for Medicare telehealth services furnished pursuant to the waiver under the Act. That is, to the extent the Act required that the patient have a prior established relationship with a particular practitioner, HHS will not conduct audits to ensure that such a prior relationship existed for claims submitted during this public health emergency. *Thus, even patients without established relationships with a physician will be able to receive telehealth services under this waiver.*

### **Smartphones and other video chat platforms are permitted**

The Act explicitly allowed the use of telephones that have audio and video capabilities (such as smartphones) for the furnishing of Medicare telehealth services during the COVID-19 public health emergency. However, our March 9, 2020, Client Alert noted that HIPAA was still in force and that there were concerns that smartphones are not HIPAA-compliant.

Fortunately, OCR has now resolved this concern with its announcement that it will exercise enforcement discretion and waive penalties for HIPAA violations against health care providers serving patients in good faith through these everyday communications technologies during the COVID-19 public health emergency. This exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19. **OCR is allowing covered health care providers to use popular applications that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, or Skype.** However, Facebook Live, Twitch, TikTok and similar video communication applications that are public facing should not be used in the provision of telehealth by covered health care providers.

Additionally, **OCR will not impose penalties against covered health care providers for the lack of a business associate agreement (“BAA”)** with video communication vendors or any other noncompliance with the HIPAA Rules that relates to the good faith provision of telehealth services during the COVID-19 nationwide public health emergency. Nevertheless, some vendors, including Skype for Business, Updox, VSee, Zoom for Health care, Doxy.me, and Google G Suite Hangouts Meet, already have indicated that they will provide HIPAA-compliant video communication products and will enter into BAAs.

### **Medicaid programs may take similar action at the state level**

Finally, CMS also pointed out that “no federal approval is needed for state Medicaid programs to reimburse providers for telehealth services in the same manner or at the same rate that states pay for face-to-face services.” Thus, it is likely we will soon be seeing similar waivers of telehealth requirements for Medicaid.

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*This document is intended to provide you with general information regarding the expansion of Medicare's telehealth benefits in response to the coronavirus outbreak. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*