



CORONAVIRUS

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Considerations for Healthcare Providers Seeking to Expand Telemedicine Services in Response to the Coronavirus Outbreak

The COVID-19 pandemic has spurred healthcare providers exponentially to expand their ability to provide telemedicine services, i.e., services that involve the use of electronic information and telecommunications to provide long distance clinical health care. At the same time, the legal landscape for telemedicine services is changing on a daily basis. Healthcare providers considering how to meet patient needs in this transformed and complex environment must nonetheless act carefully to stay compliant with the law and avoid exposure to civil or criminal enforcement action.

Government Restrictions on Telemedicine Services are Easing in Response to the Coronavirus Outbreak

Federal and state government agencies are acting quickly to enable healthcare providers to treat patients via telemedicine, rather than in person. At the federal level, the newly enacted Coronavirus Preparedness and Response Supplemental Appropriations Act allows the Secretary of the Department of Health and Human Services (“HHS”) to waive certain Medicare telehealth payment restrictions so that healthcare professionals can bill fee-for-service for telemedicine appointments and see patients over telephonic devices equipped with audio and video capabilities. Moreover, several agencies have announced changes to last for the duration of the COVID-19 public health emergency:

- The Centers for Medicare and Medicaid Services (“CMS”) has announced a waiver of existing Medicare restrictions to enable providers for the duration of the COVID-19 public health emergency to expand telemedicine services beyond senior citizens living in rural communities.
- HHS Office for Civil Rights has announced that it would waive penalties under the Health Insurance Portability and Accountability Act (“HIPAA”) for using non-public facing communication technologies in good faith that may not be fully compliant with HIPAA privacy rules, such as FaceTime, Facebook Messenger, or Skype.
- HHS Office of Inspector General has indicated that it would not subject providers to penalties for waiving or reducing cost-sharing obligations, such as copayments, coinsurance, or deductibles.
- The U.S. Drug Enforcement Administration (“DEA”) has announced that it would permit physicians to prescribe Schedule II through Schedule V opioids following a telehealth appointment and without having conducted a prior in-person evaluation, so long as the prescription meets certain conditions, including that it be issued for a legitimate medical purpose.

Vice President Pence further announced last week that HHS would issue a regulation (still forthcoming) allowing providers to practice across state lines.

At the state level, as of March 20, 2020, 18 states and the District of Columbia have enacted emergency regulations or executive orders to promote telemedicine services. These actions include changes to state Medicaid plans to allow telemedicine providers to be reimbursed for patient visits at the higher reimbursement rate for in-person appointments. Certain states also are waiving requirements for an established physician-patient relationship prior to a telehealth appointment and, in advance of any action on the part of HHS, for physicians to only treat patients in states where they are licensed to practice.

DOJ is Pursuing Fraudulent Telemedicine Schemes

Even prior to the coronavirus pandemic, the Department of Justice (“DOJ”) had made it an enforcement priority to prosecute telemedicine providers engaging in misconduct. In the past year, DOJ indicted several telemedicine providers accused of improper billing, kickbacks, bribes, and prescribing medically unnecessary drugs or devices.

Earlier this month, Attorney General Barr issued a memorandum to all U.S. Attorneys, instructing them to prioritize investigating and prosecuting coronavirus-related fraud schemes. DOJ is on the lookout specifically for individuals and businesses selling fake cures for COVID-19 or engaging in other forms of fraud, and medical providers using patient information obtained for COVID-19 testing to bill fraudulently for other tests and procedures. Following Attorney General Barr’s directive, U.S. attorneys’ offices have established coronavirus fraud taskforces. DOJ also has filed a criminal complaint charging a company in Texas with committing wire fraud in connection with the sale of fake coronavirus vaccine kits. DOJ’s aggressive posture in pursuing misconduct related to the coronavirus outbreak is certain to include healthcare providers offering telemedicine services, particularly given these services’ rapid proliferation.

Healthcare Providers Must Proceed with Caution

Healthcare providers and administrators that are planning to increase telehealth services must proceed with caution, even as they seek to respond in a timely manner to the urgency of the situation. First and foremost, the confusing and rapidly evolving legal landscape means that they should consult closely with counsel to ensure that they are compliant with all applicable federal and state laws and regulations. Among other things, healthcare providers may need to put in place or modify standard patient waivers to acknowledge the enhanced risks to patient privacy associated with telemedical consultations. Healthcare providers also would be well-advised to train physicians regarding what telemedicine services are allowable and to have in place effective controls and policies to ensure accurate billing and record keeping.

DOJ’s increasing focus on telemedicine providers coupled with Attorney General Barr’s directive to prosecute wrongdoing related to the COVID-19 outbreak means that telemedicine services will be subject to heavy scrutiny. Healthcare providers that use telemedicine services to engage in fraud or wrongly take advantage of patients can expect to face significant consequences.

Blank Rome’s Coronavirus (“COVID-19”) Task Force is continuing to monitor the COVID-19 crisis and will provide further updates as they become available.

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