ALSTON & BIRD

WWW.ALSTON.COM

Health Care ADVISORY ■

MARCH 14, 2023

Public Health Emergency Set to End May 11, 2023: What It Means for the Provision of Telehealth and Related Services

Under Section 319 of the Public Health Service (PHS) Act, the COVID-19 public health emergency (PHE) was first declared by the Secretary of Health and Human Services (HHS) on January 31, 2020, and has been renewed every 90 days since. On January 30, 2023, the Biden Administration released a statement indicating that the PHE will be extended one final time, from April 11, 2023 to May 11, 2023, and then the PHE will terminate. But what does this mean for the provision of telehealth and related remote services?

End of PHE ≠ End of All Telehealth Flexibilities

What Clients Should Know

COVID-19 PHE-related legal authorities

There are several types of rule waivers, regulatory flexibilities, and other guidance related to the COVID-19 PHE, which serve different purposes. These are derived from various authorities.

Consolidated Appropriations Act of 2023

Several emergency telehealth waivers and flexibilities were authorized during the COVID-19 PHE. Congress passed the Consolidated Appropriations Act of 2023 to extend the following telehealth flexibilities through December 31, 2024:

- Eligible health care providers can render telehealth services regardless of the patient's or provider's geographic location (i.e., telehealth is not limited to rural areas and the patient can be at home).
- The list of health care professionals that can furnish distant-site telehealth services, which includes physical therapists, occupational therapists, and speech-language pathologists, remains expanded.
- Federally qualified health centers (FQHCs) and rural health clinics (RHCs) can serve as distant-site providers for telehealth services, meaning the patient is not required to be at the FQHC or RHC at the time of service.

- An in-person visit within six months of an initial behavioral/mental telehealth service, and annually thereafter, is not required.
- Medicare will continue to reimburse for eligible audio-only non-behavioral/mental health services.
- Providers can use telehealth to recertify patients' eligibility for hospice care.
- Patients with high-deductible plans coupled with health savings accounts can utilize the first-dollar coverage for telehealth services without first having to meet their minimum deductible.
- Through the Acute Hospital Care at Home program, hospitals can continue to furnish inpatient services, including routine services, outside the hospital.

Medicare payment parity for telehealth services provided in nonfacility settings

During the COVID-19 PHE, the Centers for Medicare and Medicaid Services (CMS) has reimbursed telehealth visits at the same rate as if the service were furnished in person, allowing distant-site practitioners to use both facility and nonfacility place-of-service codes to trigger higher reimbursement when services would have been furnished in person in a nonfacility setting. In the 2023 Physician Fee Schedule Final Rule, CMS extended this flexibility and opportunity for payment parity for telehealth in nonfacility settings through the end of 2023. Absent further rulemaking, beginning January 1, 2024, distant-site practitioners would again be reimbursed based only on facility rates, resulting in reimbursement for some telehealth services reverting to lower pre-PHE levels.

Winding down HIPAA-related enforcement discretion

Throughout the COVID-19 PHE, the Office for Civil Rights (OCR) has exercised discretion in imposing penalties for violations of the Health Insurance Portability and Accountability Act (HIPAA) against covered health care providers in connection with their good-faith provision of telehealth using non-public-facing remote communication technologies, even if the technologies are not HIPAA compliant.

However, the OCR's enforcement discretion terminates at the end of the PHE. The OCR will then resume enforcing compliance with HIPAA for covered entities using technology to provide services via telehealth. See here for clarifying guidance from the OCR on HIPAA considerations for audio-only telehealth use.

Winding down OIG-related enforcement discretion

Additionally, during the PHE, through a policy statement and FAQ, the Office of Inspector General (OIG) indicated that it would not enforce certain provisions of the Beneficiary Inducement Statute or the Anti-Kickback Statute that prohibit routine reductions or waivers of costs owed by federal health care program beneficiaries for services provided via telehealth. However, the OIG's enforcement discretion will terminate at the end of the PHE, and providers that routinely waive cost-sharing obligations, such as copays and deductibles, for telehealth and related services may be subject to administrative sanctions.

Virtual direct supervision

During the COVID-19 PHE, CMS temporarily amended the definition of "direct supervision" to include supervision via virtual presence through audio/video real-time communications technology. This is particularly helpful for services furnished "incident to" the services of a physician, which would typically require the supervising physician to be physically present in the same office suite. The amended definition has been extended by regulation, 42 C.F.R. § 410.32(b)(3)(ii), through the year in which the PHE ends, making the expected expiration date December 31, 2023.

Absent further rulemaking from CMS, beginning January 1, 2024, direct supervision will again require the supervising professional to be physically present in the office suite and immediately available to furnish assistance and direction in person.

Proposed rules related to prescribing controlled medications via telehealth

The Ryan Haight Act requires practitioners to have at least one in-person medical evaluation of a patient before prescribing a controlled medication, unless an exception applies; however, one exception waives the in-person evaluation during a declared public health emergency. On February 24, 2023, the Drug Enforcement Agency, Department of Justice, and HHS announced proposed rules creating new exceptions for the prescribing of controlled medications via telemedicine and the expansion of patient access to certain therapies beyond the scheduled end of the PHE.

The first proposed rule, Telemedicine Prescribing of Controlled Substances When the Practitioner and the Patient Have Not Had a Prior In-Person Medical Evaluation, would allow eligible providers to prescribe non-narcotic Schedule III-V controlled medications without an in-person medical evaluation for limited periods of time and only if certain conditions are met. The second proposed rule, Expansion of Induction of Buprenorphine via Telemedicine Encounter, would permit the use of buprenorphine for "maintenance treatment" and "detoxification treatment" of opioid use disorder via telemedicine in limited circumstances.

Comments on both of the proposed rules are due March 31, 2023, and the final rule may be published shortly thereafter. However, without further action, at the expiration of the PHE on May 11, 2023, the in-person requirement for prescribing controlled medications will govern.

RPM and TCM considerations

During the COVID-19 PHE, CMS reimbursed for remote patient monitoring (RPM) services for both new and established patients. At the end of the PHE, CMS will only reimburse for RPM services provided to established patients, meaning providers must conduct a new patient initiating visit before rendering RPM services to new patients. The new patient initiating visit can still be conducted via telehealth after the end of the PHE.

Transitional care management (TCM) services require a face-to-face visit within 14 days of discharge (for CPT Code 99495 with moderate complexity medical decision making) or within seven days of discharge (for CPT Code 99496 with high complexity medical decision making). The face-to-face visit may be provided via telehealth even after the PHE ends. However, after December 31, 2024, unless there are additional statutory

changes, Medicare-covered telehealth services, including the face-to-face visits required for TCM services, cannot be provided in a patient's home or other nontraditional originating sites.

Conclusion

As the COVID-19 PHE comes to an end, providers rendering telehealth and related services should take inventory of any telehealth flexibilities that are currently in use and develop a plan to bring operations into full compliance with the post-PHE rules. We anticipate that additional regulatory and legislative changes may occur before the end of the PHE, and we will continue to monitor those developments.

You can subscribe to future ***Health Care*** advisories and other Alston & Bird publications by completing our **publications subscription form**.

Alston & Bird has launched the **Digital Transformation of Health Care**, an initiative that advances our commitment to an industry approach to providing legal services in the health care space. Our health care and technology teams can assist with establishing or significantly growing telehealth capabilities and navigating the regulatory landscape.

If you have any questions, or would like additional information, please contact one of the attorneys in our **Health Care Group**.

ALSTON & BIRD

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86.10.85927500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32.2.550.3700 ■ Fax: +32.2.550.3719
CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 4th Floor ■ Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 755 Page Mill Road ■ Building C - Suite 200 ■ Palo Alto, California, USA 94304-1012 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333