

## LEGAL/REGULATORY—TELEHEALTH

March 26, 2021

### Telehealth and COVID-19

General guidance that COPIC has provided to our insured providers who are considering providing medical services using telehealth technologies includes:

- Licensure, including through the Interstate Compact
- Compliance with state medical practice acts, regulations, and board policies
- Confirming coverage with their medical professional liability carrier
- Hospital credentialing
  - Facilitated under Medicare conditions of participation regulations, 42 CFR § 482.12; 42 CFR § 482.22.
- On-site supervision requirements when supervising allied health professionals
- State informed consent or notice requirements (e.g., for Medicaid)
- Prescribing requirements that may require at least one in-person visit under state law
- Controlled substance prescribing that must meet the requirements of the federal Ryan Haight Online Pharmacy Consumer Protection Act
- Medical record requirements including record retention requirements under state law, and privacy and accessibility requirements under both state law and federal HIPAA
- Liability considerations:
  - Standard of care—what a reasonably careful physician practicing in the same specialty would have done at the same time and under the same circumstances
  - Telemedicine guidelines developed by specialty associations
  - State patient compensation fund participation
  - Federal vs. state court (state protections like the peer review privilege may not apply)
  - Choice of law and forum shopping issues
  - Abandonment issues if physician unilaterally ends the physician-patient relationship without prior notice when a patient requires ongoing care

Some of these requirements have been waived in response to COVID-19.

COPIC's reference "Ten Things to Know About Telehealth" addresses these considerations. [You will need a COPIC log-in to access this resource]. [https://www.callcopic.com/docs/default-source/protected-documents/resource-center/newsletters-and-articles/nebraska-copiscope/2021/all-states-copiscope--1q21-\(issue-212-1\).pdf?sfvrsn=3a6ebb68\\_3](https://www.callcopic.com/docs/default-source/protected-documents/resource-center/newsletters-and-articles/nebraska-copiscope/2021/all-states-copiscope--1q21-(issue-212-1).pdf?sfvrsn=3a6ebb68_3)

On March 17, 2020, the HHS Office of Civil Rights (OCR) announced enforcement discretion for telehealth remote communications during the COVID-19 nationwide public health emergency. <https://www.hhs.gov/about/news/2020/03/17/ocr-announces-notification-of-enforcement-discretion-for-telehealth-remote-communications-during-the-covid-19.html>

OCR will waive potential HIPAA penalties for good faith use of telehealth during the epidemic. HIPAA-covered health care providers may communicate with patients with any non-public facing remote communication product available to communicate with patients. This exercise of enforcement discretion applies to telehealth provided for any reason, regardless of whether the service is related to the diagnosis and treatment of health conditions related to COVID-19. For example, a provider may use popular applications such as Skype or FaceTime to allow for video chats without risk that OCR might

seek to impose a penalty for noncompliance with the HIPAA rules. Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications. An FAQ on this is available at [www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf](http://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf).

The Center for Medicare & Medicaid Services (CMS) issued an updated FAQ January 7, 2021, summarizing COVID-19 related Medicare fee-for-service billing. This includes a section on Medicare telehealth services, including those that can be furnished using audio-only telephones (p. 65) <https://www.cms.gov/files/document/medicare-telehealth-frequently-asked-questions-faqs-31720.pdf>

CMS has increased flexibility to expand the types of health care professionals who can furnish distant site telehealth services to include all those that are eligible to bill for their professional services. It has waived certain regulatory provisions making it easier for telemedicine services to be furnished for a hospital's patients through an agreement with an off-site hospital. CMS has also waived the requirement for critical access hospitals (CAH) that a physician be physically present to provide medical direction, consultation, and supervision for the services provided in the CAH. These changes were updated February 19, 2021. <https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf>.

**State-specific guidance on telehealth:**

When considering providing telehealth services out of state in response to testing, treatment, and care of patients with COVID-19, providers should access state medical board sites for the latest information regarding guidance for health care professionals not currently licensed in the state. They should also confirm coverage with their medical professional liability carrier.

**Informed consent and disclosures:**

As with any medical service, patients should give informed consent for receiving care through telehealth technologies and understand any limitations.