

TELEHEALTH GUIDANCE DURING THE COVID-19 CRISIS

One of the challenges that physicians have faced during the COVID-19 pandemic is the sudden transition of having to provide services via telehealth. While some physicians may be familiar with this setting, many physicians find themselves thrust into a new environment with questions about practice standards and compliance with state and federal regulations.

GENERAL GUIDANCE

General guidance if you are considering providing medical services using telehealth technologies includes:

- The need for appropriate licensure when practicing outside the state.
- Compliance with state board regulations and policies.
- Understanding record retention requirements under state law, and privacy and accessibility requirements under both state law and federal privacy laws such as HIPAA.

Changes in regulations have occurred at both the state and federal level in response to COVID-19 and may continue to be adjusted as this crisis unfolds over the next several months. When considering providing telehealth services out-of-state, 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.

The information provided below identifies key sources that are issuing guidance and this information is current as of 4/16/20. Please check these sources for ongoing updates.

FEDERAL GUIDANCE

Some of these requirements have or may be waived in response to COVID-19. On March 17, 2020, the U.S. Department of Health and Human Services (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>

This exercise of discretion applies to widely available communications apps, such as FaceTime or Skype, when used in good faith for any telehealth treatment or diagnostic purpose, regardless of whether the telehealth service is directly related to COVID-19. In support of this action, OCR will be providing further guidance explaining how covered health care providers can use remote video communication products and offer telehealth to patients responsibly. An FAQs on this is available at www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf and here are some key details from that:

What patients can a covered health care provider treat under the Notification of Enforcement Discretion regarding COVID-19 and remote telehealth communications and does it include Medicare and Medicaid patients?

This Notification applies to all HIPAA-covered health care providers, with no limitation on the patients they serve with telehealth, including those patients that receive Medicare or Medicaid benefits, and those that do not.

Information specifically about telehealth and Medicare is available at www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet.

Which parts of the HIPAA Rules are included in the Notification of Enforcement Discretion regarding COVID-19 and remote telehealth communications?

Covered 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 telehealth during the COVID-19 nationwide public health emergency. This Notification does not affect the application of the HIPAA Rules to other areas of health care outside of telehealth during the emergency.

What telehealth services are covered by the Notification of Enforcement Discretion regarding COVID-19 and remote telehealth communications?

All services that a covered health care provider, in their professional judgment, believes can be provided through telehealth in the given circumstances of the current emergency are covered by this Notification. This includes diagnosis or treatment of COVID-19 related conditions, such as taking a patient's temperature or other vitals remotely, and diagnosis or treatment of non-COVID-19 related conditions, such as review of physical therapy practices, mental health counseling, or adjustment of prescriptions, among many others.

What is a “non-public facing” remote communication product?

A “non-public facing” remote communication product is one that, as a default, allows only the intended parties to participate in the communication. Non-public facing remote communication products would include, for example, platforms such as Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Whatsapp video chat, Zoom, or Skype... In contrast, public-facing products such as TikTok, Facebook Live, Twitch, or a public chat room are not acceptable forms of remote communication for telehealth because they are designed to be open to the public or allow wide or indiscriminate access to the communication.

NEBRASKA GUIDANCE

When practicing using telehealth technologies, providers should be aware of relevant state regulations or policies:

- Nebraska regulations reference conforming to the ethics of the medical profession found in the American Medical Association's Code of Ethics. 172 N.A.C. 88-010.02. (Ethical Practice in Telemedicine; Opinion 1.2.12 <https://www.ama-assn.org/delivering-care/ethics/ethical-practice-telemedicine>)
- As with any medical service, patients should give informed consent for receiving care through telehealth technologies and understand any limitations. There isn't a requirement for patients to sign a consent, but providers may choose to use a written form.
- Nebraska has disclosure requirements for Medicaid patients prior to providing services using telehealth technologies (See N.R.S. § 71-8505). These disclosures are not required in an emergency. A Nebraska Insurance Bulletin was issued March 23rd stating that the Nebraska Department of Health and Human Services (DHHS) and the Nebraska Department of Insurance interpret the Governor's declared state of emergency as triggering the emergency exception so there is no requirement to obtain a Medicaid patient's signature on a written agreement prior to providing telehealth services. <https://doi.nebraska.gov/sites/doi.nebraska.gov/files/doc/TelehealthWrittenStatementRequirementException.pdf>
 - ▶ In addition, the Bulletin statement noted that:
 - Insurance claims for telehealth will not be denied solely on the basis of lack of a signed written statement.
 - Health care practitioners need to comply with all other provisions of the Nebraska Telehealth Act and any other applicable law or regulation including, but not limited to, requirements to be licensed, registered, or certified to practice in the State of Nebraska unless otherwise allowed under Executive Order.
- The Nebraska Governor's March 31st Executive Order No. 20-12 required DHHS to establish and publish guidance for health care providers regarding the use of telehealth by licensed practitioners and guidance for the payment of Medicaid services provided via telehealth. <http://govdocs.nebraska.gov/docs/pilot/pubs/eofiles/20-12.pdf>
 - ▶ DHHS published a telehealth FAQ on April 1st. <http://dhhs.ne.gov/Documents/COVID-19%20General%20Statewide%20Telehealth%20FAQ.pdf>
 - ▶ This included a reference to Executive Order No. 20-10. Out-of-state providers who work in Nebraska pursuant to the order are authorized to use telehealth under the same statutory provisions that permit Nebraska health care providers to use telehealth. The order temporarily suspended certain state statutory provisions regarding credentialing to permit individuals who are properly and lawfully licensed to engage in medicine and surgery in a U.S. state or territory to work in the state of Nebraska during the state of emergency so long as they are in good standing and free from disciplinary action in the states where they are licensed. <http://govdocs.nebraska.gov/docs/pilot/pubs/eofiles/20-10.pdf>