

Federal Telehealth Waivers Provide Flexibility During the COVID-19 Crisis to Expand Coverage and Access to Healthcare

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COVID-19 has upended the way individuals across the country access medical care and has made doctors' offices and hospitals high-risk grounds for transmission. This leaves the elderly and immunocompromised who seek care especially vulnerable. In response, the U.S. Department of Human and Health Services (HHS) and Centers for Medicare and Medicaid Services (CMS) have adopted a series of waivers to allow increased access to and coverage of healthcare services through telehealth.

PRE-PANDEMIC TELEHEALTH

Telehealth is "the use of telecommunications and information technology to provide access to health assessment, diagnosis, intervention, consultation, supervision and information across distance."[\[1\]](#) Telehealth serves to help improve health care access, meet patient demand, reduce costs, and improve the quality of health care services. However, the tradeoff of these benefits often comes in the form of a limited scope of service and numerous administrative requirements for health care providers. According to an American Medical Association (AMA) survey, the percentage of physicians using virtual

patient visits doubled between 2016 and 2019; however, adoption remained low with only 28% of physicians reporting use of virtual visits.[\[2\]](#) Additionally, only 9.6% of Americans have used telehealth services, and nearly three-fourths (74.3%) say they either do not have access to or are unaware of telehealth options.[\[3\]](#) Many qualifying patients are reluctant to adopt telehealth for reasons such as unfamiliarity with telehealth apps and platforms[\[4\]](#), confusion about insurance coverage and payments, and skepticism surrounding safety, security, and effectiveness.[\[5\]](#)

COVID-19 TRIGGERS FEDERAL RESPONSE

As the COVID-19 crisis continues to unfold, federal agencies have adopted waivers to expand access to telehealth and ease legal requirements for its utilization. Prior to the adoption of these waivers, administrative burdens prevented practitioners from offering care online. Medicare could only pay for telehealth on a limited basis, and HIPAA regulations limited the types of technology permitted to deliver services.[\[6\]](#) Now, federal waivers allow for expansion of service coverage and access, flexibility for patient cost-sharing, establishment of payment parity, and discretionary enforcement of HIPAA regulations.

The Secretary of the Department of Health and Human Services (HHS), using Section 1135 of the Social Security Act (SSA) can modify or waive certain Medicare (Parts A and B), Medicaid, and HIPAA requirements. This includes the ability to establish waivers under those programs to expand access to care during emergencies. Additionally, the Office for Civil Rights (OCR) at HHS is responsible for enforcing certain HIPAA regulations. Thus, HHS has the authority to remove procedural barriers for practitioners by allowing discretionary enforcement of regulatory requirements.[\[7\]](#) Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, CMS also waived

requirements of Section 1834(m)(4)(E) and 42 CFR § 410.78(b)(2), which in turn expands the types of services that may be provided through telehealth and eligible for billing to Medicare Parts A and B.[\[8\]](#) Altogether, the HHS and CMS are responsible for blanket healthcare waivers affecting Medicaid and Medicare services and coverage.[\[9\]](#)

While the federal waivers provide regulatory flexibilities beyond just telehealth, this post focuses on how barriers to telehealth have eased for insurers, providers, and patients. Additionally, while these waivers apply to both Medicare and Medicaid, we discuss here primarily the effects on Medicare, as Medicaid plans are subject to variation from individual state regulation.

1. Expansion of Telehealth Services

Waivers issued by CMS help ease telehealth barriers by expanding coverage of telehealth services to benefit both health care providers and patients. Providers can now provide telehealth services that they could not previously, and patients can access a greater number of services that were unavailable prior to the pandemic.

Prior to the waivers, Medicare would only cover telehealth services for beneficiaries located in certain originating sites of care in qualifying rural areas. Under the waivers, coverage is now expanded for office, hospital, and other visits furnished via telehealth from a patient's place of residence. Medicare will now cover any service that is certified as deliverable through telehealth platforms, as well as monthly remote care management and monthly remote patient monitoring.[\[10\]](#) Additionally, CMS published a final rule of revised regulations for Medicare Advantage that strengthens network adequacy rules. Distance and residential requirements are now eased so that more beneficiaries can access

telehealth. Medicare Advantage plans now have more flexibility to provide telehealth services in specialty areas. This change is meant to provide patients with more health care choices, especially for those residing in rural communities.[\[11\]](#)

The CMS waivers also expand coverage of specific types of services and practitioners. Previously, services provided through telehealth included remote evaluations, virtual check-ins, behavioral health services, education services, and remote patient monitoring. Eligible telehealth practitioners were limited to doctors, nurse practitioners, physician assistants, certified registered nurse anesthetists, certified nurse midwives, clinical social workers, clinical psychologists, and registered dietitians. With the federal waivers in place, nearly any service can be delivered through telehealth if there is a medically appropriate way to do so. Over 100 services have been temporarily added through the waivers. Notable additions include brief emotional or behavioral assessment, prosthetic training, speech therapy, and acute nursing facility care.[\[12\]](#)

2. Payment Flexibility and Reimbursement Parity

Along with expanded coverage of services, CMS waivers allow for Medicare Parts A and B to exercise reimbursement parity and bill telehealth services as if they were provided in person. Specifically, telehealth services previously billed by Medicare Parts A and B between \$14-\$41 are now billed by at \$46-\$110.[\[13\]](#) Medicare reimbursement parity is retroactive to March 1, 2020. Moreover, no federal approval is needed for state Medicaid programs to reimburse providers for telehealth services in the same manner or at the same rate as face-to-face services.[\[14\]](#)

Furthermore, HHS has provided flexibility for healthcare providers to reduce or waive cost-sharing for telehealth

visits paid by federal healthcare programs, including Medicare, Medicaid, and CHIP, without being subjected to administrative sanctions.[\[15\]](#) Ordinarily, if physicians or practitioners reduce or waive costs owed by federal health care program beneficiaries including cost-sharing, coinsurance, and deductibles, they could potentially implicate 42 USC § 1320a-7b, the federal Anti-Kickback Statute. The statute prohibits the exchange of anything of value, to induce or reward the referral of business reimbursable by federal health care programs.[\[16\]](#) Restrictions are meant to deter overutilization and the resulting increase cost of healthcare services.

Waived cost-sharing allows patients to seek telehealth care without incurring out-of-pocket expenses for their visits. Since the rest of the cost will be absorbed by Medicare, Medicaid, or CHIP, beneficiaries are encouraged to make appointments and seek the appropriate health care they need. Consequently, health care providers can expect more patients and business due to HHS waivers.

3. Fewer Restrictions to Telehealth Delivery and Access

To further encourage the use of telehealth, HHS' Office of Civil Rights (OCR) stated that it will exercise enforcement discretion and not impose penalties for violation of certain provisions of HIPAA, so long as telehealth services and technology usage are made in good faith. OCR's enforcement discretion expands the delivery of telehealth to platforms that would not otherwise comply with HIPAA's regulations. Practitioners may now communicate with patients using non-public facing communication apps such as WhatsApp, Zoom, Skype, FaceTime, and iMessage.[\[17\]](#) However, public-facing video communication applications such as Facebook Live, Twitch, and TikTok should not be used in the provision of telehealth by covered health care providers. Since HIPAA

expansion under HHS' waiver does not have an expiration date, telehealth services can be carried out on permitted platforms indefinitely.[\[18\]](#)

Consistent with service expansions, federal telehealth waivers also broaden the modalities through which telehealth services can be delivered. Previously, video technology was required to deliver telehealth services. CMS waivers discarded video requirements, allowing for audio-only evaluations when appropriate. CMS has provided a list of reimbursable audio-only services.[\[19\]](#) The change is meant to encourage telehealth use among the elderly and low-income populations who might have difficulty securing and using video technology.

4. Fewer Administrative Barriers for Providers

In addition to the expansion of telehealth in terms of service, delivery, and access, the federal waivers seek to lessen administrative burdens and encourage providers to adopt telehealth. CMS created the "Patients Over Paperwork" initiative to remove paperwork barriers that previously prevented certain practitioners from offering their services virtually.[\[20\]](#) The initiative expands caregivers' abilities to administer therapy, improves reporting systems, and reduces psychiatric hospital burdens with a new survey process.[\[21\]](#)

WHAT THE FUTURE HOLDS FOR TELEHEALTH

As the country works to lower the COVID-19 infection rate and prepare for a potential second wave as states start to reopen, the healthcare system will continue to rely heavily upon telehealth to ease healthcare burdens. Since federal telehealth waivers have been instituted, the demand for telehealth has surged dramatically. AllyHealth, a telehealth platform, reported a 150% increase in Virtual Urgent Care

utilization between January 2020 and April 2020.[\[22\]](#)

The overwhelming adoption of telehealth by beneficiaries since the pandemic makes clear that telehealth is here to stay, and any legislative pushback may be seen as unnecessarily restricting access to essential health care. Experts expect that even when the pandemic subsides, CMS and HHS will maintain much of the flexibilities provided by their waivers in terms of expanded service and access.[\[23\]](#) Moreover, high demands for telehealth have put pressure on Congress to advance telehealth reform through formal regulatory changes, especially concerning payment parity and rural area funding.[\[24\]](#) While it is unfortunate that it took a pandemic to accelerate the development of telehealth and broaden its coverage and access, the resulting desire and urgency for telehealth reform will undoubtedly be, if not already, on the forefront of Congress’ mind.

	CMS WAIVER	HHS WAIVER	INSURANCE
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<p>SERVICES</p>	<p>Adds 100+ new services to the list of Medicare services that may be furnished via telehealth: group psychotherapy, eye exams, speech/hearing therapy, cochlear implant follow up exam, brief emotional/behavioral assessment, etc. Waives limitations on the types of clinical practitioners that can furnish Medicare telehealth services. Hospitals may bill as the originating site for telehealth services furnished to patients registered as hospital outpatients, including certain partial hospitalization services and when the patient is located at home.</p> <p>*Patients in rural areas benefit from network adequacy requirements. (M.A. only)</p>		<p>Medicare Parts A and B</p> <p>*Medicare Advantage</p>
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<p>PROVIDER REIMBURSEMENT</p>	<p>Increases payments for telephone visits to match payments for similar office and outpatient visits. Increases payments for these services from a range of about \$14-\$41 to about \$46-\$110.</p> <p>Payments are retroactive to March 1, 2020.</p>		<p>Medicare Parts A and B Medicaid (also subject to state's recommendations)</p>
<p>PATIENT COST-SHARING</p>		<p>Physicians and other practitioners will not be subject to administrative sanctions for reducing or waiving any cost-sharing obligations.</p>	<p>Medicare Parts A and B Medicaid (also subject to state's recommendations)</p>

PROVIDER ADMINISTRATION	<p>“Patients Over Paperwork” initiative removes paperwork barriers that previously prevented certain practitioners from offering their services virtually. Expands caregivers’ ability to administer therapy, improve reporting systems. and reduces psychiatric hospital burdens with a new survey process. Some states have provided additional relief on reporting and audit requirements.</p>		<p>Medicare Medicaid (also subject to state’s recommendations)</p>
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<p>DELIVERY AND ACCESS</p>	<p>Waives video requirement for certain telephone evaluation and management services. Eased distance and residential requirements are so that more beneficiaries can access telehealth.</p>	<p>Discretion in enforcement of HIPAA regulations. Health care providers may use popular applications that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype.</p>	<p>Medicare Medicaid (also subject to state's recommendations)</p>
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[1] *Telemedicine*, Medicare.gov, <https://www.medicaid.gov/medicaid/benefits/telemedicine/index.html> (last visited June 15, 2020).

[2] *Telemedicine Research & Reports – Pre-COVID-19: Utilization/Adoption of Telemedicine*, Alliance for Connected Care, <http://connectwithcare.org/studies-reports/#Utilization/Adoption%20of%20Telemedicine> (last visited June 15, 2020).

[3] *One in 10 Americans Use Telehealth, But Nearly 75% Lack Awareness or Access, J.D. Power Finds*, J.D. Power (July 31, 2019), <https://www.jdpower.com/business/press-releases/telehealth-usage-and-awareness-pulse-survey>.

[4] Given the growing number of telehealth apps and providers, patients and beneficiaries are overwhelmed by the choices they have. Moreover, there is a lack of information and resources to help patients determine which platforms and providers are most suitable for their needs. *Id.*

[5] Nearly half (48.7%) of respondents believe the quality of care received in a telehealth session is lower than that of a doctor's office visit." *Id.*

[6] Medicare could traditionally pay for telehealth when the person receiving the service was in a designated rural area and when they leave their home and go to a clinic, hospital, or medical facilities for the service. *Medicare Telemedicine Health Care Provider Fact Sheet*, CMS.gov (Mar. 17, 2020), <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>.

[7] *Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency*, HHS.gov, <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html> (last visited June 15, 2020).

[8] Ctr. For Medicare & Medicaid Serv., Physicians and Other Clinicians: CMS Flexibilities to Fight COVID-19 1 (2020), <https://www.cms.gov/files/document/covid-19-physicians-and-practitioners.pdf>.

[9] Dep't of Health & Human Serv., Medicare and Medicaid Programs, Basic Health Program, and Exchanges; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency and Delay of Certain Reporting Requirements for the Skilled Nursing Facility Quality Reporting Program 28, 44-60 (2020), <https://www.cms.gov/files/document/covid-medicare-and-medicaid-ifc2.pdf>. See also, Dep't of Health & Human Serv., Blanket

Waivers of Section 1877(g) of the Social Security Act Due to Declaration of COVID-19 Outbreak in the United States as a National Emergency 1 (2020), <https://www.cms.gov/files/document/covid-19-blanket-waivers-section-1877g.pdf>.

[10] Office of Inspector General, FAQs – OIG Policy Statement Regarding Physicians and Other Practitioners That Reduce or Waive Amounts Owed by Federal Health Care Program Beneficiaries for Telehealth Services During the 2019 Novel Coronavirus (COVID-19) Outbreak (2020), <https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/telehealth-waiver-faq-2020.pdf>.

[11] *Trump Administration Announces Changes to Medicare Advantage and Part D to Provide Better Coverage and Increase Access for Medicare Beneficiaries*, CMS.gov (May 22, 2020), <https://www.cms.gov/newsroom/press-releases/trump-administration-announces-changes-medicare-advantage-and-part-d-provide-better-coverage-and>.

[12] *List of Telehealth Services*, CMS.gov, <https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes> (last visited June 15, 2020).

[13] CMS.gov, *supra* note 11.

[14] Ctr. For Medicare & Medicaid Serv., Medicare Telehealth Frequently Asked Questions (FAQs) 4 (2020), <https://edit.cms.gov/files/document/medicare-telehealth-frequently-asked-questions-faqs-31720.pdf>.

[15] HHS Office of Inspector General, HHS OIG Policy Statement on Practitioners That Reduce, Waive Amounts Owed by Beneficiaries for Telehealth Services During the COVID-19 Outbreak (2020), <https://www.oig.hhs.gov/fraud/docs/alertsandbulletins/2020/factsheet-telehealth-2020.pdf>. See also, Office of Inspector General, OIG Policy Statement Regarding Physicians and Other

Practitioners That Reduce or Waive Amounts Owed by Federal Health Care Program Beneficiaries for Telehealth Services During the 2019 Novel Coronavirus (COVID-19) Outbreak 1-2 (2020),

<https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/policy-telehealth-2020.pdf>. See also, *Cost-sharing for Patients in Federal Health Care Programs*, HHS.gov, [https://www.hhs.gov/coronavirus/telehealth/index.html#:~:text=The%20HHS%20office%20of%20Inspector,CHIP\)%2C%20during%20the%20public%20health](https://www.hhs.gov/coronavirus/telehealth/index.html#:~:text=The%20HHS%20office%20of%20Inspector,CHIP)%2C%20during%20the%20public%20health) (last visited June 15, 2020).

[16] *Anti-kickback Statute and Physician Self-Referral Laws (Stark Laws)*, American Society of Anesthesiologists, <https://www.asahq.org/quality-and-practice-management/managing-your-practice/timely-topics-in-payment-and-practice-management/anti-kickback-statute-and-physician-self-referral-laws-stark-laws#:~:text=The%20federal%20Anti%2DKickback%20Statute,by%20federal%20health%20care%20programs> (last visited June 15, 2020).

[17] HHS.gov, *supra* note 6.

[18] *When does the Notification of Enforcement Discretion regarding COVID-19 and remote telehealth communications expire?*, HHS.gov (March 26, 2020),

<https://www.hhs.gov/hipaa/for-professionals/faq/3020/when-does-the-notification-of-enforcement-discretion-regarding-covid-19-and-remote-telehealth-communications-expire/index.html>.

[19] CMS.gov, *supra* note 10.

[20] Ctr. For Medicare & Medicaid Serv., *Patients Over Paperwork Fact Sheet* (2019), <https://www.cms.gov/About-CMS/Story-Page/Patients-Over-Paperwork-fact-sheet.pdf>.

[21] Ctr. For Medicare & Medicaid Serv., *Status Update:*

Reducing Home Health Burden with Human Centered Design 1-3 (2020),

<https://www.cms.gov/files/document/february-2020-update.pdf>.

[22] *AllyHealth's Telemedicine Demand Surges vs. Pre COVID-19 Levels*, AllyHealth (Apr. 7, 2020), <https://www.allyhealth.net/allyhealths-telemedicine-demand-surges-vs-pre-covid-19-levels/>.

[23] Robert King, *HHS official: 'Cat out of the bag' on telehealth but unclear what changes will stick*, Fierce Healthcare (June 5, 2020), https://www.fiercehealthcare.com/payer/hhs-official-cat-out-bag-telehealth-but-unclear-what-changes-will-stick?mkt_tok=eyJpIjoiTWpoaU1qQmtZamxoTldVdyIsInQiOiJFbXJzdjBpckdldlhRV2VrZHNTakxhS2hTWStPeXlSc3hoMENNSTJBREl1Vnh0TGxVQnQ1VWwxMDdPN0xJZzLSVmdUbHRUa0VKChFnBhplQk5ob1ZsY2VZZFZmNEtDSkJYV2JJOHFrNThtMTE2RkNEMm50ZjZSdGNSSGF4YUNQUVvk3d0V2bU9CUHNjUU5ETlZhb1pZUnc9PSJ9&mrkid=57343265.

[24] Heather Landi, *Providers to Congress Patients will lose access to care without permanent expansion of telehealth*, Fierce Healthcare (June 18, 2020), https://www.fiercehealthcare.com/tech/providers-to-congress-permanent-expansion-telehealth-will-help-address-health-disparities?mkt_tok=eyJpIjoiTnpBMU9UVXl0alkzWm1SbCIIsInQiOiJJaXC90XC85QUR1cHRDMkNqUUNNbTlKamRUODREcGRvMFVxdU5MUUFrR3R0WUlyM2REYW8wNm9wU2NMYXg1SjA3OGhsT0U2VXNXR1hoWkkRULgzTkZ2cG1TdE5pbERSMWJibXY5alp5NXdBefpndlUzOUphdko0U0tLZ0M1RkI2bHlLZGZTd1ZrZjdxem9Mc1ozZFdDaHNDQT09In0%3D&mrkid=57343265. See also, Joyce Frieden, *COVID-19 Changes to Telehealth Rules Should Stick, Senator Says*, MedPage Today (June 17, 2020), <https://www.medpagetoday.com/practicemanagement/reimbursement/87140>.