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Expansion of Medicare Telehealth Benefits and Co-Pay Waivers During the COVID-19 Outbreak

In response to the ongoing developments regarding the COVID-19 outbreak, President Trump and the Office of Inspector General (“OIG”) made significant announcements impacting the expansion and availability of telehealth benefits for Medicare beneficiaries during the COVID-19 outbreak.

The President’s Announcement:

One of the major restrictions of CMS’s telehealth program is that Medicare does not cover (i.e. does not reimburse for) telehealth services for beneficiaries who do not live in a rural area. In addition and regardless of whether one lives in a rural area, Medicare does not cover telehealth services if the patient/beneficiary is receiving such services while he/she is in his/her home. The President’s latest waiver announcement removes such restrictions effective as of March 6, 2020. Accordingly, this means that a provider may be reimbursed for telehealth services provided to his/her/its patients regardless of the patient’s location at the time he/she receives telehealth services.

As a reminder, and while the location requirement has been removed (temporarily), only certain services are covered by Medicare when they are provided via telehealth. CMS maintains a list of services that may be furnished via telehealth. This list is available here: <https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes>. The latest announcement from the President does not change what services are eligible for telehealth reimbursement.

The types of providers who are eligible/permitted to provide services via telehealth has also not been changed by this latest waiver. More specifically, only physicians, PAs, APRNs, certified nurse midwives, CRNAs, LCSWs, clinical psychologists, and registered dietitians or nutrition professionals may provide services via telehealth.

Finally, and in response to a question regarding whether any specialized equipment is needed to furnish Medicare-covered telehealth services, CMS states that:

1. Currently, CMS allows for use of telecommunications technology that have audio and video capabilities that are used for two-way, real-time interactive communication;
2. The new waiver in Section 1135(b) of the Social Security Act explicitly allows the

Secretary of Health and Human Services (“HHS”) to authorize the use of telephones that have audio and video capabilities for the furnishing of Medicare telehealth services during the COVID-19 public health emergency; and

3. **Effective immediately, the HHS Office for Civil Rights (“OCR”) will exercise enforcement discretion and waive penalties for HIPAA violations against health care providers that serve patients in good faith through everyday communications technologies, such as FaceTime or Skype, during the COVID-19 public health emergency.**

For other and more specific technical, billing or compliance questions, CMS has issued a very helpful list of Frequently Asked Questions (“FAQs”). To read the FAQs on this announcement visit: <https://www.cms.gov/files/document/medicare-telehealth-frequently-asked-questions-faqs-31720.pdf>

OIG’s Policy Statement Regarding Co-Pay Waivers:

Ordinarily, routine reductions or waivers of costs owed by Federal health care program beneficiaries, including cost-sharing amounts such as coinsurance and deductibles, potentially implicate the Federal anti-kickback statute, the civil monetary penalty, exclusion laws related to kickbacks, and the civil monetary penalty law prohibition on inducements to beneficiaries.

On March 17, 2020, however, the OIG issued the *“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”* (the “Policy Statement”), which notifies physicians and other practitioners that they will not be subject to sanctions for reducing or waiving any cost-sharing obligations Federal health care program beneficiaries may owe for telehealth services, subject to the conditions specified in the Policy Statement.

More specifically, and recognizing the unique circumstances resulting from the COVID-19 outbreak, OIG will not subject physicians and other practitioners to OIG administrative sanctions for arrangements that satisfy *both* of the following conditions:

1. A physician or other practitioner reduces or waives cost-sharing obligations (*i.e.*, coinsurance and deductibles) that a beneficiary may owe for telehealth services furnished consistent with the then-applicable coverage and payment rules; and
2. The telehealth services are furnished during the time-period subject to the COVID-19 public health emergency declaration.ⁱ

ⁱ Note that “[a public health emergency] declaration lasts until the Secretary declares that the [public health emergency] no longer exists or upon the expiration of the 90-day period beginning on the date the Secretary declared a [public health emergency] exists, whichever occurs first. The Secretary may extend the [public health emergency] declaration for subsequent 90-day periods for as long as the [public health emergency] continues to exist, and may terminate the declaration whenever he determines that the [public health emergency] has ceased to exist.” See U.S. Department of Health & Human Services, Public Health Emergency Declaration Q&As, available at <https://www.phe.gov/Preparedness/legal/Pages/phe-qa.aspx#faq7>.

The OIG also states that its Policy Statement is subject to the following considerations:

1. Nothing in the Policy Statement *requires* physicians or other practitioners to reduce or waive any cost-sharing obligations (*i.e.* it's voluntary);
2. During the public health emergency declaration, the OIG will not view the provision of free telehealth services alone to be an inducement or as likely to influence future referrals (*i.e.*, OIG will not view the furnishing of subsequent services occurring as a result of the free telehealth services, without more, as evidence of an inducement);
3. Nothing in the Policy Statement affects the operation of CMS's programmatic rules and regulations;
4. Nothing in the Policy Statement otherwise affects a physician's or other practitioner's responsibility to bill only for services performed and to comply with legal authorities related to proper billing, claims submission, cost reporting, or related conduct; and
5. Nothing in this Policy Statement affects a physician's or other practitioner's responsibility to comply with Federal, State, or local statute, rule, regulation, ordinance, or other law that may be applicable in effect at the time.

Please see <https://go.usa.gov/xdtXC> for the OIG's full Policy statement.

Questions or Assistance

If you have any questions about this alert, please contact any member of our Health Law Practice Group listed on page 1.

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