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HEALTH CARE

COVID-19 DEVELOPMENTS IN HEALTH CARE

While the past few weeks have been very difficult for many industries, health care providers have been under unique strain in the midst of the COVID-19 crisis. Lawmakers at the federal, state and local levels have tried to ease that burden by churning out new laws and executive orders and relaxing certain regulatory requirements. While much of the attention this week has gone to the new federal and New York paid leave requirements for employees affected by COVID-19, there have been several other developments worth the attention of New York health care providers.

Routine Survey Activity Suspended

The Centers for Medicare & Medicaid Services ("CMS"), Department of Health ("DOH") and Joint Commission have all announced that they will not conduct routine surveys of health care facilities. Survey activity may still be necessary in certain circumstances. For example, surveys will still be conducted in response to immediate jeopardy complaints or complaints alleging non-compliance with infection control standards.

Expanded Medicare Telehealth Benefits

Until this week, Medicare's coverage of telehealth services was fairly limited. Only routine visits were covered and only under limited circumstances to Medicare beneficiaries who reside in rural areas. After President Trump's emergency declaration under the Stafford Act and the National Emergencies Act, CMS expanded telehealth benefits under its 1135 waiver authority and the Coronavirus Preparedness and Response Supplemental Appropriations Act. This expansion is effective for dates of service beginning March 6, 2020.

A wide range of practitioners (e.g., physicians, nurse practitioners, clinical psychologists, and licensed clinical social workers) are able to offer telehealth to Medicare beneficiaries. These patients can receive those services in a physician's office, hospital, nursing home, rural health clinic and, most importantly in the current crisis, without leaving their homes. Various telehealth services are covered, including office visits, mental health counseling and preventive health screenings. The chart below offers a summary of the available types of services, including the billing codes that should be used.

TYPE OF SERVICE	WHAT IS THE SERVICE?	HCPCS/CPT CODE	Patient Relationship with Provider
MEDICARE TELEHEALTH VISITS	A visit with a provider that uses telecommunication systems between a provider and a patient.	Common telehealth services include: • 99201-99215 (Office or other outpatient visits) • G0425–G0427 (Telehealth consultations, emergency department or initial inpatient) • G0406–G0408 (Follow-up inpatient telehealth consultations furnished to beneficiaries in hospitals or SNFs) For a complete list: https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes	For new* or established patients. *To the extent the 1135 waiver requires an established relationship, HHS will not conduct audits to ensure that such a prior relationship existed for claims submitted during this public health emergency
VIRTUAL CHECK-IN	A brief (5-10 minutes) check in with your practitioner via telephone or other telecommunications device to decide whether an office visit or other service is needed. A remote evaluation of recorded video and/or images submitted by an established patient.	• HCPCS code G2012 • HCPCS code G2010	For established patients.
E-VISITS	A communication between a patient and their provider through an online patient portal.	• 99421 • 99422 • 99423 • G2061 • G2062 • G2063	For established patients.

https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet

Executive Orders Relax Certain Regulatory Requirements

Since the declaration of a disaster emergency in the State of New York via Executive Order 202 on March 7, 2020, Governor Andrew Cuomo issued a series of related Executive Orders to relax certain statutory and regulatory requirements applicable to health care providers. Among the more notable pronouncements:

- Executive Order 202.1: By their very nature, the certificate of need requirements prevent New York facilities from building access capacity that could be used in the event of a surge such as the one that will likely be created by COVID-19. To allow hospitals to meet the coming demand for additional beds, through April 11, 2020, existing hospitals do not need a certificate of need to expand the services they can offer or create temporary facilities.
- Executive Order 202.5: To increase the number of practitioners available to work in New York, through April 17, 2020:
  - Physicians, nurse practitioners, physician assistants and registered nurses who are licensed and in good standing in other states can practice in New York without being licensed and registered in New York.
  - Article 28 facilities do not need to follow their normal credentialing processes before granting privileges to a practitioner so long as that practitioner is credentialed at another New York facility.

Executive Order 202.5 also makes it possible for nursing homes to admit residents affected by the COVID-19 crisis more expeditiously. While DOH regulations require a physician to approve the admission of a resident, such approval can be obtained "as soon as practicable" after admission or done away with entirely if the resident was evacuated from the facility and is returning to the facility for re-admission. Similarly, facilities that receive residents displaced from other facilities can be comprehensively assessed as soon as practicable or even not at all for individuals returned to facilities from which they were evacuated.

While not the subject of an Executive Order, the State is surveying retired practitioners via the DOH website to gauge retirees' willingness to come out of retirement to assist with the coming high patient demand. The survey indicates that the State is willing to make the necessary licensure and certification accommodations to permit retirees to practice again.

Suspension of Certain HIPAA Rules and Enforcement

On March 17, 2020, the Office for Civil Rights ("OCR"), the agency with enforcement authority for the HIPAA regulations, announced that it will not pursue enforcement actions against covered entities that use certain non-HIPAA-compliant technology to communicate with patients during the COVID-19 crisis.

Effective immediately, health care providers are permitted to use remote technology to interact with patients even though that technology may not meet HIPAA standards. Examples of newly permissible applications include Apple FaceTime, Facebook Messenger video chat, Google Hangouts video and Skype. Public-facing applications like Facebook Live, Twitch and TikTok remain impermissible vehicles for patient interaction because they pose a high chance of compromising patient privacy.

The use of this expanded telehealth technology is not limited to the screening for or treatment of COVID-19; it can be for conditions entirely unrelated to COVID-19.

OCR encouraged providers to notify patients that these remote communication applications potentially introduce privacy risks. OCR also indicated that providers should enable all available encryption and privacy modes when using these applications.

OCR also waived some HIPAA Privacy Rule requirements for hospitals. Effective March 15, 2020, hospitals that have instituted a disaster protocol do not have to comply with the following provisions of the Privacy Rule:

- the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient's care.
- the requirement to honor a request to opt out of the facility directory.
- the requirement to distribute a notice of privacy practices.
- the patient's right to request privacy restrictions.
- the patient's right to request confidential communications.

Families First Coronavirus Response Act

Signed into law by President Trump on March 19, 2020, the Families First Coronavirus Response Act (the "FFCRA") requires insurers that offer group or individual health insurance coverage to provide coverage and prohibits cost-sharing (including deductibles and copays) for COVID-19 testing and related office, urgent care center and emergency room visits. The FFCRA also requires federal health care programs (e.g., Medicare and Medicaid) to cover testing without cost-sharing requirements.

States will receive a temporary 6.2% increase in the amount the federal government pays to support the Medicaid program. As a condition to receipt of these funds, states must offer coronavirus testing through their Medicaid programs without patient cost-sharing.

For more information, contact any member of the Health Care team or visit www.hselaw.com.

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