March 31, 2020

COVID-19 and Telehealth: Providing Care at a Distance

UPDATE: This advisory was updated to reflect an announcement by the Centers for Medicare & Medicaid Services (CMS) on April 9 and updated Medicare Fee-for-Service (FFS) billing FAQs. The April 9 announcement suspended a number of rules allowing hospitals, clinics and other healthcare facilities to increase their frontline medical staff to aid in providing care during the COVID-19 pandemic, and the FAQs address changes to FFS billing. The advisory now includes information related to physicians providing remote care at rural hospitals and updates to telehealth billing. This advisory was further updated to reflect an announcement by CMS on April 30, which articulated further expansion of telehealth reimbursements and eligible services for Medicare. The advisory updates reimbursement information and now includes information related to federally qualified health clinics' ability to furnish telehealth services.

As the country continues to adjust to challenges faced during this novel coronavirus (COVID-19) pandemic, healthcare providers are presented with especially difficult decisions related to furnishing care to patients and keeping their offices open. One option is to provide services via telehealth. The following are practical guidelines for practices to consider when implementing telehealth services.

What is telehealth?

Telehealth is defined as

- the exchange of medical information from one site to another through electronic communication with the goal of improving patient health; or
- the use of electronic information and telecommunication technologies to support long-distance clinical healthcare, patient and professional health-related education, public health, and health administration.
    - Telecommunication technologies include videoconferencing, the internet, store-and-forward imaging, streaming media, and terrestrial and wireless communication.
    - Historically, telehealth services had to be furnished using both audio and video capabilities; however, on March 30, CMS announced that providers also can evaluate beneficiaries who have only audio capabilities.
    - For private payers, use of audio-only technology also may be an acceptable form of telehealth. The applicable participation/network agreements, payer websites (provider portal) or provider relations should be consulted to determine eligibility.

Medicare reimbursement changes

- Historically, Medicare reimbursed only for telehealth provided to beneficiaries in rural areas who had established provider relationships.
- During this national public health emergency, Medicare has revised its coverage and payment rules as follows:
    - Previously, Medicare paid for office, hospital and other visits furnished by *certain* providers, such as doctors, nurse practitioners and physician assistants. Recently, CMS expanded the list of practitioners that may be reimbursed for providing telehealth during the COVID-19 emergency. Now additional practitioners, such as

physical therapists, occupational therapists and speech language pathologists, also may provide telehealth services.

- Providers may use interactive audio and video telecommunication systems as follows:
  - Telecommunication systems should allow real-time communication between the provider and patient; however, CMS also will reimburse for certain services furnished by audio-only telephone communication between beneficiaries and providers. Previously, audio-only reimbursements were limited to physicians and other clinicians evaluating beneficiaries, but CMS recently expanded the use of audio-only telehealth visits to include many behavioral health and patient education services. To be reimbursed by Medicare, a provider must use an interactive audio and video telecommunication system that allows real-time communication between the provider and the patient.
  - The reimbursement fee for such services increased from $14-$41 to roughly $46-$110, with payment being retroactive to March 1.
- Providers will be reimbursed at the same rate as for regular, in-person visits.
- Initially, under the Section 1135 waivers, providers were required to bill for telehealth as if they were conducting the service in person and to add POS-02 to indicate that the service was provided via telehealth. CMS recently updated its billing guidance and now requires providers to report the POS code that would have been reported had the service been furnished in person and to add the telehealth modifier 95 to claim lines that describe services furnished via telehealth.
- Common telehealth services include office or other consultative visits (such as CPT 99201-99215). For a complete list of services and applicable codes, visit here.
- Coinsurance/deductibles typically apply when services are provided via telehealth; however, providers can either reduce or waive such fees.
- Telehealth can be provided to new patients and established patients.
- Telehealth is available to treat all patients (and all diagnoses) and is not limited to services related to COVID-19.

- Under the CARES Act, CMS now is reimbursing rural health clinics and federally qualified health clinics for providing telehealth services. Historically, such entities were not reimbursed for telehealth services as "distant sites," but they now have more options for providing such needed services.
- For more information about Medicare reimbursement and telehealth, see here and here.

Operational considerations

- The Health Insurance Portability and Accountability Act (HIPAA) still applies to telehealth services during this national emergency, but the federal government has issued guidance that it will not penalize providers for providing telehealth services if such services would otherwise violate HIPAA.
  - Allowable telehealth platforms that are non-public-facing communications include WhatsApp, FaceTime, Zoom Health and Google Hangouts.
  - Public-facing communication with patients, such as with TikTok, Facebook Live or Twitch, is prohibited.
- Providers are encouraged to inform patients of the potential privacy risks in using non-public-facing technology and, when possible, to ensure that all available privacy and encryption settings are enabled.
- DEA-registered practitioners may issue prescriptions to patients via telehealth for controlled substances without conducting an in-person medical evaluation.

- Telehealth prescribing for controlled substances is permitted as long as
  - the prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice;
  - telemedicine communication is conducted via an audiovisual, real-time, two-way interactive communication system; and
  - the practitioner is acting in accordance with applicable federal and state laws.

- Telehealth should be conducted in private locations where conversations cannot be overheard.
- While not legally required to do so, providers should receive verbal authorization from patients to receive telehealth services before furnishing services. Document such authorization in the patient's medical record.
- Accurately document telehealth services in the patient's medical record in the same manner as if services were provided in person.
- CMS recently announced that during the COVID-19 pandemic, physicians "can now directly care for patients at rural hospitals, across state lines if necessary, via phone, radio, or online communication, without having to be physically present." Additionally, providers now may furnish telehealth services from their homes during the COVID-19 pandemic. Providers should report the POS code that would have been reported had the service been furnished in person and include the telehealth modifier. For more information on these recent updates, please visit here and here.

State considerations

- Several states are relaxing licensure requirements for healthcare providers.
- In the vast majority of states, it is permissible to provide telehealth in the same state where the patient is located.
- State laws may vary when considering providing telehealth services across state lines. Please seek legal advice before offering telehealth to patients who are not located in your state.

Additional resources

HIPAA:

- Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency
- FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency

Telehealth prescribing:

- DEA's response to COVID-19: DEA is protecting the nation's prescription drug supply chain

Day Pitney attorneys are available to help you navigate the many questions involved in providing telehealth services. We're in this together.

Day Pitney attorneys are available to help you navigate the many questions involved in providing telehealth services. We are in this together. For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.