

# Exponential Increase in Telehealth Use – Will Waivers & Flexibilities Last?

As most are aware, the telehealth industry has experienced a major expansion during the COVID-19 pandemic. The volume of telehealth claim lines in April 2020 alone [reportedly](#) increased more than 8,000% versus April of 2019, based on privately-billed medical and dental claim records alone. In anticipation of this surge and to accommodate it, Congress, the U.S. Department of Health and Human Services (HHS), and other federal agencies provided a variety of critically important legal and regulatory waivers and flexibilities to facilitate this expanded use of telehealth during the pandemic. Such measures include, among others:

- Allowance of a patient's home as an eligible originating site for Medicare purposes
- Waiver of the Medicare geographic originating site limitation to allow for telehealth visits in non-rural areas
- Expansion of the list of health care professionals who can furnish and bill for telehealth services under Medicare
- Major expansion of the list of reimbursable Medicare "telehealth" services
- Medicare-based licensure flexibilities to facilitate the provision of care across state lines
- For HIPAA purposes, allowing providers to conduct telehealth visits via a broader range of non-public facing communication platforms, such as Skype and Zoom, that have traditionally not satisfied certain HIPAA requirements
- Certain HHS Office of the Inspector General allowances for reduction or waiver of patient cost-sharing for telehealth visits paid for by federal health care programs
- A Drug Enforcement Administration (DEA) waiver allowing DEA-registered practitioners to prescribe Schedule II-V controlled substances without an in-person medical evaluation so long as certain conditions are met (and note that state-specific requirements, which may or may not be waived, will still apply)

Although these measures have eased the use of telehealth during the pandemic, providers should remember that, at present, they remain temporary and will expire once the current public health emergency ends. Fortunately for the near term, HHS has [renewed](#) the public health emergency, which had been set to expire on July 25, 2020, for another 90 days.

Further, as discussed in prior updates, Centers for Medicare and Medicaid Services (CMS) Administrator Seema Verma has repeatedly demonstrated her desire to make many of the above telehealth waivers permanent. In a recent *Health Affairs* [blog post](#), Administrator Verma highlighted CMS' and HHS' efforts before and during the pandemic to expand access to telehealth. She also reported on a number of trends evidenced by Medicare claims data, including the fact that approximately 1.7 million Medicare beneficiaries received telehealth services during the last week of April 2020 versus 13,000 beneficiaries per week before the pandemic.

Administrator Verma reiterated that CMS is reviewing temporary waivers to determine which can and should be made permanent through regulatory action. She emphasized that this work includes examining whether and when an existing practitioner-patient relationship should be required, payment rates for services provided via telehealth (including examining costs of telehealth versus in-person care), and how to extend waivers while protecting against fraud and abuse. As this work continues, it is possible we may see some related regulatory action in CMS' forthcoming Medicare Physician Fee Schedule and Outpatient Prospective Payment System rules. CMS has already proposed to make some telehealth regulatory flexibilities for telehealth permanent in its [CY 2021 Home Health Proposed Rule](#).

Notwithstanding these potential regulatory developments, it is important to bear in mind that many pandemic-related waivers address statutory rather than regulatory restrictions, and statutory restrictions cannot be changed or removed without further action by Congress. Of course, Congress is aware of this and is considering a number of legislative proposals. As one example, the members of the Congressional Telehealth Caucus recently proposed the [Protecting Access to Post-COVID-19 Telehealth Act](#), which focuses on:

- Eliminating Medicare geographic and originating site restrictions
- Establishing the patient's home as a permissible originating site
- Allowing CMS to continue to reimburse for telehealth 90 days beyond the end of the current public health emergency
- Expanding HHS' disaster waiver authority for purposes of future emergencies

As another similar example, Republicans on the House Ways and Means Committee recently released a discussion draft of a bill under the heading "[Keeping Medicare Patients' Improved Access to Care Through Telehealth](#)." In its current form, this bill would, among other things:

- Remove Medicare geographic and originating site restrictions to allow Medicare beneficiaries across the country to access telehealth services from home
- Expand the list of health care practitioners who may provide services via telehealth and give HHS the authority to waive limitations on other types of practitioners
- Permanently allow audio-only telehealth services when audio-visual isn't an option if the patient and provider have an established relationship

Based on these recent developments, we expect to see a number of statutory and regulatory changes positively impacting telehealth in the months ahead. Stay tuned for more information.

*If you have any questions, please contact [Cal Marshall](#) or another member of our [Health Care](#) section.*

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