# COVID-19 and Telehealth: Issues for Florida Providers on the Horizon and Beyond

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It is no secret that 2020 and the COVID-19 pandemic brought fundamental changes to the healthcare industry, particularly in the fields of telehealth and telemedicine. As we move through 2021, and the pandemic continues across the United States, telehealth and telemedicine similarly continue to evolve and adapt.

In addition to ever-changing technological advancements, 2021 ushers in turnover at multiple levels of government, both at the state and federal level. As the Biden Administration and the new Congress begin to make their mark on the country and advance their respective agendas, we can expect the legal, regulatory, and technological landscapes of telehealth and telemedicine to continue to shift.

While 2021 holds the promise of a brighter future and hopefully, a return to "normalcy," it also fosters great potential for the continued advancement and adaptation of telehealth into the everyday fabric of medicine/medical practice. In anticipation of these developments, we have identified a number of issues where we see trajectory for key growth and activity throughout this year, both generally, and in the context of COVID-19.

**Telemedicine, patient privacy and the transition out of the public health emergency**

The Office for Civil Rights (OCR) March 17, 2020, Notice of Enforcement Discretion relaxed privacy standards during the COVID-19 public health emergency. While several of those relaxed standards will expire with the public health emergency, it is probable that some will remain in place on a permanent basis. After the public health emergency has passed, providers will no longer have limited regulatory authority to disclose a patient's protected health information without authorization. Appropriate Business Associate Agreements must be entered into with telemedicine platforms. Health care systems will be expected to dedicate resources once consumed by response to the public health emergency, to ensure that data security systems are robust.

It is likely that the OCR will continue the multipronged approach to evaluating the security of telemedicine platforms, increasing the list of approved platforms as competition drives enhanced encryption systems. Public-facing platforms will never be approved for telemedicine services. Even after the public health emergency, providers will likely encounter emergent situations where a patient requires

immediate care which could only be provided via telemedicine. In those circumstances, it is reasonable to predict that the OCR would approve the use of a "middle-tier" platform when the patient is aware of potential security risks with that platform and consents to move forward with treatment.

**Expanding access to care by expanding access to technology**

One of the largest barriers to implementing telehealth in rural areas has traditionally been the lack of financial support for expanding broadband access. While legislation and other measures passed during the pandemic in 2020 helped promote telehealth access and coverage, extending this coverage beyond the current crisis remained an open question.

In the early days of the Public Health Emergency, the CARES Act provided significant funding for telehealth access and infrastructure, to the tune of $200 million. On April 2, 2020, the FCC issued an order establishing a new program to distribute these funds: the COVID-19 Telehealth Program. While the COVID-19 Telehealth Program availed funds to both rural and non-rural areas, it provided vital support to healthcare providers to purchase telecommunications, information services, and connected devices to provide "connected care services" in response to COVID-19.

In an emergency order issued by Florida's Surgeon General on March 31, 2020, telemedicine services were expanded even further to address potential limitations in access to videoconferencing capabilities. Specifically, providers were permitted to conduct health visits via telephone only, without videoconferencing, so long as they specifically noted that video capability was unavailable, and that the provider could appropriately identify the patient's identity. As of April 27, 2021, Florida's Governor has rendered an additional order extending the initial Executive Order for an additional 60 days, thereby extending the Surgeon General's orders as well.

Additional developments in the early portion of 2021 indicate a continued push toward the development and expansion of telehealth infrastructure, particularly in rural and other technologically underserved areas. One such push includes the FCC's implementation of the Emergency Broadband Benefit Program on February 25, 2021. The purpose of the Program, which is part of the Consolidated Appropriations Act of 2021 (the latest COVID relief bill signed into law by President Trump in late 2020), is to help underserved households improve broadband access for telehealth and other services. The program allows for eligible providers to offer eligible recipients monthly discounts for internet connectivity, as well as the use of technological equipment during the public health emergency.

Additionally, the FCC recently announced telehealth programs that will receive grants as part of its Connected Care Pilot Program, which also strives to expand broadband connectivity for underserved parts of the country. This program, implemented on November 5, 2020, provides up to $100 million from the Universal Service Fund to support the provision of connected care services. In total, these funds are projected to cover 85 percent of the eligible costs for

necessary broadband connectivity, network equipment, and information services needed for the intended patient population.

The American Rescue Plan, signed by President Biden on March 11, 2021, directs significant resources to increasing broadband access for purposes which include health monitoring and telemedicine, through the $10 billion Coronavirus Capital Projects Fund. Proposed legislation like the Accessible, Affordable Internet for All Act continues efforts to increase the national broadband infrastructure and assist families in paying for broadband service.

As the pandemic subsides and "normal life" returns, we can expect telehealth usage to decrease from the stratospheric levels it enjoyed in 2020. At the same time, we can also expect to see broader expansion of these services into areas that have yet to make full use of them. In short, telehealth is here for the masses, and it is here to stay.

**Expanding access to care by breaking down administrative boundaries**

The key issue to watch with respect to Medicare and Medicaid will be the continuation, adjustment, and curtailment of the Federal COVID-19 waivers and regulatory changes. Throughout the pandemic, CMS has issued waivers designed to relax traditional regulatory requirements, for the purpose of expanding access to care, including care provided via telemedicine. The scope of these waivers is broad and has encompassed a variety of administrative and practical issues involving the provision of telemedicine services.

Some of the highlights include the following:

- Patient location – While the pandemic persists, CMS generally permits reimbursement for telehealth visits in lieu of in-person visits. This allows medical providers to furnish services to patients located in their homes and outside of designated rural areas.

- Relationship between patient and provider – While a pre-existing provider-patient relationship had traditionally been required before the initiation of telehealth services, these requirements have been relaxed during the public health emergency. This allows providers to utilize telehealth services to treat existing patients, as well as new ones. Florida is one such state where a physician-patient relationship can be established through telemedicine, and moving forward, this provision will remain.

- Types of covered telemedicine services – Throughout the COVID-19 public health emergency, the scope of services that may be provided via telehealth has significantly expanded. In several instances, CMS has waived the requirement for video technology, now allowing these services to be conducted over the telephone. A full list of telehealth services covered under the COVID-19 waivers is available here: https://www.cms.gov/Medicare/Medicare-General-

Information/Telehealth/Telehealth-Codes

- Types of eligible providers – For the duration of the COVID-19 public health emergency, if a provider is eligible to bill Medicare for his or her professional services, they are similarly allowed to bill for services provided via telehealth.

- Supervision of healthcare providers – While providers were traditionally required to supervise services on an in-person basis, the waivers now allow this to be done using audio and video communication.

- Cost-sharing – Healthcare providers may reduce or waive cost-sharing obligations for telehealth services paid for by Medicare or Medicaid, without the risk of administrative sanctions.

While the CMS waivers have, for the time being, adjusted the day-to-day provision of medical services, it is unclear the extent to which they will continue after the pandemic has subsided, and after the public health emergency has ended. Some may be continued in their entirety, others may be adjusted, and some may be terminated altogether. These will be critical issues to watch as we reach the end of the pandemic.

**Expanding access to care by relaxing licensure requirements**

The expansion of telehealth and telemedicine increases the ease by which medical professionals can provide services across state lines. Accordingly, we may begin to see a shift in the traditional manner in which the Federal and State governments regulate these services through licensing requirements.

Almost every state has modified licensure requirements/renewal policies for healthcare providers in response to COVID-19, including out-of-state requirements for telehealth. Many of these modifications will likely "expire" at the conclusion of the public health emergency. Given the potential legal, practical, and political complications, it is unlikely these modifications will continue in the post-pandemic world. Nevertheless, the possibility of federal funding as an "incentive" to opt-in to licensure reciprocity is an outlet through which some iteration of the current situation may develop. Putting aside that "possibility," we can expect the usage of interstate compacts to play a more prominent role as telehealth usage increases across the country. Compacts such as the Interstate Medical Licensure Compact (for physicians) and the Nurse Licensure Compact (for nurses) allow medical professionals to practice in multiple states, via licensure through a multi-state "compact."

In Florida, legislation establishing standards of practice for telehealth services and authorizing out-of-state healthcare providers to perform telehealth services for patients in Florida was enacted even prior to the COVID-19 pandemic. The law, which took effect on July 1, 2019, requires out-of-state healthcare practitioners to register with the Florida Department of Health and permits those providers to treat Florida-based patients so long as such treatment is provided within the applicable scope of

practice established by Florida law or administrative regulations. Using telemedicine, providers are permitted to diagnose and treat the patient absent a physical exam, and under limited circumstances, may also use telehealth to prescribe controlled substances.

With the proclamation of the COVID-19 pandemic in March 2020, the Governor of Florida and Surgeon General signed a series of executive and emergency orders to adapt to the state of emergency. These orders served to relax or temporarily waive certain regulatory provisions governing telehealth, including temporary permissions applicable to certain out-of-state healthcare providers allowing them to provide telemedicine services to Florida patients, relaxed requirements governing the dispensing of controlled substance medications, remote educational programs via videoconferencing technology for nursing staff, extended deadlines for licensure renewals, and the ability to conduct telephone health visits under limited circumstances. While telehealth has certainly gained wide acceptance due to the events of the past year, we can be confident that many aspects of telemedicine are here to stay. Moving forward, it is imperative that healthcare providers take proactive steps to ensure continued compliance with patient privacy regulations, billing requirements, licensure status, and evolving technology platforms as emergency orders may soon expire and we begin to put the pandemic behind us.

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