

Regulators Allow New HIPAA, Anti-Kickback and Reimbursement Flexibility for Telehealth Services During Health Emergency

Three federal regulators have announced policy changes for the duration of the COVID-19 public health emergency designed to permit health care providers to make use of telehealth services without risk of sanctions related to various health regulatory provisions.

HIPAA. The Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services issued [guidance](#) that permits health care providers covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to communicate with patients – and provide telehealth services – through remote communications technologies even if such technologies are not fully compliant with HIPAA rules.

A covered health care provider wishing to use audio and/or video communication technology to provide telehealth services to patients may use any non-public-facing remote communication product that is available to communicate. OCR is using its enforcement discretion to not impose penalties for noncompliance with HIPAA in connection with good faith use of telehealth during the public health emergency.

Common video chat applications – including Apple FaceTime, Facebook Messenger, Google Hangouts and Skype – that entail a non-public-facing connection between the patient and provider are allowable during the emergency. Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such technology.

Other applications – including Facebook Live, Twitch, TikTok and similar communication services – are considered “public-facing” and should not be used for the provision of telehealth. Use of such applications will not be considered good-faith telehealth under the regulatory guidance.

OCR notes that it is preferable for providers to use HIPAA-compliant communications applications pursuant to a Business Associate Agreement with the technology provider, but OCR will permit use of the more common applications during the emergency.

Anti-Kickback. The Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services issued a [policy statement](#) to notify practitioners subject to the anti-fraud provisions of federal health care programs that OIG will not subject practitioners to administrative sanctions for reducing or waiving cost-sharing obligations that a beneficiary may owe for telehealth services furnished during the COVID-19 public health emergency.

Provision of free or reduced-cost telehealth services during the emergency will not be viewed as an illicit inducement of future referrals. As a result, providers can offer such waivers without concern about anti-kickback sanctions.

Reimbursement. The Centers for Medicare & Medicaid Services (CMS) [announced](#) regulatory flexibility to broaden access to telehealth services for Medicare beneficiaries. Under the new waiver, Medicare can pay for office, hospital and other visits furnished via telehealth for services starting March 6, 2020.

Providers covered include physicians, nurse practitioners, clinical psychologists and licensed clinical social workers. Services covered include evaluation and management visits (common office visits), mental health counseling and preventive health screenings.

Such visits will be considered the same as in-person visits and paid at the same rate.

The provider should originate from an office, skilled nursing facility or hospital, but the patient can be located at any location, including their home.

CMS also broadened the permitted use of “virtual check-in” services that entail brief electronic communications after the provider has an established relationship with the patient. Reimbursement for such communications has been limited to patients in rural or remote locations.

Vandenack Weaver attorneys have many years of experience in health care regulatory issues and are continuing to monitor developments in these areas during the COVID-19 outbreak. Please call us with any questions regarding any of the latest issues.