



COVID-19 Section 1135 Waiver Update - Telehealth Waiver

On March 13, 2020, as a result of the public health emergency and national emergency declarations (the “Emergency”) regarding the 2019 Novel Coronavirus Disease or COVID-19 (hereinafter, COVID-19), the Centers for Medicare & Medicaid Services (CMS) issued several blanket waivers waiving or modifying certain Medicare, Medicaid, and Children’s Health Insurance Program (CHIP) program requirements and conditions of participation pursuant to Section 1135 of the Social Security Act (“1135 Waivers”).¹ As a result of the 1135 Waivers, CMS has expanded Medicare’s telehealth benefits, retroactive to March 6, 2020, to last for the duration of the COVID-19 Emergency (the “Telehealth Waiver”).²

Federal legislation limits Medicare payments for telehealth to select circumstances³ – namely beneficiaries in certain rural markets.⁴ However, the Telehealth Waiver significantly expands the telehealth benefits available to Medicare beneficiaries during the COVID-19 Emergency.

- **Medicare Telehealth Visits.** Under the new Telehealth Waiver, Medicare is permitted to pay for office, hospital, and other visits furnished via telehealth⁵ across the country, including in patients’ places of residence, with greater flexibility and without the requirement of a prior established physician-patient relationship. A range of providers, such as physicians, nurse practitioners, physician assistants, nurse midwives, certified nurse anesthetists, clinical psychologists, clinical social workers, registered dietitians, and nutrition professionals, are all able to offer a variety of telehealth services to their patients under the Telehealth Waiver, subject to state law, including state scope of practice and licensing laws. To the extent that federal law requires that the patient have a prior established relationship with a particular practitioner, the Department of Health and Human Services (HHS) has indicated that it will not enforce the requirement of a prior established physician-patient relationship for claims submitted during the COVID-19 Emergency.
- **Cost-Sharing Waiver.** In coordination with CMS’s issuance of the Telehealth Waiver and further pursuant to the COVID-19 Emergency, the HHS Office of Inspector General (OIG) has issued guidance allowing flexibility for healthcare providers to reduce or waive cost-sharing requirements for telehealth visits paid by federal healthcare programs. Pursuant to its enforcement authority under the Federal law to issue Civil Monetary Penalties for beneficiary inducements and kickbacks,⁶ the OIG issued a Policy Statement on March 17, 2020 notifying practitioners that they will not be subject to administrative sanctions for reducing or waiving any cost-sharing obligations that federal healthcare program beneficiaries may owe for telehealth services, as long as the following conditions are met:

¹ More information regarding the blanket waivers can be found [here](#).

² The press release discussing the expansion of telehealth benefits for Medicare beneficiaries can be found [here](#).

³ More information regarding requirements for Medicare telehealth visits and billing can be found [here](#). FAQs regarding Medicare telehealth services can be found [here](#).

⁴ In 2019, Medicare began making payments for Virtual Check-Ins, which are short communications with a healthcare practitioner initiated by established patients, and E-visits, which are non-face-to-face communications initiated by an established patient through an online patient portal. More information regarding Virtual Check-Ins and E-visits can be found [here](#).

⁵ Telehealth is as a medical service provided by a health care provider via an interactive audio and video telecommunications system that permits two-way, real-time communication between the provider and the beneficiary. 42 C.F.R. § 410.78.

⁶ 42 U.S.C. 1320a-7b(b); 42 U.S.C. 1320a-7(b)(7); 42 U.S.C. 1320a-7a(a)(7); 42 U.S.C. 1320a-7a(a)(5).

1. A physician or other practitioner reduces or waives cost-sharing obligations (i.e., coinsurance and deductibles) that a beneficiary may owe for telehealth services furnished consistent with the then-applicable coverage and payment rules; and
 2. The telehealth services are furnished during the time period subject to the COVID-19 public health emergency declaration by the Secretary.⁷
- **OCR Enforcement Discretion.** In a related effort to ease regulatory burdens during the COVID-19 Emergency, effective immediately, the HHS Office for Civil Rights (OCR) will exercise enforcement discretion and will not impose penalties for Health Insurance Portability and Accountability Act of 1996 (HIPAA) violations against health care providers that serve patients in good faith through certain everyday communications technologies, such as FaceTime or Skype, during the COVID-19 Emergency.⁸ This exercise of discretion applies to telehealth services provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19. For more information on additional efforts of the OCR to reduce regulatory burdens pursuant to the 1135 Waivers and a discussion of approved everyday communication technologies, see our parallel [Client Alert – COVID-19 Limited Waiver of HIPAA Sanctions and Penalties and Office of Civil Rights Guidance Regarding Continued HIPAA Applicability](#).

Despite the flexibility authorized under the Telehealth Waiver, many states continue to restrict the provision of telehealth services by out-of-state providers, require in-person visits to establish a provider-patient relationship, and/or require certain additional informed consent requirements to be met. Health care providers are encouraged to contact state licensing agencies and medical boards to determine whether state licensing requirements are temporarily relaxed due to the COVID-19 Emergency.

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We anticipate that additional guidance in response to COVID-19 will be issued in the coming days and weeks, which may include additional waivers or modifications. Covered health care providers who are or may be affected by the consequences of the COVID-19 pandemic should monitor additional developments and announcements from the OCR, HHS, CMS, and state agencies. If you have questions about the impact of COVID-19 on health care providers, the 1135 Waivers, the Telehealth Waiver or related guidance, please contact a member of our [national Healthcare team](#).

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⁷ The Policy Statement can be found [here](#).

⁸ More information regarding OCR enforcement discretion for telehealth services can be found [here](#).

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