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# ***FAST BREAK: COVID-19***

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# CORONAVIRUS COVID-19



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# Agenda

1. Medicare telehealth waivers and funding
2. Enforcement discretion policies from OCR and OIG
3. State and federal licensing waivers
4. Treating and billing Medicare patients remotely

# **MEDICARE TELEHEALTH WAIVERS AND FUNDING**

# The Rise of Telehealth?

- Telehealth has been a growing medium in the healthcare industry for nearly a decade
  - When deployed effectively, it can reduce cost, increase access, and enhance quality for the services it is designed to support
  - The development of sophisticated smart phone technology with video capability has been a substantial boost for telehealth
    - Entirely different medium than “internet questionnaires”
    - Adoption in many states and by many commercial insurers
- However, despite these gains, telehealth has not been widely accepted in the Medicare program

# The Impact of COVID-19

- The infectiousness of COVID-19 has forced us to practice social distancing or risk catching and spreading the virus
- Given this new reality, telehealth has been tapped as the solution
- The current state of laws around telehealth, including reimbursement and licensure, prevent the type of widespread and immediate adoption many state and federal officials are looking for to address the growing crisis
  - Limitations on patient use, limitations on reimbursement, and limitations on who can provide

# Recent Actions Surrounding Telehealth

- On March 6, Congress passed its first COVID-19 related bill
  - Coronavirus Preparedness and Response Supplemental Appropriations Act (CPRSAA)
- This law temporarily sets aside the two main barriers to telehealth in the traditional Medicare program
  - Geographic area
  - Originating site
- Under the law, only applies to established Medicare patients of a qualified supplier
  - However, in program instructions, CMS indicated it is exercising enforcement discretion and will not audit for whether the patient is new or established to the supplier

# The CARES Act

- On March 27, Congress passed the CARES Act, which contained several important telehealth related provisions
  - Emphasis on treating patients at home, remotely
  - Allowance for home health, hospice, and SNF providers
- Substantial funding for all necessary expenses incurred for healthcare providers in treatment of COVID-19 crisis
  - \$100 billion allocated for funding of temporary structures, medical supplies and equipment, workforce training, emergency operation centers, and other facility/infrastructure development
  - \$27 billion for various items including telehealth access and infrastructure



# CMS Interim Final Rule

- On March 29, CMS issued a massive rule that enhances access to telehealth services for Medicare patients
  - The IFR is far-reaching and creates substantial flexibility for nearly all healthcare services to be rendered via telehealth
  - Removes certain service limitations and practice modality requirements
  - Increases certain reimbursement (specimen collection and some physician E/M visits)

# **ENFORCEMENT DISCRETION POLICIES FROM OCR AND OIG**

# Recent Actions Surrounding Telehealth

- HHS OIG and OCR issued announcements regarding the exercise of enforcement discretion with respect to telehealth services on March 17<sup>th</sup>, the same day that CMS issued telehealth program instructions
- Federal agency guidance is complementary and is aligned in providing regulatory relief to providers
- OIG and OCR announcements facilitate implementation of the CMS telehealth waiver to broaden telehealth flexibility and expand the use of technology
  - OIG enforcement discretion with respect to copays
  - OCR discretion with respect to telehealth-related HIPAA privacy violations

# OIG Announcement Regarding Enforcement Discretion

- OIG policy statement announced that it is exercising enforcement discretion with respect to copay waivers for covered telehealth services
  - Medicare coinsurance and deductible payments would apply to expanded telehealth services
  - Reductions or waivers could implicate AKS and beneficiary inducement CMP law
- OIG will not enforce these statutes or impose administrative sanctions
  - Furnishing free telehealth services will not be viewed as inducement to influence future referrals
  - Must be consistent with Medicare coverage and payment rules

# OIG Announcement Regarding Enforcement Discretion

- Services do not need to be for the purpose of diagnosing or treating COVID-19
- Reductions or waivers of cost-sharing obligations are not required
- OIG announced this policy to encourage patients to seek remote care without payment/financial concerns, as well as to encourage healthcare providers to advertise the availability of these services to their patient populations
- OIG has since announced additional policies to lighten providers' administrative burdens, including extensions of audit response timelines and other flexibilities

# HIPAA Privacy in the Time of COVID-19

- HIPAA is not intended to be an obstacle to a healthcare organization's essential treatment, emergency response and public health functions
- OCR took a similar approach to COVID-19, issuing the bulletin "HIPAA Privacy and Novel Coronavirus" in February
- The February bulletin reminds providers that HIPAA protections are not set aside during an infectious disease or other emergency situation
- Disclosure of protected health information (PHI) is still permitted
  - For treatment purposes
  - To a public health authority, such as the CDC or a state or local health department
  - To persons at risk of contracting or spreading a disease or condition ***if other law, such as state law, authorizes*** the covered entity to notify such persons as necessary to prevent or control the spread of the disease ***or otherwise to carry out public health interventions or investigations***

# OCR Announcement Regarding Enforcement Discretion

- OCR policy statement announced that it is exercising enforcement discretion and penalty waivers with respect to HIPAA privacy violations resulting from services furnished in accordance with the telehealth waiver through “everyday communications technologies”
  - Technologies must be used in good faith to furnish telehealth services
  - Nonpublic facing technologies (e.g., FaceTime or Skype)
  - Use of public facing technologies (e.g., Facebook Live, Twitch, TikTok) discouraged
  - All available encryption/privacy modes enabled
  - Patient notification of potential privacy risks
  - For any telehealth treatment or diagnostic purpose regardless of whether directly related to COVID-19

# **STATE AND FEDERAL LICENSING WAIVERS**



# Recent Actions Surrounding Telehealth

- On March 15, with a retroactive effect date to March 1, HHS also issued a licensure waiver
  - This waiver allows Medicare/Medicaid payment for services even if a supplier is not licensed in the state in which the services are provided
  - However, this does not mean that physicians can practice in any state so long as licensed in one state – state law still applies

# Recent Actions Surrounding Telehealth

- Several states have waived their licensure requirements to allow out-of-state licensed physicians to provide telehealth on a temporary basis
  - Not all states have done this and there are nuances to each state's waiver
  - Compare Florida, Texas, and North Carolina
- Additional encouragement from federal government for states to waive healthcare licensing requirements in the emergency

# **TREATING AND BILLING MEDICARE PATIENTS REMOTELY**

# What Still Applies?

- HIPAA
- Stark
- Anti-kickback Statute
- Billing Requirements
- Enrollment Procedures

# Medicare Telehealth

- Not only are some state Medicaid programs allowing and reimbursing for telephone audio-only encounters, Medicare recently began to allow telephone-only consultations in certain circumstances
- POS Code accuracy
- E/M guidance accuracy

# Issues from the Frontline

- What types of issues are healthcare providers dealing with today?

# Thanks!



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Jacob Harper advises stakeholders across the healthcare industry, including hospitals, health systems, large physician group practices, practice management companies, hospices, chain pharmacies, manufacturers, and private equity clients, on an array of healthcare regulatory, transactional, and litigation matters. His practice focuses on compliance, fraud and abuse, and reimbursement matters, self-disclosures to and negotiations with OIG and CMS, internal investigations, provider mergers and acquisitions, and appeals before the PRRB, OMHA, and the Medicare Appeals Council.

# Thanks!



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Scott A. Memmott represents life sciences and healthcare organizations in government and internal corporate investigations; civil, criminal, and administrative enforcement actions by government agencies; and complex civil and criminal litigation. Scott handles a range of fraud, abuse, and compliance matters involving the False Claims Act, the Anti-Kickback Statute, the Stark Law, off-label promotion, government reimbursement, and quality of care for global pharmaceutical and medical device manufacturers; healthcare providers, suppliers, and payors; biotechnology companies; contract research organizations; diagnostic testing facilities; and laboratory equipment manufacturers.



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Featuring Michele Buenafe and Karen Abesamis

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