

Health Information Compliance Alert

Case Study: Do You Know Your State's Laws on Telehealth?

Tip: Stay on top of evolving changes.

There's no doubt that the telehealth expansion in response to COVID-19 has saved many lives and helped providers avoid shuttering their businesses. But the telehealth updates have come via federal regulation changes, which haven't necessarily translated to the individual states.

This can be a real problem for healthcare providers that operate businesses across state lines, warned attorney **Kyle Y. Faget** with Foley and Lardner LLP in the "Regulatory and Compliance Issues in Telehealth" session at the Collaborative Compliance Conference, presented by AAPC and the American Health Law Association (AHLA).

Reminder: When the Department of Health and Human Services (HHS) Secretary determines there's a high risk of disease and disorder due to an emergency or disaster, a public health emergency (PHE) is declared. Under the PHE, the feds can offer grants, conduct investigations, support state and local healthcare efforts, and waive or modify certain federal requirements to accommodate and/or address the emergency.

Now: On April 15, HHS Secretary **Xavier Becerra** extended the PHE for another 90 days, effective April 21, 2021. It is the PHE's fifth renewal, coming after former HHS Secretary **Alex Azar's** original Jan. 31, 2020 declaration and his renewals on April 21, 2020, July 23, 2020, Oct. 2, 2020, and, most recently, Jan. 7, 2021, the declaration reminds.



Do Your Homework on Your State's Laws

Under this latest PHE extension, HHS and its partner agencies can continue to offer the popular federal telehealth waivers and flexibilities to providers. From coding and billing changes to HIPAA modifications, there's a lot covered in the waivers - but that doesn't mean the state laws must follow the same requirements.

"A provider (physician, NP, PA, etc.) offering care via telehealth is subject to licensure rules of the state in which the patient is physically located at the time of the consult," Faget said.

Plus, individual states determine the telehealth standards and application requirements for providers practicing in their states. "Every state has taken a different approach," Faget added. "Some are required to register. Some are a free-for-all while other states have a much more conservative approach and want to know who is providing services in their states."

Good news: During the pandemic, governors have relaxed licensure requirements, allowing physicians to help patients in a state they aren't licensed in to thwart the spread of the virus, Faget indicated.

Caveat: Many of the state definitions for telehealth services don't align with other states' explanations. Plus, documentation requirements differ by state with some mandating more stringent notes and medical recordkeeping than the feds. In addition, many of the state legislatures continue to tweak regulations and introduce state bills and amendments to their telehealth laws.



Prepare for a Post-COVID World

Right now, payments are relatively uniform with certain E/M visits being reimbursed for the same amount whether they're performed virtually or in person; however, that may not always be the case. In fact, "some states are already

seeing some debates by lawmakers that will eliminate payment parity," Faget acknowledged.

And don't forget about those HIPAA notifications of enforcement discretion related to telehealth - they aren't forever either. The Office for Civil Rights (OCR) offered the "HIPAA discretions to make telehealth easier for everyone and that's why new platforms are now acceptable during the PHE. This makes access to telehealth much easier," Faget reminded. But "OCR didn't change the platforms; they are just exercising the enforcement discretion. That means that they will likely go back to the previous format requirements."

The extension is helpful in the here and now, but things may change; moreover, the states continue to update their policies and revise regulations. That's why it's critical for organizations to start planning for post-COVID compliance now.

"The [PHE] declaration will not extend indefinitely, so providers should keep one eye to the future and be aware of how changes implemented to respond to COVID-19 will have to be reverted once the flexibilities terminate," says attorney **Madison Pool** with Arnall, Golden, Gregory LLP in online analysis.