



CORONAVIRUS: TELEHEALTH REQUIREMENTS RELAXED AMID COVID-19 PUBLIC HEALTH EMERGENCY

March 24, 2020

By: Brooke Bennett Aziere, Amanda M. Wilwert, and Lisa M. Bryers (Brown)

Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).

The Centers for Medicare and Medicaid Services (“CMS”), the Office for Civil Rights (“OCR”), the Drug Enforcement Administration (“DEA”), and Kansas Governor Laura Kelly have all taken steps to relax the restrictions for services provided via telehealth.

CMS WAIVES MEDICARE TELEHEALTH REIMBURSEMENT RESTRICTIONS

Beginning on March 6, 2020, and through the conclusion of the Public Health Emergency declared by the Secretary of Health and Human Services (“HHS”), Medicare beneficiaries in all areas of the country will now be able to receive telehealth services, and importantly, healthcare providers will be able to seek reimbursement from CMS for those services. The Medicare telehealth reimbursement changes include:

- Waiver of the requirement for the beneficiary to reside in a rural area. A beneficiary may reside in an urban area and still qualify to receive telehealth services.
- Waiver of the requirement for the beneficiary to receive the telehealth services in a medical facility. A beneficiary may receive telehealth services from his/her home.
- Waiver of the requirement for the provider to furnish the telehealth services from a physician’s office or other authorized healthcare facility. A provider may furnish telehealth services from his/her home.
- Telephones with audio and video capabilities may be used to provide telehealth services.

The list of services which may be provided via telehealth can be found [here](#).

HHS encourages all providers to have an established relationship with a patient prior to providing telehealth services, but HHS stated that it will not conduct audits to ensure that one existed for claims submitted during the Public Health Emergency.

For more information on the CMS telehealth requirements and telehealth services in general, CMS has developed a General Provider Telehealth and Telemedicine Toolkit which can be found [here](#).

These relaxed requirements apply to Medicare beneficiaries only. In recent days, however, we have seen commercial payors taking steps to extend the use of telehealth services for their covered beneficiaries. Providers should consult their agreements with commercial payors to determine how telehealth services may be provided to patients covered by commercial policies.

OCR SUSPENDS ENFORCEMENT OF CERTAIN HIPAA TELEHEALTH REQUIREMENTS

On March 17, 2020, OCR announced that it will waive potential penalties for violations of the Health Insurance Portability and Accountability Act (“HIPAA”) for the good faith provision of telehealth services through remote communications during the COVID-19 Public Health Emergency. A healthcare provider may use any non-public-facing remote communication product that is available to provide telehealth services.

Providers may use applications that allow for video chats (e.g., Apple FaceTime, Facebook Messenger video chat, or Skype). These platforms employ end-to-end encryption, which allows only an individual and the person with whom the individual is communicating to see what is transmitted. OCR encourages providers to notify their patients that these third-party applications potentially introduce privacy risks. We recommend providers document this notification in the patient’s medical records. Also, providers should enable all available encryption and privacy modes on those applications.

OCR explicitly prohibited the use of public-facing applications that are designed to be open to the public or to allow wide or indiscriminate access to the communication. Public-facing applications include Facebook Live, Twitch, and TikTok.

OCR has also provided a nonexclusive list of HIPAA-compliant technology vendors who publicly advertise their willingness to enter into business associate agreements with covered healthcare providers for telehealth services:

- Skype for Business/Microsoft Teams
- Updox
- VSee
- Zoom for Healthcare
- Doxy.me
- Google G Suite Hangouts Meet

Importantly, OCR stated it will not impose penalties against providers for lack of a business associate agreement during the COVID-19 Public Health Emergency.

For more information on this waiver, providers should review the OCR’s Notification of Enforcement Discretion [here](#). The OCR has also issued FAQs on telehealth and HIPAA, available [here](#).

DEA CONFIRMS EXCEPTION TO IN-PERSON PRESCRIPTION REQUIREMENT

Beginning March 16, 2020, and continuing through the Public Health Emergency, DEA-registered practitioners may issue prescriptions for all schedule II-V controlled substances without an in-person medical examination if the following conditions are met:

- The prescription is issued for a legitimate medical purpose by a practitioner in the usual course of his/her practice;
- The telehealth communication is conducted using audio-visual, real-time, two-way interactive communications; and
- The practitioner is complying with all other state and federal laws.

More information on the DEA, telehealth, and controlled substances during COVID-19 can be found [here](#).

GOVERNOR KELLY ISSUES EXECUTIVE ORDER REGARDING TELEHEALTH

Kansas Governor Laura Kelly issued an Executive Order regarding telehealth services on March 20, 2020. This Order encourages physicians to utilize telehealth services where appropriate to minimize the travel of patients within the state and provides directives to reduce impediments to the provision of telehealth services to Kansas residents.

Governor Kelly directed the Kansas Board of Healing Arts (“BOHA”) to refrain from enforcing any statutes, rules, or regulations which require in-person examinations for prescribing medications so long as the physician complies with the Executive Order. Specifically, physicians must conduct an appropriate assessment and evaluation of the patient’s current condition with appropriate documentation prior to prescribing, and physicians are encouraged to access the Prescription Monitoring Program prior to prescribing a controlled substance.

Out-of-state physicians may use telehealth services to treat patients located in Kansas without a Kansas license so long as the physician advises BOHA in writing of the physician’s telehealth practice in Kansas. Any such physician must hold an unrestricted license to practice medicine in the state in which the physician practices and cannot be under investigation for or subject to any disciplinary proceeding.

The full text of Executive Order No. 20-08 may be found [here](#).

Foulston Siefkin would like to take this opportunity to recognize and thank our healthcare providers and partners for the work they are doing in these unique circumstances and the work they do every day. We understand that hospitals, ambulatory surgery centers, clinics, home health agencies, hospices, and other providers cannot close their doors; cannot stop treating patients; and cannot cease prescribing medications during this public health emergency. By lifting restrictions on the delivery of telehealth services, state and federal regulators are giving healthcare providers an important tool to continue healthcare operations and provide necessary treatment to patients.

In the coming weeks, and perhaps months, this will allow for more innovation and creativity in getting necessary care to patients. We are proud to support you in your efforts to respond to this challenging situation and will continue to monitor and provide updates as soon as new information is available. Thank you.

FOR MORE INFORMATION

If you have questions or want more information regarding monitoring and managing COVID-19, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston’s healthcare lawyers maintain a high level of expertise regarding federal and state regulations affecting the healthcare industry. At the same time, our healthcare practice group’s relationship with Foulston’s other practice groups, including the taxation, general business, labor and employment, and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For more information, contact **Brooke Bennett Aziere** at 316.291.9768 or baziere@foulston.com, **Lisa Brown** at 785.354.9414 or lbrown@foulston.com, or **Amanda Wilwert** at



913.253.2181 or awilwert@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Wichita, Kansas City, and Topeka, Foulston provides a full range of legal services to clients in the areas of administrative & regulatory; antitrust & trade regulation; appellate law; banking & financial services; business & corporate; construction; creditors' rights & bankruptcy; e-commerce; education & public entity; elder law; emerging small business; employee benefits & ERISA; employment & labor; energy; environmental; ERISA litigation; estate planning & probate; family business enterprise; franchise & distribution; government investigations & white collar defense; governmental liability; government relations & public policy; healthcare; immigration; insurance regulatory; intellectual property; litigation & disputes; long-term care; mediation/dispute resolution; mergers & acquisitions; Native American law; oil, gas & minerals; OSHA; privacy & data security; private equity & venture capital; product liability; professional malpractice; real estate; securities & corporate finance; supply chain management; tax exempt organizations; taxation; trade secret & noncompete litigation; water rights; and wind & solar energy.

HEALTH LAW RESOURCES

Sign up to receive these issue alerts straight to your inbox [here](#).

This update has been prepared by Foulston Siefkin LLP for informational purposes only. It is not a legal opinion; it does not provide legal advice for any purpose; and it neither creates nor constitutes evidence of an attorney-client relationship

PRACTICE AREAS

- Healthcare
- Employee Benefits & ERISA