



# Compliance TODAY

A PUBLICATION OF THE HEALTH CARE COMPLIANCE ASSOCIATION

JULY 2018



**Local expertise,  
regional teams,  
and multinational  
compliance**

---

an interview with  
**Jonathan Turner**

by Randi E. Seigel, Esq. and Megan N. Sherman, Esq.

# Telehealth: A new frontier for compliance officers

- » Key risk areas must be evaluated when engaging in or contracting with providers of telehealth services.
- » Providers may need to be licensed in several locations in order to provide telehealth or telemedicine services.
- » Disclosure and consent requirements imposed on providers engaged in telehealth encounters may vary by state.
- » Prohibitions on corporate practice of medicine apply to telehealth providers.
- » Government programs have established their own set of requirements for telehealth reimbursement.

*Randi E. Seigel (rseigel@manatt.com) is a Partner in the Manatt, Phelps & Phillips, LLP New York City office and Megan N. Sherman (msherman@manatt.com) is an Associate in the Manatt, Phelps & Phillips, LLP Albany, NY office.*

As telehealth services become increasingly popular, healthcare providers and health insurers need to keep a careful eye on the unique compliance issues raised by the delivery of these services. Various state statutes, regulations, and guidance can be a minefield for the unwitting, because states have implemented wide-ranging and inconsistent policies on regulating the provision of telehealth services.

## Defining telemedicine and telehealth

The differences begin at the outset, with states taking varying approaches to defining the terms “telemedicine” and “telehealth.” Even within states, there may be multiple definitions of telehealth within varying bodies of law and regulatory agencies.

**California** defines telehealth as:

the mode of delivering health care services and public health via information

and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient’s health care while the patient is at the originating site and the health care provider is at a distant site. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers.<sup>1</sup>

**Washington** defines telemedicine as:

the delivery of health care services through the use of interactive audio and video technology, permitting real-time communication between the patient at the originating site and the provider, for the purpose of diagnosis, consultation, or treatment [for the purposes of commercial health insurance].<sup>2</sup>

**Michigan** defines telehealth as:

the use of electronic information and telecommunication technologies to support or



Seigel



Sherman

promote long-distance clinical health care, patient and professional health-related education, public health, or health administration, [including telemedicine].<sup>3</sup>

[Telemedicine is defined as] the use of an electronic media to link patients with health care professionals in different locations [and must provide the healthcare professional with the ability] to examine the patient via a real-time, interactive audio or video, or both, telecommunications system and the patient must be able to interact with the off-site health care professional at the time the services are provided.<sup>4</sup>

**New York** has multiple definitions of telehealth. For purposes of coverage by health insurers, the state defines telehealth as:

the use of electronic information and communication technologies by a health care provider to deliver health care services to an insured individual while such individual is located at a site that is different from the site where the health care provider is located.”<sup>5</sup>

[For purposes of reimbursement by the Medicaid program, telehealth is defined as] the use of electronic information and communication technologies by telehealth providers to deliver health care services, which shall include the assessment, diagnosis, consultation, treatment, education, care management and/or self-management of a patient [and is limited to include only] ‘telemedicine,’ ‘remote patient monitoring’ and ‘store and

forward technology,’ as those are defined in statute.<sup>6</sup>

Although states have varying definitions for these terms, they generally exclude provider-to-provider consultations and the use of solely telephone or fax from the definition of telehealth or telemedicine.

Understanding whether a state’s definition of telehealth and telemedicine encompasses a proposed service is key to assessing the risks associated with the tele-program and understanding whether the professional practice, licensure, disclosure, and consent requirements apply, and whether reimbursement can be sought.

Understanding whether a state’s definition of telehealth and telemedicine encompasses a proposed service is key to assessing the risks...

### Professional practice and licensure requirements

Ensuring that a provider holds the required license to provide services to a patient located within a given state is crucial to ensuring compliance with state licensure laws.

With regard to physician licensure, 22 states currently participate in the Interstate Medical Licensure Compact, which allows physicians to practice across states that participate in the Compact if they meet certain requirements. This allows physicians engaged in telemedicine across state lines to avoid the aforementioned licensure requirements when both the state in which the physician is licensed and the state in which the patient is located participate in the Interstate Medical Licensure Compact.

However, in states that do not participate in the Interstate Medical Licensure Compact and for other medical professionals, most states require that providers who render care to patients located within the state be licensed by that state and hold either a full license or a

temporary or provisional license for the purpose of rendering telehealth services.

**New York<sup>7</sup> and Georgia<sup>8</sup>** require that providers be licensed by the state in order to provide telehealth services to patients located within those states.

**Washington DC** requires that any provider who renders telemedicine to a patient located in the District of Columbia be licensed to practice medicine there, and that for any services rendered outside of the District, the provider meet any licensure requirements of the jurisdiction in which the patient is located.<sup>9</sup>

**Ohio,<sup>10</sup> Minnesota,<sup>11</sup> and Nevada<sup>12</sup>** allow out-of-state providers to obtain a limited telemedicine certificate or permit, which allows the provider to render telehealth services to a patient located in the state without obtaining a license from the state.

Some states have even more burdensome requirements for providers who deliver telemedicine, requiring that the provider be located within the state when delivering services. For example, Arkansas requires that physicians and physician assistants who provide telehealth services in the state be both licensed by and located within the state.<sup>13</sup>

When contracting for or providing telehealth services, providers need to be careful that they are aware of and meeting all relevant licensure and professional practice standards for the state where the patient is located.

### Prior patient relationship requirements

As more and more patients access care through telemedicine, regulators have expressed concerns over the quality of care provided. Although some states apply the same standard of care to telehealth as they do to traditional in-person encounters, many states have implemented additional guardrails for the provision of telehealth services. These guardrails focus mostly on ensuring that patients are seen in person when appropriate,

and that a provider-patient relationship is established such that the provider remains responsible for the patient's care.

**Maryland** requires that a physician providing services through telehealth perform "a patient evaluation adequate to establish diagnoses and identify underlying conditions or contraindications to recommended treatment options before providing treatment or prescribing medication," and that if a prior in-person, face-to-face interaction with a patient has not occurred, the physician must "incorporate real-time auditory communications or real-time visual and auditory communications to allow a free exchange of information between the patient and the physician performing the patient evaluation."<sup>14</sup>

**Texas** requires that when a practitioner-patient relationship is established solely through a telemedicine encounter, the practitioner must provide the patient with appropriate follow-up care or, if the patient consents, provide the patient's primary care physician with a medical record or report within 72 hours of the encounter.<sup>15</sup>

**Maine** generally requires that a provider-patient relationship be entered into through an in-person encounter and allows a provider to establish a provider-patient relationship through a telehealth encounter only if the standard of care does not require an in-person encounter and the provider follows "evidence-based standards of practice and telemedicine practice guidelines that address the clinical and technological aspects of telemedicine." Further, the law requires that a provider perform an in-person medical interview and physical examination for each patient, unless the technology used in a telemedicine encounter is sufficient to establish an informed diagnosis as though the medical interview and physician examination had been performed in person and the provider interviews the patient to collect the relevant medical history

and performs a physical examination, when necessary, sufficient for the diagnosis and treatment of the patient. The use of an internet questionnaire “that is a static set of questions provided to the patient” does not meet this requirement.<sup>16</sup>

Some of these requirements may create barriers to providing telehealth services, but compliance with these rules is nevertheless imperative.

### Disclosures and consent

Virtually all states place some sort of requirement on the practitioner to inform the patient about the use of telehealth services and obtain the patient’s consent. The information that must be disclosed and the form of consent vary from state to state.

**California** requires that providers “inform the patient about the use of telehealth and obtain verbal or written consent from the patient for the use of telehealth as an acceptable mode of delivering health care services and public health.”<sup>17</sup>

**Mississippi** requires that the provider inform the patient “of the risk and benefits of being treated via a telemedicine,” including how to receive follow-up care in the event of an adverse reaction to treatment, or if an equipment failure interrupts the telehealth encounter.<sup>18</sup>

**Texas** requires that physicians provide patients with “written or electronic notification of the physician’s privacy practices” prior to receiving telehealth services via electronic communications other than phone or fax, and make a good faith effort to obtain the patient’s written or electronic acknowledgment of the notice.<sup>19</sup>

Providers should be sure to understand and comply with the specific requirements applicable in the state in which they practice and/or provide telehealth services. At a minimum, obtaining informed consent in accordance with the applicable state law or regulation—and maintaining documentation of it in the patient’s medical record—is highly recommended.

### Corporate practice of medicine

The corporate practice of medicine doctrine is a well-established and long-standing principle that generally prevents corporate entities from employing medical professionals or practicing medicine. Some states prohibit the corporate practice of any

licensed profession; New York requires that professional services only be offered by a licensed person or professional organization.<sup>20</sup> California, for example, prohibits non-physicians from owning or operating a business that offers medical services, such as evaluation, diag-

nosis, care, or treatment. Some states have no such prohibition, but there are 33 states where the corporate practice of medicine doctrine is alive and well.

It is critical that companies that offer telehealth services comply with the restrictions imposed by the doctrine. The doctrine can be particularly problematic for technology companies entering the healthcare space to provide telehealth services, because they may be unaware of the doctrine and their corporate structure may violate it. It is important to ensure that when engaging with companies that provide telehealth services, the entities

...there are 33 states where the corporate practice of medicine doctrine is alive and well.

are structured in a way that complies with the doctrine.

### Reimbursement

The ability to seek reimbursement for telehealth services from Medicare and state Medicaid programs varies widely. Medicare fee-for-service provides coverage for telehealth for a very limited set of services that meet strict requirements related to the technology used, the originating site, and the provider type. A complete list of the services that are eligible for reimbursement can be found on the CMS.gov website.<sup>21</sup>

The only type of telehealth encounters eligible for reimbursement by the Medicare program are real-time audio-visual communications between providers and patients. Asynchronous store-and-forward services are reimbursed by the federal telemedicine demonstration programs only in Alaska and Hawaii.

Moreover, telemedicine services are covered only when the originating site is located in a rural area—either in a county outside of a Metropolitan Statistical Area (MSA) or in a Health Professional Shortage Area (HPSA) in a rural census tract—and when the originating site is a physician or practitioner office, a hospital, a critical access hospital (CAH), a rural health clinic, a Federally Qualified Health Center, a hospital-based or CAH-based renal dialysis center, a skilled nursing facility, or a community mental health center.

Medicare also limits which types of practitioners may render telehealth services. Only physicians, nurse practitioners, physician assistants, nurse midwives, clinical nurse specialists, certified registered nurse anesthetists, clinical psychologists or clinical social workers, and registered dietitians or nutrition professionals are eligible.

Despite these limitations, Medicare paid a total of \$17.6 million in telehealth payments

in 2015, compared with \$61,302 in 2001.<sup>22</sup> In a report issued in April 2018, the Office of Inspector General (OIG) stated that the Centers for Medicare & Medicaid Services (CMS) found that 31 out of 100 claims did not meet the Medicare requirements. As a result, the OIG recommended, among other things, that CMS “conduct periodic postpayment reviews to disallow payments for errors for which telehealth claim edits cannot be implemented (e.g., unallowable originating sites or unallowable means of communication).” Accordingly, we anticipate increased scrutiny of telehealth claims by CMS.

Currently, Medicare Advantage Plans must cover the set of telehealth services that are covered by fee-for-service Medicare, as outlined above, but they can provide additional telehealth services by using rebate dollars or charging beneficiaries a supplemental premium with approval from CMS.<sup>23</sup> However, recent legislation will allow Medicare Advantage Plans to be reimbursed beginning in 2020 for telehealth benefits that do not meet the strict requirements for coverage by fee-for-service.<sup>24</sup>

Medicaid reimbursement for telehealth services varies widely across states. States limit coverage in a variety of ways, either through the technology eligible for reimbursement, the provider types eligible to provide these services, or the types of services for which telehealth may be used.

**California** provides reimbursement for all covered benefits appropriately provided via live video, but limits reimbursement for store-and-forward services to teledermatology, teleoptometry, and teledentistry.<sup>25</sup>

**Illinois** reimburses for services provided via a telecommunication system when the patient is accompanied by a physician or other licensed provider at the originating site and the distant site provider is a physician, physician assistant, podiatrist or advanced

practice nurse licensed in Illinois or in the state where the patient is located.<sup>26</sup>

**North Carolina** reimburses for telemedicine only when it is provided via two-way real-time interactive audio and video and the distant site is located “a sufficient distance from the originating site to provide services to a beneficiary who does not have readily available access to such specialty services.”<sup>27</sup>

When seeking reimbursement for telehealth services, it is critical to know the requirements of the payer for reimbursement and to comply with these requirements to ensure that claims are appropriately made.

Equally important, just as with all services for which reimbursement is sought, the provision of telemedicine and telehealth services must be medically necessary and documented in the record, and the record must contain all generally required elements to support a billable service.

## Conclusion

Compliance professionals who are charged with evaluating relationships with or new offerings by telehealth or telemedicine providers need to confirm their checklists include a review of the following:

1. Does the service being rendered meet the state(s)' definition(s) of telehealth or telemedicine services?
2. Are the providers appropriately licensed to provide the telehealth or telemedicine services?
3. Will the providers need to have a pre-existing or other relationship with the patient before providing telehealth or telemedicine services?
4. Is there a process in place for providers engaged in telehealth encounters to comply with the disclosure and consent requirements the states impose on them?
5. Is the telehealth provider operating in compliance with any restrictions on the

corporate practice of medicine or of the professions?

6. How will compliance with government program requirements, such as limitations on originating sites, be ensured and monitored? 📍

1. California Business & Professions Code BPC § 2290.5. Available at <https://bit.ly/2kh3JJW>
2. Washington State Legislature: RCW 48.43.735. Available at <https://bit.ly/2IImyJR>
3. Michigan Compiled Laws, Chapter 333.16283. Available at <https://bit.ly/2IDgNUD>
4. Michigan Compiled Laws, Chapter 500.3476. Available at <https://bit.ly/2KMoKr8>
5. New York Consolidated Laws, Insurance Law § 3217-h. Available at <https://bit.ly/2Lnr09C>
6. 2016 New York Public Health Law § 2999-cc. Available at <https://bit.ly/2IE8lsv>
7. University of the State of New York: Office of the Professions, Letter to the Members of the Board of Regents, Committee on Professional Practice on Telepractice. November 16, 1999. Available at <https://bit.ly/2KMeBuK>
8. Georgia Admin. Code § 360-3-07 (a) (1). Available at <https://bit.ly/2IWY6U3>
9. District of Columbia Municipal Regulations § 17-4618.1. Available at <https://bit.ly/2ICoLXu>
10. Ohio Revised Code § 4731.296 Telemedicine Certificate. Available at <https://bit.ly/2s2bVky>
11. 2017 Minnesota Statutes § 147.032. Available at <https://bit.ly/2IFS8p>
12. Nevada R.S. 630.261 (1) (e). Available at <https://bit.ly/2x6iVml>
13. Arkansas Admin. Code 060.00.1-38. Available at <https://bit.ly/2GGS0IG>
14. Code of Maryland Regulations (COMAR) 10.32.05.05. Available at <https://bit.ly/2LmvEov>
15. V.T.C.A., Texas Occupations Code § 111.005. Available at <https://bit.ly/2GETiZL>
16. State of Maine 02-373 CMR Ch. 6, § 3. Available at <https://bit.ly/2kfolSV>
17. Ibid, Ref #1
18. Mississippi Admin. Code 30-17-2635:5.3. Available at <https://bit.ly/2LoaNkC>
19. Texas State Board of Medical Examiners, Title 22 § 174.4(1). Available at <https://bit.ly/2LmbASR>
20. New York State Education Department Office of the Professions, Corporate Practice of the Professions. Available at <https://bit.ly/2GFx6Pc>
21. CMS Medicare Learning Network: Telehealth Services. ICN 901705, February 2018 Available at <https://go.cms.gov/20WVqC2>
22. HHS, Office of Inspector General: “CMS Paid Practitioners for Telehealth Services That Did Not Meet Medicare Requirements” April 2018. Available at <https://bit.ly/2qQTmQM>
23. United States Government Accountability Office, Telehealth: Use in Medicare and Medicaid. July 2017. Available at <https://bit.ly/2s3XL2U>
24. See Bipartisan Budget Act of 2018 § 50323. Available at <https://bit.ly/2ojVqyQ>
25. See California Welfare & Inst. Code §§ 14132.72 and 14132.725. Available at <https://bit.ly/2s3Pqfl>
26. Joint Committee on Administrative Rules: 89 Ill. Adm. Code 140.403. Available at <https://bit.ly/2LmxICn>
27. NC Division of Medical Assistance, Medicaid and Health Choice, Telemedicine and Telepsychiatry, Clinical Coverage Policy No: 1FH; amended January 1, 2018. Available at <https://bit.ly/2rZ564e>