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## Federal and State Telemedicine Updates

### SUMMARY

Several telemedicine provisions were recently updated at the federal level in an effort to increase patient access to health care services, and New Jersey enacted a telemedicine statute on March 19 in an attempt to address the COVID-19 pandemic. This Alert addresses the recent federal guidance related to remote communications, the federal waiver on interstate licensing rules and the recently enacted New Jersey statute. Providers need to regularly monitor federal, state and commercial payor changes to ensure they continue to provide the broadest availability of telemedicine options that are compliant.

#### OCR Guidance on Telehealth Remote Communications

On March 20, 2020, the Office for Civil Rights (OCR) at the U.S Department of Health and Human Services (HHS) issued guidance in the form of Frequently Asked Questions (FAQs) regarding telehealth remote communications following HHS's Notification of Enforcement Discretion during the COVID-19 public health emergency. Last week, we reviewed HHS' notice. The FAQs provide a background section and provides more substantive responses to each of the following questions:

- When does the Notification of Enforcement Discretion expire?
  - There is currently no expiration date. Instead, OCR will issue a public notice when it is no longer exercising its enforcement discretion.
- Does the Notification apply to 42 C.F.R. Part 2, governed by the Substance Abuse and Mental Health Services Administration (SAMHSA)?
  - No, however SAMHSA has issued similar guidance.
- What is a "non-public facing" remote communication product?
  - A non-public facing remote communication product is a product that only allows the intended parties to participate in the communication, as the product's default setting.
- What may constitute bad faith in the provision of telehealth by a covered health care provider?
  - OCR will consider all facts and circumstances with regard to enforcing bad faith acts but provides examples such as the sale of protected health information, violations of state licensing laws and the use of public-facing remote communication products.

#### Waiver of the Interstate Licensing Rule

Earlier this month, the Secretary of HHS published an initial list of waivers available for health care providers under the Secretary's 1135 Waiver authority. When the HHS Secretary has declared a public health emergency under the Public Health Service Act, the Secretary may temporarily waive or modify certain Medicare, Medicaid and CHIP requirements to

ensure sufficient health care items and services are available. Under this most recent waiver, HHS waived the Medicare billing requirement that out-of-state health care providers be licensed in the state where they are providing services when they are licensed in another state. For example, under this waiver, a provider licensed in Pennsylvania may deliver telehealth services to a Medicare, Medicaid or CHIP patient living in New Jersey, so long as the health care provider is not barred from practicing medicine in New Jersey. The waiver does not preempt state licensing rules.

### **New Jersey Telemedicine Statute Enacted**

On March 19, New Jersey Governor Phil Murphy signed legislation (A3860 and A3862) to expand access to telehealth services and to allow professional and occupational licensing boards to expedite licensure for out-of-state professionals.

A3860 authorizes health care practitioners to provide telemedicine services for the duration of the COVID-19 public health emergency declared by Governor Murphy and directs the Commissioner of Health and the Director of Consumer Affairs to waive any requirements or regulations needed to facilitate the provision of health care services using telemedicine.

A3862 expands access to health care by allowing professional and occupational licensing boards to expedite licensure of out-of-state professionals during the state of emergency. The professional or occupational licensing board within the Division of Consumer Affairs in the Department of Law and Public Safety may grant a license, certificate of registration or certification on an expedited basis to any individual who holds a corresponding license, certificate of registration or certification, in good standing, in another state.

Governor Murphy stated, "Telehealth is crucial in order to allow as many New Jerseyans as possible to get the medical services they need during this crisis. Through the expansion of telehealth services as well as the waiving of licensure requirements for out-of-state professionals, we will be able to accept assistance from both in-state and from out-of-state more easily and allow residents to get the help they require."

New Jersey's action follows Delaware's action last week to lift certain state telehealth restrictions.

COVID-19 is changing the way providers practice medicine. The benefits of telemedicine for patients and providers is profound. Once the COVID-19 pandemic is under control, it will be interesting to see if the federal government and/or individual states maintain or expand telemedicine options on a more permanent basis.

Saul Ewing Arnstein & Lehr attorneys regularly counsel providers in telemedicine and licensing matters. Please feel free to contact the authors if you have questions about these telehealth rule changes and how they can impact your practice or company's ability to deliver telehealth services.

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