

MEDICARE COMPLIANCE

Weekly News and Compliance Strategies on Federal Regulations,
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‘Destination Medicine’ Is a Telehealth Path; Regulations May Be a Hurdle

The future of telehealth may be in “destination medicine,” where health systems provide comprehensive care to patients in person and follow-up care long distance with telemedicine. They have to navigate licensure, reimbursement and other regulatory minefields, however, including federal and state laws on prescribing drugs through telehealth.

“Where hospitals can capitalize on telemedicine is with second opinions and consultations,” said attorney Monica Chmielewski, with Foley & Lardner LLP in Chicago. “The systems that are growing have figured out that once you get the patient to the hospital, you provide them with the care that brought them in the door but you can arrange for it to be one-stop shopping. They came for a cardiac consult, but they can meet with ophthalmology, primary care and ear, nose and throat. It’s coordinated.” When the patient returns home – to a rural area in the same state or across the country – the hospital provides follow-up care with telemedicine technology.

It’s a matter of “learning how to structure your program and keeping your mind on the legal hurdles,” she said at the Health Care Compliance Association’s Compliance Institute in April. Meanwhile, the reimbursement picture is slowly improving.

One of the legal and regulatory challenges for telemedicine programs is licensure, said Tampa attorney Thomas Ferrante, with Foley & Lardner. Physicians must be licensed in the state where the patient is located. “If you have a doctor in Texas and the patient is in Florida and the Texas doctor wants to provide services with telemedicine, the doctor must have a Florida medical license,” he said. “The doctor could be located in Maine, Texas or the Moon. It’s the locus of the patient that matters. This is true in almost all states.”

There are exceptions. For example, the peer-to-peer consultation exception allows physicians to consult with another physician in a state where they’re not licensed, Ferrante said. “There are frequency and other limitations,” he noted.

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Meanwhile, coverage of telemedicine is improving and services were added to Medicare's menu in the 2018 Bipartisan Budget Act, although it's still limited. For coverage under fee-for-service Medicare, patients must be located in qualifying rural areas, which are counties outside of Metropolitan Statistical Areas (MSAs) or in health professional shortage areas either outside of an MSA or in a rural census tract. There's an easy way to figure this out, Ferrante said. Google the phrase "telehealth eligible analyzer," which brings you to the Health Resources and Services Administration web site, and type in the address. "It spits out whether the area is considered a qualifying rural area," he said.

Telehealth services have to be delivered in an "originating site," such as hospitals and physician practices. Both originating sites and distant site providers, including physicians, bill Medicare. The connection between originating and distant sites was the basis of an April audit report on telehealth from the HHS Office of Inspector General. "We reviewed 191,118 Medicare paid distant-site telehealth claims, totaling \$13.8 million, that did not have corresponding originating-site claims," the report stated. "We reviewed provider supporting documentation for a stratified random sample of 100 claims to determine

whether services were allowable in accordance with Medicare requirements." The findings: 31 were not compliant. For the majority—24—patients received services at non-rural originating sites; seven claims were submitted by ineligible institutions; three claims were for services provided at unauthorized originating sites; two involved unauthorized means of communication; one claim was for a noncovered service; and one service was provided by a physician outside the United States.

As of 2018, Medicare Part B coverage included office or other outpatient visits; subsequent hospital care services; individual psychotherapy; smoking cessation services; and subsequent nursing facility care services. The Bipartisan Budget Act added Medicare reimbursement for telemedicine to stroke patients beyond qualifying rural areas in 2019. "Now they can be in urban locations and have telestroke services and get paid," he said. The budget legislation also extended Medicare reimbursement to telemedicine for oversight of dialysis and, starting in 2020, permits Medicare Advantage plans to include telehealth services in a plan's basic benefits and gets rid of rural restrictions and adds patient homes for some accountable care organizations. All services must be provided by synchronous technology, which is interactive, audiovisual communication, although Medicare has a pilot program under way for "store and forward" technology in Hawaii and Alaska.

Ryan Haight Act Requires In-Person Exam

When providers deliver care by telemedicine, they have to consider whether it will include remote prescribing of prescription drugs, and if so, whether that means controlled substances, Chmielewski said.

"When you think about prescriptions, you have to think about regular prescriptions and prescriptions for controlled substances and you have to think about state laws and federal laws," she said. Some state laws are different for controlled substances vs. non-controlled substances, while other states have rules that apply across the board, she said. For example, in some states, providers must examine the patient at least once in person before writing any prescription.

Federal laws are often more restrictive than state laws. The major player is the Ryan Haight Act, "which was initially enacted to combat rogue online pharmacies," Chmielewski said. Under the Ryan Haight Act, it's a per se violation of the Controlled Substances Act for physicians to prescribe controlled substances through telemedicine without one in-person physician exam unless they meet an exception or there are special circumstances. It's possible to prescribe controlled substances through telemedicine if there's one

Report on Medicare Compliance (ISSN: 1094-3307) is published 45 times a year by the Health Care Compliance Association, 6500 Barrie Road, Suite 250, Minneapolis, MN 55435. 888.580.8373, hcca-info.org.

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in-person exam or an exception is met, “but the exceptions in the Ryan Haight Act are outdated and limit telemedicine.” Exceptions include patients present in a VA-registered hospital or clinic. “The most important exceptions are not yet enacted,” she said, such as

allowing physicians to get special registration to prescribe controlled substances through telehealth.

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