

# Predictions For How Telehealth Law Will Evolve In 2021

By **Nathaniel Lacktman** (January 21, 2021)

With 2020 officially behind us, what does 2021 have in store for telemedicine and digital health policy? Below are five predictions for what legal changes telemedicine and digital health companies might expect to see this year.



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## **1. Licensing: More Efforts to Increase Reciprocity and Reduce Barriers**

In an effort to balance workload nationally and expand access to health care practitioners during the public health emergency, many states temporarily suspended medical licensing requirements.

As these temporary waivers begin to sunset, some state legislatures will seek to make the waivers permanent, allowing practitioners licensed in other states to deliver telehealth services across state lines, provided the out-of-state practitioner follows local state practice standards. While this may be a topic of discussion among policy shops, we expect few states will actually enact such changes in 2021.

Federally, the Public Readiness and Emergency Preparedness Act allows practitioners to deliver telehealth services across state lines under a licensure exemption for COVID-19 testing and certain limited covered countermeasures (e.g., treatment of COVID-19 infections).

The PREP Act also grants certain immunities and protections, preempting state laws during the public health emergency. Given its constitutional complexity and political nature, interstate licensing does not have a widely accepted solution, nor does it have the bipartisan support seen in other areas of telehealth.

Licensure will be a friction point between virtual care stakeholders and traditional practitioners invested in brick and mortar locations industry. The status quo (i.e., profession-specific interstate compacts and state-by-state patchwork legislative efforts) has left many digital health stakeholders unimpressed, frustrated and increasingly searching for an alternate solution.

Yet, a federal top-down preemption approach will be perceived as an unconstitutional encroachment on states' rights under the 10th Amendment. Keep an eye out for a third channel to thread the needle, perhaps tying federal funds (e.g., Medicaid or COVID-19 relief dollars) to state adoption of certain licensure waivers, enticing states to opt-in to interstate licensure reciprocity rather than federally compel it.

## **2. Modalities: Technology-Neutral State Laws That Prioritize Quality of Care**

In 2020, many states enacted new telehealth laws and rules to change prior practice standards, allowable modalities or prescribing requirements.

Changes included eliminating face-to-face exams, practicing via telephone only, or waiving modality prescribing restrictions on telemedicine. Some of these changes were made by legislation while others by executive order or regulation. Many of the changes were on a

temporary basis during the pandemic, with expiration dates that, confoundingly, often did not match the federally declared public health emergency date.

These waivers created a telehealth regulatory environment that focused less on technical modalities of care delivery (e.g., audio-video vs. asynchronous) and more on meeting the standard of medical care for a given patient. Aiding in this effort, the American Telemedicine Association published model policy language for state telehealth rules, to serve as a reference tool for best practices.

This trend towards technology-neutral telemedicine laws will continue in 2021, with stakeholders emphasizing the importance of medical standard of care and clinical quality of services, rather than proscriptive modality requirements.

### **3. Privacy: Greater Sensitivity to Patient-as-Consumer in Digital Health**

Telemedicine and digital health companies handling patient information on substance use disorder treatment can expect to see favorable changes to Health Insurance Portability and Accountability Act laws, designed to encourage easier sharing of patient data, particularly for treatment purposes.

Similar changes are anticipated to regulations under Title 42 of the Code of Federal Regulations, Part 2, to ease payment and health care operations. Telehealth companies should also keep an eye on state data privacy laws.

More states are expected to enact their own consumer laws to protect data privacy, as California did with its California Consumer Privacy Act. And the Federal Trade Commission — the nation's top federal privacy regulator — will continue enforcement investigations against organizations that violate consumer privacy rights.

Given the proliferation of new telehealth services and startup companies launched in 2020, increased privacy regulation is likely to occur in 2021.

### **4. Enforcement: OIG and DOJ Will Build on Prior Investigations**

Building on their 2019 and 2020 criminal and civil investigations, U.S. Department of Health and Human Services Office of Inspector General and U.S. Department of Justice will continue their takedown of companies engaged in telefraud: scams that couple aggressive online marketing tactics with telemedicine services to serve as a conduit for illegal kickback arrangements with pharmacies, durable medical equipment suppliers and laboratories.

Most telemedicine enforcement actions to date have involved kickback schemes and billing for medically unnecessary equipment and diagnostic tests, and few have centered on billing and coding of telehealth professional services. The American Telemedicine Association has commented how these companies do not represent the industry at large, and issued a letter articulating hallmarks of legitimate telemedicine providers.

With many traditional in-person providers having newly (and quickly) moved into telehealth in 2020, along with new temporary waivers of billing and coding rules and a relaxed regulatory environment, the future will likely see more Medicare audits and overpayment claims of telehealth professional services.

Some niche areas of enforcement may be marketing/referral arrangements with pharmacies and laboratories, waivers of patient financial responsibility, ordering high-cost genetic tests,

billing for practitioners located outside the U.S., and arrangements seeking to take advantage of the global pandemic.

## **5. Payment: Continued Expansion of Telehealth Reimbursement**

The pandemic compelled health plans, both government and commercial, to remove prior restrictions on telehealth and expand coverage for virtual care at a rate previously unseen.

The new policy changes on Medicare reimbursement followed the previously established pathway of coverage, but the pace at which they were made was stunning. The Centers for Medicare & Medicaid Services also introduced nearly 100 telehealth service codes covered on a temporary basis until the public health emergency expires.

Much of 2020's reimbursement expansion will continue through 2021, as commercial payers follow CMS' lead. Remote patient monitoring still has plenty of room to grow. Despite the recent payment expansions remote patient monitoring has seen, it has yet to have its breakout year in widespread use and payment.

Employers will explore more telehealth services for employees to deal with the stress of the pandemic, focusing on tele-primary care, behavioral health, and specialty care like fertility.

As more traditional providers offer telehealth services in addition to in-person care, we may see telehealth increasingly paid on a fee-for-service basis, rather than a per-employee-per-month enterprise model. At the same time, value based models focusing on or centered around virtual care, including bundled payments and shared savings, will grow beyond the pilot phase, as providers begin to own certain care pathways.

## **Conclusion**

Time will tell how these five predictions will hold up over the next 12 months. What is certain, however, is that telemedicine and virtual care continues to be one of the fastest-growing areas in health care.

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