California Legislative Update: Pushing for Payment Parity and Removing Barriers to Telehealth

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Earlier this month, Governor Newsom signed several provider-friendly telehealth bills into law. Designed to expand patient access to telehealth services by increasing reimbursement and coverage, the new laws will no doubt alter California's telehealth landscape. Most notable is AB 744, which mandates "payment parity" for telehealth services provided in commercial markets, making California one of nearly a dozen states to require payment parity. The governor also signed AB 1264, specifying that an appropriate examination prior to prescribing and dispensing drugs to a patient can now be achieved through telehealth, including through the use of self-screening tools or questionnaires. And lastly, building off Medi-Cal's recent expansion of telehealth coverage is AB 1494, which requires that Medi-Cal reimburse safety net providers who furnish services via telehealth during states of emergency without prior face-to-face visits. Below we provide further detail and analysis on each of these new laws.

AB 744 – Payment Parity

AB 744 establishes two new statutes – section 1374.14 of the Health and Safety Code and section 10123.855 of the Insurance Code – and requires that health plans and health insurers reimburse for telehealth services "on the same basis and to the same extent" as equivalent in-person services. The law also prohibits higher cost-sharing, including deductibles, copayments, or coinsurance for a healthcare service delivered via telehealth. Additionally, any annual or lifetime dollar maximum must apply in the aggregate to all items and services covered, preventing insurers from having a separate maximum for telehealth services.

Under the newly created section 1374.14(b)(1), the legislature notes that the law "does not limit the ability of a health care service plan and a health care provider to negotiate the rate of reimbursement of a health care service provided pursuant to a contract subject to this section." The takeaway from this provision is that AB 744 in no way dictates reimbursement rates as long as the services are the same (as determined by a provider's description of the service on the claim), regardless of whether they are provided in-person or through telehealth. In order to prevent narrow networks from leaving out traditional providers of telehealth, such as hospitals and health systems, the law also prohibits plans from limiting coverage to telehealth services delivered by select third-party corporate providers. That said, plans are not required to cover telehealth services by out-of-

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network providers, unless such coverage is required by law.

Lastly, the new law only applies to any agreement between a health plan and provider that is issued, amended, or renewed on or after January 1, 2021.

Takeaways for providers: AB 744 resolves a significant barrier to telehealth implementation by delivering payment parity for telehealth reimbursements and encouraging greater adoption and integration of telehealth by providers. It will also be particularly significant in advancing coverage to rural and underserved communities by enabling providers and specialists to directly serve patients in those communities through telehealth modalities.

AB 1264 – Appropriate Prior Examinations

California's Medical Practice Act prohibits prescribing, diagnosing, or furnishing dangerous drugs without "an appropriate prior examination and a medical indication." Bus. & Profs. Code § 2242. (Under California law, "dangerous drugs" include any drug requiring a prescription that is not a controlled substance). Prior to AB 1264, physicians received little guidance from the legislature or the California Medical Board as to what constituted an "appropriate" prior examination in the telehealth context. Sponsored by Planned Parenthood, AB 1264 was introduced to address this ambiguity, particularly around prescribing of birth control through mobile applications. The law, which went into effect the day Governor Newsom signed it on October 11, 2019, amends Section 2242 to specify that an appropriate prior examination "does not require a synchronous interaction between the patient and the licensee and can be achieved through the use of telehealth, including, but not limited to, a self-screening tool or a questionnaire, provided that the licensee complies with the appropriate standard of care."

The bill also revises the Medical Practice Act by declaring that, under limited circumstances, it is not "unprofessional conduct" for physicians to treat patients via telehealth without first conducting a "prior appropriate examination." Specifically, the "prior appropriate examination" requirement no longer applies in the following situations where:

- A practitioner designated to serve in the absence of the patient's practitioner prescribes medication to "maintain the patient until the return of the patient's practitioner," but no longer than 72 hours;
- A practitioner transmits an order for drugs to a registered nurse or a licensed vocational nurse in an inpatient facility after consulting with that RN or LVN who had reviewed the patient's records; or
- A practitioner designated to serve in the absence of the patient's practitioner had access to the patient's medical records and orders a single refill on a medically-indicated prescription in the same amount and strength as the original prescription.

Takeaways for providers: This is an important development for California providers utilizing telehealth, as it legitimizes what many California providers are already doing, *i.e.,* treating by reviewing clinical data collected by self-assessment tools and online questionnaires to determine an appropriate course of treatment. It also clarifies that telehealth services may be provided to patients in arrangements where a practitioner designates another to treat his or her patients for a limited period of time due to travel or other issues.

It is important to note that while this is a welcome development for many providers, the amendments to the Medical Practice Act authorize the use of these tools only *if the licensee complies with the appropriate standard of care.* As a result, the burden is on practitioners to assess whether and when the applicable standard of care demands synchronous audio-video interaction or an in-person visit, rather than asynchronous care. The California Medical Board regularly disciplines physicians who provide treatment without performing an "appropriate prior examination," and as scrutiny of telehealth arrangements picks up steam, that trend is likely to continue.

AB 1494 – Medi-Cal Coverage of Telehealth in States of Emergency

In the wake of California's devastating 2017 and 2018 wildfires, AB 1494 was introduced to ensure that affected communities receive continuous and timely access to care when an emergency strikes. The new law, signed by Governor Newsom on

October 12, 2019, provides clarity to guarantee that Medi-Cal enrolled community health centers, including federally-qualified health centers (FQHCs) and rural health centers (RHCs), can continue to provide, and will be reimbursed, for telehealth services, telephonic services, and other specified services for Medi-Cal beneficiaries that have been impacted by a declared state of emergency. The law also prohibits Medi-Cal from requiring face-to-face contact or a patient's physical presence on the premises of an FQHC or RHC in order to receive reimbursement. While not required, the Department of Health Care Services is authorized by the law to allow other enrolled fee-for-service Medi-Cal providers, clinics, or facilities to receive Medi-Cal reimbursement. The law additionally directs DHCS to issue guidance on or before July 1, 2020 for entities seeking reimbursement for the above-described services, including providing instructions on the submission of claims for telehealth or telephonic services, as well as adopt regulations by January 1, 2024.

Takeaways for Providers: AB 1494 will ensure continuity of care for patients in communities hit by disaster. Currently, the law only authorizes FQHCs and RHCs to receive reimbursement for care delivered during a declared emergency without restrictions to location or care delivery platform, though the Department has the option to expand such reimbursement to all Medi-Cal providers through promulgation of regulations or guidance.

Other New and Vetoed Telehealth Laws

While this alert concentrates on the newly signed telehealth laws directly affecting providers, it is worth noting that these are just a few of the bills signed by the Governor this legislative session that advance California's leadership in the telehealth arena. For example, AB 1642 mandates telehealth be considered as a way for Medi-Cal managed care plans to offer alternative access when meeting network adequacy standards. SB 24 requires healthcare clinics at California State University and University of California campuses provide access to telemedicine abortion services beginning 2023. The governor also signed AB 1519, which establishes strict regulations for dental and orthodontic telehealth services.

He also vetoed a number of measures, including AB 848, which would have required Medi-Cal to cover continuous glucose monitors (CGMs) and related mHealth supplies as covered services. Governor Newsom noted in his veto that while the goal of enhancing access to CGMs is important, it should be considered during the budget process.

Hooper, Lundy and Bookman's digital health attorneys will continue monitoring these developments. For further information, please contact Jeremy Sherer in Boston, Andrea Frey in San Francisco, or your regular Hooper, Lundy and Bookman attorney.

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