

Telehealth Updates – California

Insights

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Last week, California's Governor, Jerry Brown, signed into law AB 2861, which expands access to behavioral health and substance use providers via telehealth for Medicaid patients. AB 2861 will expand Medi-Cal reimbursement for services provided via telehealth technology by certain licensed practitioners and certified substance use disorder ("SUD") counselors.

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AB 2861 and Access to Behavioral Health Providers via Telehealth. AB 2861 expands access to SUD telehealth services for Medi-Cal beneficiaries by providing Drug Medi-Cal ("DMC") reimbursement for individual counseling services provided via telehealth technology by certified alcohol or other drug counselors and other health care professionals. The timeline for implementation of this expanded coverage is unclear, however, because it may require an amendment to California's Medi-Cal State Plan. In addition, the statute directs the Department of Health Care Services ("DHCS") to adopt regulations by July 1, 2022 to implement the bill. However, if earlier implementation is possible, DHCS is permitted to issue provider bulletins, written guidelines, or similar instructions until such regulations are adopted.

In the interim, the current rules concerning DMC telehealth services will stand. For counties that do not participate in the DMC Organized Delivery System ("DMC-ODS") waiver, telehealth services are not covered for individual counseling. Counties that have opted in to the DMC-ODS waiver may provide coverage for certain counseling services provided through telehealth, but coverage varies among the counties participating in the waiver.

In addition to current limits on DMC Medi-Cal reimbursement for counseling via telehealth in some counties, there are also requirements regarding prescribing medications via telehealth. Qualified clinicians are generally only able to prescribe prescription medication upon an "appropriate prior medical examination" resulting in a "medical indication." While the determination of what constitutes an "appropriate prior medical examination" is ultimately a clinical determination, the California Medical Board has indicated that, with respect to telehealth, an appropriate medical examination means a live, two-way, audio-video communication between the clinician and the patient.

Medication Assisted Treatment ("MAT")¹ – Telehealth, Federal Law and Prescribing Controlled Substances via Telemedicine.² Even with AB 2861's passage, there are still important considerations under federal law for California providers that wish to offer MAT. In particular, the Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (Ryan Haight Act) prohibits providers from prescribing controlled substances without conducting an in-person examination of the patient unless an exception applies. The Ryan Haight Act includes telemedicine exceptions, but they are narrow and restrictive. For a provider to prescribe controlled substances via telemedicine in accordance with the most commonly used

exceptions, the patient must be in the physical presence of a DEA-registered practitioner, or located at a DEA-registered health care facility (unless, for example, the provider is an employee or contractor of the Department of Veterans Affairs or the Indian Health Service). Notably, the DEA has previously committed to creating a telemedicine registration process that would allow providers to prescribe controlled substances via telemedicine more broadly, but it has not issued proposed or final rules yet.

Finally, it is important to note that the federal landscape, as it relates to telemedicine and controlled substances, may be changing very soon. The Senate and the House are currently working on a compromise package of bills to fight the opioid crisis. In the past, Congress has considered establishing a statutory deadline for the DEA to promulgate regulations implementing a special telemedicine registration process, and it is possible that pending legislation may address telemedicine and MAT. We will be following the legislative process and will provide updates through similar alerts or articles.

Practice-Oriented Takeaways. AB 2861, once implemented, will increase access to some behavioral health services for Medi-Cal beneficiaries. Provider facilities will be better equipped to provide therapeutic services to Medi-Cal beneficiaries, both those battling SUD and otherwise, as therapeutic services delivered by SUD counselors, social workers, psychologists and other clinicians via telemedicine will be eligible for reimbursement. AB 2861 does not, however, change the status quo surrounding prescribing controlled substances for MAT via telemedicine, which is still largely prohibited under federal law as of the date this alert is published.