Mapping Out the "Telehealth Cliff(s)" for Expanded Telehealth Flexibilities

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PROFESSIONAL

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Health care services are governed by a patchwork of federal and state statutes and regulations addressing a wide range of issues, including without limitation Medicare coverage and reimbursement standards, the Controlled Substances Act, state medical practice acts, state insurance laws, ERISA, HIPAA, state health information privacy and security laws, state Medicaid policies, and state level prescribing standards. The drastic expansion in utilization of telehealth in the United States during the COVID-19 pandemic impacted *all* of these sources of authority, and the entities responsible for them are each independently determining what, if any, changes are necessary to facilitate continued telehealth services post-pandemic. The lack of coordination between various federal agencies, state lawmakers and state regulators makes it impossible to succinctly summarize what the regulation of telehealth will look like in the future.

The potential disappearance of the many telehealth flexibilities introduced during the COVID-19 pandemic has been described as a "telehealth cliff," but in reality, there are, potentially, at least three "telehealth cliffs" concerning Medicare telehealth services and federal controlled substances prescribing rules alone. This article outlines some of the important areas for health care providers and their counsel to track as we move into 2023.

Tools Available to Avoid the "Telehealth Cliffs"

It is possible that all of the flexibilities listed herein will be further extended through an act (or acts) of Congress or, concerning certain changes, the Medicare Physician Fee Schedule Final Rule. At present, there are two primary pieces of legislation which address extending pandemic-era COVID-19 flexibilities, while some flexibilities are also addressed in the 2023 Physician Fee Schedule.

Congressional Activity

Earlier this year Congress passed the Consolidated Appropriations Act of 2022, providing an extension of most Medicare telehealth waivers 151 days following the end of the public health emergency (PHE). Over the summer, the House of Representatives went a step further to overwhelmingly pass the Advancing Telehealth Beyond COVID-19 Act of 2022 (H.R. 4040) by a bipartisan vote of 416-12. The legislation would extend the majority of the current PHE waivers related to Medicare telehealth services through the end of 2024.

Other legislative efforts have included the Telehealth Modernization Act (H.R. 1332/ S. 368), which would permanently remove the originating and geographic site restrictions and permanently allow federally qualified health centers and rural health clinics to provide telehealth

services, and the Telehealth Extension and Evaluation Act (H.R. 7573/ S. 3593), which would extend the current waivers for two years following the PHE and establish certain guardrails to monitor for any abuse.

This issue has received a great deal of bipartisan attention and support, but the dynamics in Congress are such that there remain concerns over the cost and fraud and abuse that could make final passage a challenge. Without the urgency of the cliff imminent, Congress may struggle to pass something before the end of the Congressional session, forcing efforts to start fresh in a new Congress beginning in 2023. Absent more comprehensive legislation, it is possible that Congress might include some shorter-term extension of waivers to further data to inform longer-term telehealth policy and reforms.

Calendar Year 2023 Medicare Physician Fee Schedule Final Rule

As discussed herein, CMS signaled its intent to extend coverage of certain Medicare telehealth services through the end of 2023 in the CY 2023 Physician Fee Schedule proposed rule. Those proposals could become permanent in the final rule.

Understanding the Telehealth Cliffs

Despite the efforts described above, should Congress not intervene, flexibilities expanding coverage and utilization of telehealth during the PHE will expire in the near future.

Cliff 1: When the PHE Ends. The COVID-19 PHE was last extended for an additional 90 days on October 13th, 2022, meaning that the PHE will remain in place until at least January 11th, 2023. Unless the PHE is further extended at that time, the following flexibilities would terminate immediately, absent further action by Congress or the Centers for Medicare & Medicaid Services ("CMS"), as applicable:

- Remote patient monitoring ("RPM") services for new patients. Historically, remote patient monitoring ("RPM") services have only been billable to Medicare for established patients, meaning that a practitioner-patient relationship needed to exist before RPM claims were billed to CMS. During the COVID-19 PHE, Medicare changed that policy to temporarily permit billing for RPM for new. However, in the CY 2021 PFS Final Rule, CMS confirmed that when the PHE ends, it "again will require that RPM services be furnished only to an established patient."[1]
- Federal Waivers of the Controlled Substances Act. As discussed in a separate article in this report, the DEA exercised its authority to waive provisions of the Ryan Haight Act which require practitioners to examine a patient in-person before prescribing controlled substances unless certain exceptions are satisfied during the PHE. However, once the PHE ends, the authority which the DEA exercised to waive those requirements will expire. Thus, once the PHE terminates, federal law will again require a prior in-person exam before prescribing controlled substances via telehealth, unless an exception is satisfied.[2]
- State Specific DEA Registration. As discussed in a separate article in this report, federal law normally requires practitioners to be registered with the DEA in any state where a patient to whom the practitioner prescribes controlled substances is located. The DEA waived that requirement for the duration of the PHE in March 2020.[3] However, that exception is granted "through the duration of this public health emergency as declared by the Secretary of HHS."

Industry should receive 60 days' notice if the PHE will terminate in January, meaning we should have an answer to this question by mid-November.

Cliff 2: 151 Days Post-PHE. Most of the pandemic-era changes to Medicare telehealth services will not outlast the pandemic unless Congress amends the Social Security Act or extends waivers implemented during the PHE. Currently, Congress has extended certain telehealth flexibilities for 151 days after the end of the PHE, in an effort to avoid a "telehealth cliff."

Changes Currently Subject to 151 Day Extension:

- Expanded Originating Site Definition. Patients receiving care via telehealth while located at home. The Act extends the modified definition of "originating site" to include the patient's home. See Section 301.

- Expanded List of Practitioners. Occupational therapists, physical therapists, speech-language pathologists, and audiologists can continue to bill for telehealth services.
- FQHC and RHC Flexibility. Pre-pandemic, federally qualified health centers ("FQHCs") and rural health centers ("RHCs") could only serve as "originating site" facilities for telehealth services, meaning that patients could only receive treatment via telehealth while located at an originating site facility. During the PHE, FQHCs and RHCs have been able to operate as distant sites, meaning their clinicians can treat patients located elsewhere via telehealth. That change is extended for 151 days after the PHE ends.
- Delayed in-Person Requirements for Telebehavioral Health Services. Congress established new requirements for telebehavioral health coverage in December 2020, including requiring an in-person visit within 6 months of the first telebehavioral health service furnished and subsequent in-person visits every 12 months thereafter. That requirement will not be implemented until 151 days after the PHE ends.
- Audio-Only Coverage. During the PHE, CMS established coverage for audio-only telehealth services, and paid for those services at the same level as audio-video services. That policy will remain in place for 151 days after the PHE.
- Hospice Care Recertification. During the PHE, CMS established coverage for hospice recertification services provided using two-way audio-video technology, which will remain in place until 151 days after the PHE.

Cliff 3: End of Calendar Year 2023 – Coverage of Category 3 Medicare Telehealth Services. More than 135 new Medicare telehealth services were added to the covered list in calendar year 2020. During the physician fee schedule process, CMS can permanently add services to the Medicare telehealth services list as Category 1 services (those that are similar to professional services already covered) or Category 2 (services not similar to professional services already covered) in response to submissions from industry. CMS established a third category, Category 3, which describes services that have been added during the pandemic, and which will remain covered until at least the end of calendar year 2023.[4]

In the calendar year 2023 physician fee schedule ("PFS") proposed rule, CMS declined to add any services to the "Medicare telehealth services" list on a category 1 or category 2 basis, i.e., permanently. CMS confirms in the CY 2023 PFS proposed rule that category 3 services will be covered until the end of calendar year 2023, but notes that depending on when in 2023 the public health emergency ends, it may consider further extending coverage of these services.[5]

Therapeutic and Physical Therapy Services. CMS proposes to add certain therapeutic and physical therapy services (97150, 97530, and 97542) as "Category 3" services in the 2023 PFS PR. Note, however, that the therapists who bill for such services are currently only approved to bill Medicare for such services until 151 days after the PHE ends.

Audio-Only Services Outside of Behavioral Health. In the 2022 PFS Final Rule, CMS permanently changed the definition of "telecommunications system" for purposes of certain behavioral health treatment furnished via telehealth to allow such services to be provided via audio-only technology.[6]

There's a Catch: If legislation is passed extending the waivers, "Cliff 2" and "Cliff 3" would likely be delayed in parallel. For example, if H.R. 4040 passed the Senate, Cliff 2 would be extended until the end of calendar year 2024, meaning all of the "Cliff 2" waivers would remain in place until the end of calendar year 2024. The same could be true of CMS extending its coverage of category 3 services until the end of 2024, as referenced above.

If you have any questions, please contact one of our government relations professionals, Marty Corry or Monica Massaro in Washington D.C., attorney, Jeremy Sherer in Boston, or any other member of our Hooper, Lundy & Bookman team.

[1] 85 Fed. Reg. 84545 (Dec. 28, 2020).

[2] See DEA 075 (March 2020).

[3] See DEA 067.

[4] 86 Fed. Reg. 65276 (Nov. 19, 2021).

[5] See 2023 PFS PR pre-publication version at PDF p. 80.

[6] See 86 Fed. Reg. 65055.

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