Telehealth at the State Level: Trends in Licensure, Prescribing, Modalities

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As the COVID-19 pandemic continues, many states are revisiting their medical practice laws to incorporate telehealth standards to allow for the continued evolution and growth of virtual care. While this newsletter does not lend itself to an exhaustive 50-state review of all changes in state law impacting telehealth so far in 2022, this article highlights three important trends that have emerged in state virtual practice laws during 2022.

Trend 1: States are building licensure frameworks to make pandemic era telehealth expansion permanent.

One of the most fundamental steps a state can take to build a foundation for telehealth practice is establishing pathways to licensure for out-of-state practitioners. States have taken steps towards building interstate licensure processes in 2022 which include West Virginia, Alabama, New Hampshire and Vermont.

West Virginia In March 2022, the West Virginia Board of Osteopathic Medicine established an interstate licensure process for osteopathic physicians and physician's assistants. The rule sets forth comprehensive requirements for telehealth practice in West Virginia, including interstate telehealth registration eligibility, establishment of provider-patient relationship via telehealth, the standard of care as it relates to delivery of telehealth services, and prescribing authority via telehealth.[1] This authorization was part of a larger bill, S.B. 334, which authorized various boards to institute licensure rules.

Alabama Similarly, on April 6, 2022, Governor Kay Ivey signed Act No. 2022-302, eliminating Alabama's "special purpose license" for telemedicine and instead requiring physicians treating Alabama residents to hold a full medical license or a license issued via the Interstate Medical Licensure Compact, unless exceptions for peer consultations or irregular treatment are satisfied.

New Hampshire Like many other states, New Hampshire established a streamlined, temporary licensure process to enable out-of-state practitioners to treat New Hampshire residents during the COVID-19 pandemic. In June 2022, New Hampshire took the unusual step of making those temporary licenses granted during the pandemic permanent.[2] In doing so, New Hampshire regulators sought to avoid losing the expanded healthcare workforce the state experienced amidst pandemic flexibilities.

Vermont After signing House Bill 655 into law in May 2022, Vermont put wheels in motion to require health care professionals licensed in another state to obtain a telehealth license or registration in Vermont prior to providing health care services via telehealth to patients located in the state.[3] The bill allows the issuance of a 90-day provisional license to providers who have completed an application and are awaiting a background check, or are an active duty military member or spouse of active-duty military assigned to duty in the state. We provide more information on this development here.

Trend 2: States are joining the DEA in grappling with controlled substances prescribing issues.

Florida Florida Senate Bill 312, signed into law in April 2022, expanded physicians' ability to prescribe controlled substances through the use of telehealth. Previously, Florida law prohibited prescribing Schedule II-V controlled substances pursuant to a telehealth interaction, except in situations including treatment of psychiatric disorders and patients in residential facilities. As amended, only Schedule II controlled substances listed remain subject to those requirements, rather than all controlled substances in Schedules II-V.[4]

Tennessee In April 2022, the Tennessee Legislature amended the Tennessee Code Annotated Title 63 which prohibits a health care professional authorized to prescribe buprenorphine from prescribing via telehealth unless they are employed or

contracted with a nonresidential opiate treatment facility or program, community mental health center or hospital and the telehealth is provided on behalf of that entity.[5] Buprenorphine is often used to treat certain substance use disorders.

Vermont On April 27, 2022, Vermont signed Senate Bill 74 into law, which modifies Vermont's patient choice at end of life laws to define "telemedicine" and to protect physicians against criminal and civil liability for prescribing medication for a terminal patient that is self-administered to hasten death if the patient made a request using live interactive audio and video, for either the initial request or the second request after 15 days.[6]

Trend 3: States vary in assessing value of audio-only treatment beyond the COVID-19 pandemic.

Medicare's expanded coverage of, and reimbursement for, audio-only services as telehealth services has been widely reported and discussed within the healthcare industry. Concurrently, a number of states including Arkansas, Florida and Tennessee have taken steps to incorporate synchronous audio-only communication (i.e., telephone conversation) into their definitions of telehealth.

Recently, some states have considered appropriate modalities for telehealth offerings, specifically whether audio-only visits meets the standard-of-care. In considering the possibility of increasing access to care by allowing audio-only telehealth, states have diverged on the appropriate outcome.

Arkansas In April 2021, Arkansas expanded the definition of "telehealth" in Arkansas' Telehealth Act[7] to allow for audio-only visits.[8] The bill specifies that an Arkansas licensed doctor overseen by the Arkansas Medical Board would provide the audio-only telemedicine services and would be held to the same standards via telehealth as an in-person visit.[9]

Florida As defined under Florida law, telehealth did not include audio-only interactions until SB 312 was passed in 2022. Specifically, SB 312 eliminated audio-only interactions from the types of care excluded from the definition of telehealth in Section 456.47 of the Florida Statutes.[10]

Tennessee Passed in 2022, Tennessee H.B. 1843 amended Tennessee law to include HIPAA-compliant audio-only conversations in the definition of "provider-based telemedicine" that health insurance entities must cover.[11] The bill requires healthcare providers to notify patients that the financial responsibility for audio-only services is consistent with in-person or audio-video treatment. The legislature specifically designates audio-only calls as the second choice to audio-video encounters– the bill specifies that audio-only calls should only be used in cases where the patient does not own the video technology necessary; is in a location where video encounters cannot take place due to lack of service; or has a physical disability that inhibits the use of video technology.[12]

With state COVID-19 emergency declarations continuing to lapse, one can expect state legal frameworks to continue evolving as lawmakers look to facilitate virtual care moving forward.

If you have any questions, please contact Jeremy Sherer or Melania Jankowski in Boston, or any other member of our Hooper, Lundy & Bookman team.

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[1] S.B. 334 (W. Va. 2022).

[2] S.B. 277 (N.H. 2022).

[3] H.B. 655 (Vt. 2022).

[4] S.B. 312 (Fla. 2022).

[5] S.B. 2240 (Tenn. 2022).

[6] S.B. 74 (Vt. 2022).

[7] Arkansas Code Sections 17-80-402 & 12-80-403.

[8] H. B. 1063, 93rd Gen. Assembly, (Ark. 2021).

[9] Id.

[10] Florida SB 312.

[11] H.B. 1843, (Tenn. 2022).

[12] Id.

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