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Are States Making COVID-19 Telehealth Emergency Measures Permanent?

Texas may be among the first of many states to enact laws that encourage providers to continue electronically communicating with and monitoring their patients after COVID-19 emergency regulations and governors' orders expire. State legislatures are acknowledging the advantages telehealth offered during COVID-19 and are making major changes to pre-pandemic law to accommodate its continued use and growth. Some states, like Texas, are barely dipping their toe in the proverbial water, while others, like Arkansas, have dived on in.

TEXAS: ADDING MORE PERMANENT TELEHEALTH BENEFITS TO ITS MEDICAID AND PUBLIC BENEFITS PROGRAMS

Texas's new telehealth bill, which its governor is expected to sign, instructs the Health and Human Services Commission ("Commission") to "establish policies and procedures to improve access to care under the Medicaid managed care program by encouraging the use of telehealth services, telemedicine medical services, home telemonitoring services, and other telecommunications or information technology under the program." More broadly the bill provides the Commission with authority to ensure that Medicaid recipients, child health plan program enrollees, and other individuals receiving benefits under a public benefits program administered by the commission or a health and human services agency have the option to receive medical services through telecommunications or information technology. These services include, among others, preventive health and wellness services, case management services, behavioral health services, including substance abuse treatment, occupational, physical, and speech therapy services, nutritional counseling, remote monitoring, certain assessments, and "case management services" including service coordination, service management, and care coordination.

The bill also requires the executive commissioner to develop and implement a system that ensures behavioral health and other services may be provided using an audio-only platform to the extent it is cost-effective, clinically effective, and otherwise appropriate. The Commission is specifically instructed, however, that licensed treatment facilities may



provide outpatient chemical dependency treatment program services to adult and adolescent clients using telecommunications or information technology.

Pragmatically, the bill instructs the Commission to develop policies, procedures, guidelines, and forms specific to Medicaid managed care organizations and health plans regarding the use of telecommunications or information technology to conduct assessments and provide other services. In establishing the policies and procedures, the commission must determine whether using the telecommunications or information technology is appropriate and consider the extent to which a managed care organization agrees, along with the feasibility of an in-person assessment and recipient requests and consents. The burden of monitoring claims for fraud, waste, and abuse and for determining whether additional social services or supports are needed to support the telehealth services falls on Medicaid managed care organizations.

The bill also addresses an issue of interest to managed care organizations and their associates who perform case management and population health services: the executive commissioner must adopt and publish guidelines regarding how such organizations may communicate by text message or e-mail with enrollees using the contact information they provide in their application for Medicaid benefits. Perceived uncertainties in federal law addressing such communications, including in HIPAA and the TCPA, have led many state Medicaid agencies to develop policies and procedures to ensure that such texts and emails are not overly intrusive, that the content is easily understood, and that they include an opt-out option.

Notably, however, the new law will be more limited and tentative than many similar state laws. For example, while it permits patients to provide oral rather than written consent to receive care coordination services, written authorizations are required for other telehealth services. It will also allow the Commission to continue requiring in-person visits for certain services and may, on a case-by-case basis, require a Medicaid managed care organization to discontinue the use of telecommunications or information technology for assessment or service coordination services if the Commission determines that the discontinuation is in the recipient's best interest.

OTHER STATE RESPONSES TO EXPIRING TELEHEALTH PUBLIC EMERGENCY EXPANSIONS

Many bills proposing to maintain broad access to and expand reimbursement for telehealth are winding their way through Congress and state legislatures. These bills all express lawmakers' recognition that telehealth expansions have successfully, cost-effectively, and safely provided better access to care, improved care coordination, and enhanced patient engagement.

Legislators in Arkansas acted in record time to ensure that telehealth expansions provided in expiring Executive Order 20-05 became permanent. They amended their Telemedicine Act ("Act") to allow a healthcare professional licensed in Arkansas to establish a professional relationship with, and to diagnose and treat, a patient using any appropriate technology, including the telephone, if the healthcare professional has access to a patient's health record. Effective April 21, 2021, the Act also permits licensed professionals to prescribe, as they deem appropriate, non-controlled drugs based on a telehealth encounter.

On Monday, May 31, the Illinois State Senate passed House Bill 3308, which, if approved by the Illinois House of Representatives and governor, will maintain expansions and bring Illinois into the fold of states – thirty-seven so far - that require private insurers to reimburse providers for telehealth services. If the bill becomes law, insurance companies will also be prohibited from requiring in-person contact between patients and health care professionals before allowing telehealth services.

More states are certain to follow suit with their own expansions. We will keep you advised.

King & Spalding LLP regularly counsels hospitals and other health care providers, management services organizations, and population health and care management companies, among others, on best practices and federal and state law requirements and opportunities relating to telehealth.



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