



On Friday, March 13th, Texas Governor Greg Abbott declared a “[state of disaster](#)” in response to the coronavirus pandemic and instructed state agencies to take action to make telemedicine readily available to the community. Per Governor Abbott’s direction, the Texas Medical Board (TMB) issued a [press release](#) the following day informing the public that it is temporarily suspending certain provisions of the Texas Occupations Code and the Texas Administrative Code that place restrictions on practitioners’ ability to use telemedicine in their treatment of patients.

Currently, Texas Occupations Code Section 111.005 requires that a physician establish a valid physician-patient relationship through one of three methods if the physician wishes to render telemedicine services to a patient:

1. A pre-existing relationship with the patient;
2. Providing call coverage for another physician who has an established relationship with the patient; or
3. Providing telemedicine services to a patient with whom the physician does not have a prior relationship through technology that includes either:
 - a. Synchronous (real-time) audiovisual interaction between the practitioner and the patient; or asynchronous store and forward technology in conjunction with synchronous audio interaction between the practitioner and the patient, if the practitioner also uses clinical information from photographic or video images, including diagnostic images;
 - b. The patient’s relevant medical records (e.g., relevant medical history and diagnostic test results); or
 - c. Another form of audiovisual technology that allows the encounter to meet the standard of care.

To facilitate access to care, the TMB is departing from its strict technology requirements and is now allowing a practitioner-patient relationship to be established through a telephone conversation and for the diagnosis and treatment of patients by phone. This suspension is in effect until the disaster declaration is lifted.

The TMB reminded practitioners that the laws and regulations related to standard of care have not changed—practitioners are required to provide services according to the same standard of care as if the services are provided in person.

FEDERAL WAIVER

On March 6, 2020, the President signed into law the [Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020](#) which, among other things, gives the Secretary of the Department of Health and Human Services (HHS) the authority to waive restrictions on the provision of telehealth services (commonly referred to as an 1135 waiver). Today the Centers for Medicare and Medicaid Services (CMS) issued a [press release](#) announcing the expansion of telehealth benefits, allowing some flexibility with respect to how, when and where telehealth services may be rendered. We encourage all providers to review the Telehealth Waiver FAQ issued by CMS which provides details about how providers may render telehealth services during this “Public Health Emergency (PHE).”

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One of the modifications under the 1135 waiver that will have the most significant impact is CMS' coverage of telehealth services rendered to individuals in their homes effective March 6th. During the PHE, Medicare beneficiaries are no longer required to be located in a rural health area and travel to a physician's office or healthcare facility to have their telehealth services covered. This opens the door for many who would not otherwise have telehealth benefits and more importantly keeps individuals who suspect they may have the virus in their homes thus limiting the risk of exposing others.

CMS also reports that, to the extent telehealth laws require the patient and practitioner have a preexisting relationship, HHS will not audit providers to ensure there was a prior relationship. Keep in mind that this will only apply to telehealth services rendered during the PHE.

With respect to the technology that may be used to render these services, unlike the Texas Medical Board, which is allowing practitioners to render telehealth services by telephone without video capabilities, CMS currently will only cover telehealth services if they are rendered using both audio and video capabilities allowing for "two-way, real-time interactive communication". That said, the HHS Office of Civil Rights (OCR) will exercise discretion in its enforcement of privacy and security requirements to allow practitioners to render telehealth services using common communications technologies including FaceTime and Skype which means almost all practitioners will have the technological capability of rendering telehealth services during the PHE. Practitioners must still make good faith efforts to protect patient privacy.

OTHER CONSIDERATIONS

It is important to note that the waiver of laws and regulations related to telemedicine do not necessarily mean that all payers will cover telemedicine services. Providers will need to look to payer policies to determine whether they have expanded coverage. To encourage members to use telemedicine as a first line of defense, many payers are waiving the patient responsibility for their urgent care needs. Aetna, for example, [announced](#) to its members that it will have a \$0 copay and waive costs of telemedicine services provided by its participating providers; however, it is not clear whether this would apply to providers who are not contracted with Aetna should they provide telemedicine services to Aetna members. The Texas Department of Insurance created a [helpful webpage](#) that provides links to various payers' websites addressing coverage for testing and telemedicine services.

Matters involving coronavirus are evolving rapidly. We will continue to monitor any developments and keep readers informed.

ABOUT THE AUTHOR



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As a former hospital administrator, Jenny has a unique understanding of the challenges facing healthcare providers and the ins and outs of their business operations. Health systems, physicians and providers of ancillary services trust Jenny to help them navigate complex regulatory matters and, more importantly, to craft realistic solutions that they can operationalize. Jenny is Board Certified in Health Law by the Texas Board of Legal Specialization and Certified in Healthcare Compliance by the Compliance Certification Board.