Propelled by COVID-19, State Governments Attempt to Keep Up With Telemedicine Innovation and Digital Health Platforms

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As is the case with most new technologies or significant industry innovations, companies embracing and driving the disruptions often move very fast in a legal and political landscape that is always playing catch-up. This is very true for the fast-growing telemedicine and digital health industries. However, likely motivated by COVID-19, state governments are moving faster than they traditionally do to pass new regulations and to extend certain regulatory waivers.

COVID-19 required a shift in the delivery of medical care with the state and local lockdowns. During the pandemic, the United States Department of Health and Human Services (HHS) has issued guidance on various compliance waivers and enhanced flexibility. Governors across the country issued executive orders to help address the requirements of providing ongoing medical care while maintaining proper social distancing (e.g., New Mexico, Texas, etc.). The result was more people receiving medical care remotely. Similar to the realization by many that working from home was not only feasible but in some cases preferable, many also came to the conclusion that a trip to the doctors' office was not necessary for the treatment of certain conditions. For example, the Minnesota Department of Human Services published a Telemedicine Utilization Report that indicated delivery of telemedicine or telehealth services in Minnesota increased by over 2600% from March through June 2020 compared to the same time period in 2019.

As we continue to progress to some semblance of normalcy, many of the changes in the federal guidance and state executive orders are likely here to stay. The Centers for Medicare and Medicaid Services (CMS) further confirmed that expansion of telemedicine services would be permanent and added over 60 Medicare-covered telemedicine services in its annual Physician Fee Schedule final rule. In a press release dated December 1, 2020, the former CMS Administrator stated, “the pandemic accentuated just how transformative it could be, and several months in, it’s clear that the healthcare system has adapted seamlessly to a historic telehealth expansion that inaugurates a new era in healthcare delivery.” As services expand in the federal health care programs, focus will turn to reimbursement rates for telemedicine, which have been historically low and were recently recommended by MedPAC in its March 2021 Report to Congress to return to lower rates after the public health emergency.

The permanence of the change is further exemplified by the vast number of proposed bills in state governments across the United States. The delivery of telemedicine is generally regulated by state health care practitioner licensing laws and state insurance laws. In many instances, prior to COVID-19, states had antiquated telemedicine laws that barely addressed technologies currently available, and relied on the often-ambiguous “standard of care” as determined by the practicing physician in the course of a telemedicine visit.

In the past few months, rarely has a week gone by where at least one state government proposes a bill to update and improve telemedicine laws (e.g., Illinois, North Carolina, Ohio, etc.). Fortunately for digital health care providers, the bills most often increase the flexibility in the provision of care and offerings health care practitioners are able to provide. In some states, so long as the patient is clearly identified, the provider appropriately presents their credentials and the standard of care is met, among other things, a health care provider may be able to prescribe certain medications upon review of a patient’s completed online questionnaire. In other cases, digital health companies may be reimbursed by Medicaid or private insurance companies for a patient encounter that consists of a health care provider remotely reviewing and monitoring a medical device worn or used by a patient at home.

The focus on increased use of telemedicine has also reached administrative agencies. On February 26, 2021, the HHS Office of the Inspector General (OIG) issued a press release indicating its support of expanded telehealth services, but also reaffirmed its commitment to minimizing fraud. The OIG stated: “As our work and the national conversation continues, OIG believes there is a shared goal: ensuring that telehealth delivers quality, convenient care for patients and is not compromised by fraud.” The OIG plans to publish findings relating to “telefraud” during the COVID-19 pandemic later this year, which will guide future policies.

While technology and innovation will likely always outpace the law, the future of telemedicine and digital health is bright and state governments and regulators seem motivated to move swiftly to help provide more clarity for digital health care providers. For the time being, digital health care providers will need to remain nimble and attentive as the next few years will likely bring large shifts in the legal landscape.

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