

COVID-19 and Cross-State Clinician Licensure: Federal and State Regulations, Revisited, and What To Do About Them

March 20, 2020 – Dorsey Health Law

by Ross C. D'Emanuele, Randall Hanson, and Shira Hauschen



The COVID-19 pandemic has dramatically increased the number of patients and providers seeking to implement and use telehealth visits and other digital health solutions – and rapidly, at that. The challenge of implementing digital health solutions, particularly telehealth, has historically been the patchwork setup of both federal and various state regulations that made it difficult for providers and telehealth vendors to offer solutions at a large scale, particularly across state lines. In the current state of public emergency, both the federal government and various state governments are recognizing the need to ease prior restrictions and expand telehealth availability in order to help patients receive care at home; this helps limit the spread of COVID-19 by further enabling social distancing and freeing up providers' brick-and-mortar hospitals and clinics to treat COVID-19 patients. The need is clear, as is the desire by all parties to jump in and offer telehealth visits. The new challenge has become understanding how state requirements fit in daily updates to federal law. In this blog post, we will look first to the current legal environment with respect to the federal waiver and state regulations, and then provide recommendations (in numbered list below) as to what this means for your plans to offer telehealth visits.

Specifically, clinical licensure has traditionally been amongst the most challenging regulations to contend with in offering telehealth visits. Federal reimbursement and state

Related People

- Ross C. D'Emanuele
- Randall Hanson

Related Capabilities

- Healthcare & Life Sciences
- Healthcare Transactions & Regulations
- Healthcare Litigation
- Medical Devices

clinician licensure rules generally restrict clinicians from offering telehealth services to a patient physically located in a state without the appropriate medical license in that state. Now, however, through CMS 1135 waivers and state-specific executive orders, which we have described more below, clinicians are able to leverage relaxed cross-state reimbursement and licensure rules to offer telehealth services more easily and immediately during this time of public health emergency.

Historically, the general rule, with few exceptions, is that a clinician must be licensed to practice in the state in which the patient receiving telehealth services is located. These rules are derived from state professional licensing laws, as well as from payor requirements, including the conditions of payment under the Medicare and Medicaid programs. Therefore, a physician licensed to practice in Minnesota, for example, could not typically provide telehealth services to a patient located in Iowa during the time of the visit without first obtaining an Iowa license to practice medicine. Failure to do so could subject the physician's medical license to discipline, and could also render the services not billable to various private and governmental payors. Currently, the in-state licensure requirements of payors and professional licensing bodies are beginning to change within the confines of the COVID-19 public health emergency. With respect to Medicare and Medicaid billing requirements, under the emergency proclamation by the President, CMS has the authority to issue "1135 waivers" that will temporarily waive or modify certain Medicare and Medicaid requirements to ensure that sufficient health care items and services are available to meet the needs of individuals enrolled in Federal health care programs. Shortly following the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, both HHS and CMS issued statements announcing a number of COVID-19 1135 waivers now either applicable automatically nationwide or available through request by individual providers and the states, depending on the type of waiver.

These waivers encompass an array of options and relaxing of rules that apply to services provided to Medicare and Medicaid patients. One of the waivers provides that CMS will "temporarily waive [reimbursement] requirements that out-of-state providers be licensed in the state where they are providing services when they are licensed in another state" (the "Clinician Licensing Waiver"). (Other waivers ease restrictions surrounding provider Medicare and Medicaid enrollment, skilled nursing and other long-term care facility requirements, and bed allocation requirements). This is an enormous and important shift, and one that digital health advocates have been championing for a long time, as it enables clinicians to "see" patients in other states without a protracted cross-state licensure process.

The challenge, however, is understanding how the federal waivers and existing state requirements interact. These 1135 waivers apply only to federal requirements, and any providers looking to practice in accordance with these waivers must be careful to also comply with applicable state laws. Largely, the COVID-19 1135 waivers fall in two categories: (1) blanket waivers; and (2) case-by-case waivers. The blanket waivers include those waivers listed by CMS in their statement and are applicable automatically nationwide with respect to **Medicare** rules (not Medicaid or other CMS programs, except

by request, as noted below). The Clinician Licensing Waiver is one such waiver. This waiver applies automatically to **Medicare** reimbursement, but clinicians must also ensure they are practicing in accordance with a particular state's licensing rules before issuing professional services in that state.

States that would like these Medicare blanket waivers, including the Clinician Licensing Waiver, to apply to their state's **Medicaid** program must send a request to CMS for case-by-case approval. Currently, only Florida and Washington have received approval for their requested COVID-19 1135 waivers, including the Clinician Licensing Waiver along with other provider enrollment and prior authorization requirement waivers. However, CMS states that it will continue to expeditiously review and approve 1135 waivers during the COVID-19 public health emergency. This CMS website will provide up-to-date information on all states that receive any COVID-19 1135 waivers.

While the Clinician Licensing Waiver is limited in applicability to Medicare and Medicaid reimbursement, states are beginning to follow suit by temporarily waiving their state level professional licensure requirements for telehealth providers. Still, providers should take caution to not provide services without a state license unless and until it is confirmed that the state will allow this practice. One state that we have identified as permitting telehealth practice without a state license during the COVID-19 public health emergency is Iowa. Iowa's emergency proclamation contains a section that temporarily suspends various telehealth practice standards, including the requirement that Iowa telehealth providers be licensed in Iowa. Note, however, that commercial payor rules may be unaffected by both the federal waivers and the easing of state professional licensing rules.

From an operational standpoint, the Clinician Licensing Waiver ostensibly eases offering telehealth visits across state lines, but the state-specific regulations still require ongoing vigilance. For those providers and other types of vendors seeking to offer telehealth, we would encourage the following:

- 1. Identify *exactly* which populations you must be able to treat in order for the telehealth visits to be feasible and viable (financially and operationally) for your organization**

While organizations would like to be able to immediately offer telehealth visits for everyone, the reality at this time, while states sort out whether they will ease state licensure restrictions, is that you may only be able to conduct telehealth visits and receive reimbursement in states in which your clinician is allowed to practice without a license and for certain populations only. It will vary tremendously by state, and the answer may change on a near-daily basis, as states make their decisions.

- 2. Speak with your attorney about the states in which you want to offer visits (or where your patient populations may currently be) to understand the current status for those states**

Per above, the situation is changing rapidly, and we strongly recommend asking your attorney to check the state's status vis-à-vis the federal waivers. We would advise adding that into your tracking document (see next item).

3. Draft your quick state-by-state plan and what your readiness checks will be to start with a new state (and do not worry – this can be rough-and-ready)

We often help our clients with state rollout plans and readiness checklists, and they are still important now; however, given the dramatic need for speed, do not let the perfect be the enemy of the good. Based on your answers to the above two items, you should confirm with your team both the plan for which states you will be able to offer visits in and also the criteria for when and how you will assess and identify the next states in which you can offer telehealth services. You can perfect and polish these plans at a later point, but having a plan of action for all involved will prevent confusion or, worse, lack of compliance if you do not pay careful attention to states' evolving rules. We would recommend that your state readiness checklist include an attorney approval step; this is particularly important now, since the states' rules are changing so rapidly. The good news is that, for the most part, the changes are leaning toward the more permissive rather than restrictive, so you may find new states in which you are able to operate.

4. Identify exactly which active state licenses your clinicians hold and document, ideally in a spreadsheet or other easy tracking mechanism

We recommend (and create for our clients) tracking tools with respect to clinical licensure during regular times, and it is equally important now. While the goal is to be able to offer telehealth visits to patients in states in which your clinicians are not currently licensed, you will need to keep track of who is actually licensed where, so that if and when regulations should revert, or if and when there should be changes to the scope of licensure or reimbursement, you are able to quickly assess your own staff's licensure status and pivot as needed. These tracking tools need not be fancy, though it is helpful to tie them to calendar reminders or other ticklers to enable consistent monitoring.

5. Keep in mind – and regularly monitor – other relevant requirements as you contemplate the nature and process of the telehealth visits.

For example, you will still want to abide by current HIPAA requirements (which are also changing during this public emergency – please see our article [here](#)), documentation requirements, and reimbursement-related considerations. Your standard operating procedure and telehealth visit process will likely need to be altered to include verbal caveats or discussion points between your providers and the patients. We would advise reviewing and then either drafting or updating your current visit script, as well as the

documentation presented on your website portal for the telehealth visit.

6. Your plan for downtime procedures is going to become all the more important – assess if you're ready and that your providers are aware of what to do.

With so many people using internet and particularly video chat services, our IT infrastructure and that of the telehealth platform vendors themselves is experiencing a surge in usage, which will test capacity levels. This would be the case in “regular” life, but becomes more important now, as you reach out to and conduct telehealth visits with new patients: does your script and posted information include information as to how the patient can reach you if the telehealth visit is interrupted? What should be their plan with respect to reaching out to local (in-state) providers versus your organization, both for downtime and post-visit?

This issue is rapidly changing and being updated at both the Federal and state level on a day-to-day basis. For additional information on various COVID-19 responses, guidance and resources, please see our articles on [Medicare payment](#) for telehealth services; [HIPAA](#) provisions now allowing the use of personal devices and everyday communication technology to deliver telehealth; [DEA prescribing laws](#) now allowing controlled substances to be prescribed via telehealth without an in person exam; and numerous other helpful legal analyses and guidance on [COVID-19](#) related matters.

If you would like specific information on how your state is currently treating these issues, please reach out to the authors or your usual Dorsey attorney or Dorsey Health Strategies business consultant.