

The End Is Here — Or Is It? The Public Health Emergency Concludes, but Telehealth Expansion Remains

WRITTEN BY

Erin S. Whaley | Emma E. Trivax | Kimberly Hughes Gillespie

The COVID-19 Public Health Emergency (PHE) resulted in many changes to the health care system. One of the most dramatic involved the introduction of regulatory flexibilities that enabled the rapid expansion of telehealth. From state licensure waivers to Medicare changes in reimbursement policies, providers across all specialties found new and innovative ways to increase access to care through telehealth. While the PHE will end on May 11, and so too will most of the waivers and other regulatory flexibilities enacted during the PHE, numerous telehealth policies originated during the PHE will remain in place through 2024 or permanently.^[1]

The Consolidated Appropriations Act of 2023 Extends Flexibilities for Telehealth

On December 29, 2022, the Consolidated Appropriations Act of 2023 (CAA) extended many flexibilities and waivers authorized during the PHE through December 31, 2024, particularly around telehealth services. This includes, but is not limited to:

- Removing geographic requirements and expanding originating sites for telehealth services;
- Expanding the types of practitioners eligible to furnish telehealth services, including audiologists, occupational therapists, physical therapists, and speech-language pathologists;
- Extending telehealth services for federally qualified health centers and rural health clinics;
- Delaying the in-person requirements under Medicare for mental health services furnished through telehealth and telecommunications technology;
- Allowing audio-only telehealth services;
- Allowing the use of telehealth to conduct face-to-face encounters before recertifying hospice care eligibility;
- Providing a study on telehealth and Medicare program integrity by the HHS secretary;
- Extending the safe harbor exceptions under health savings account-eligible, high-deductible health plans for telehealth services; and

- Authorizing Medicare payment for telephone evaluations and management visits equivalent to the Medicare payment for office/outpatient visits with established patients.

Certain Flexibilities and Waivers Will Continue Permanently

The Centers for Medicare and Medicaid Services (CMS) also provided a list of flexibilities and waivers made permanent beyond the end of the PHE and the December 31, 2024 deadline set in the CAA, as described below:[\[2\]](#)

- Licensed clinical social workers, clinical psychologists, physical therapists, occupational therapists, and speech language pathologists can continue to provide e-visits;
- Patient counseling and therapy services for opioid treatment programs (OTP) may be provided by telephone when unavailable by two-way interactive audio-video communication technology and when meeting all other applicable requirements;
- A general level of supervision for the initiation of nonsurgical-extended duration therapeutic services provided in hospital outpatient departments and critical access hospitals is permitted, in lieu of direct supervision;
- Nurse practitioners, clinical nurse specialists, certified nurse-midwives, physician assistants, and certified registered nurse anesthetists may supervise diagnostic tests as authorized under state law and licensure; and
- A treating physical or occupational therapist who develops, or is responsible for, the maintenance program or plan may delegate performance of the related services to a therapy assistant when clinically appropriate.

This list provides the most relevant and useful permanent flexibilities, but providers should evaluate all flexibilities permitted by the CAA that may impact their operations. Policies and procedures should also be updated to implement these permanent changes.

DEA Issues Proposed Rules for Permanent Telemedicine Waivers

During the PHE, the Drug Enforcement Agency (DEA) allowed registered health care professionals to issue prescriptions for controlled substances to patients who they had not previously seen in person.[\[3\]](#)

On February 24, the DEA announced proposed rules for permanent telemedicine flexibilities for certain prescribing practices. These proposed rules provide safeguards for telemedicine consultations by a medical practitioner who has never conducted an in-person evaluation for a patient that results in a 30-day supply prescription of a Schedule III-V non-narcotic-controlled medications and buprenorphine for treatment of opioid use disorder.[\[4\]](#)

What Areas Are Returning to Pre-PHE Compliance?

Despite many waivers being extended after May 11, several other helpful flexibilities and waivers will end, and the

rules will revert to the pre-PHE framework. For example, the Office of Civil Rights (OCR) exercised its enforcement discretion by relaxing certain HIPAA privacy and security rules to expand access to certain telehealth technologies, testing sites, and appointment scheduling during the PHE. Though OCR implemented a grace period to give health care providers time to return to full HIPAA compliance when the PHE concludes, this grace period will end 90 days afterwards.

There also were several 1135 waivers that will no longer be in effect when the PHE ends, such as waivers for practicing across state lines. Provider must evaluate their telehealth programs to ensure that they are conducted through HIPAA compliant systems and meet all cross-border practice requirements.

Conclusion

Overall, the PHE inspired many useful changes in the health care industry. The burgeoning of telehealth services has created a notable improvement for patient access to health care. Additionally, the relaxation of some supervisory rules has offered better job opportunities for nonphysician practitioners and significantly improved patient access to care.

But with the PHE coming to an end, providers should review their telehealth programs to ensure that they comply with applicable requirements, including those adopted by the CAA and CMS. Troutman Pepper's health care regulatory and health IT attorneys are available to answer any questions you may have about telehealth compliance requirements.

[1] The White House, "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak" (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

[2] The Centers for Medicare & Medicaid Services, "Physicians and Other Clinicians: CMS Flexibilities to Fight COVID-19" (Feb. 24, 2023), <https://www.cms.gov/files/document/physicians-and-other-clinicians-cms-flexibilities-fight-covid-19.pdf>.

[3] Press Release, Drug Enforcement Admin., "DEA's response to COVID-19" (Mar.20, 2020), <https://www.dea.gov/press-releases/2020/03/20/deas-response-covid-19>.

[4] Press Release, Drug Enforcement Admin., "DEA Announces Proposed Rules for Permanent Telemedicine Flexibilities" (Feb. 24, 2023), <https://www.dea.gov/press-releases/2023/02/24/dea-announces-proposed-rules-permanent-telemedicine-flexibilities>.

RELATED INDUSTRIES + PRACTICES

- Health Care + Life Sciences
- Health Care Transactions