Status of DEA Rules for Prescriptions via Telemedicine

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Richelle Marting is an attorney, registered health information administrator, and certified coder who focuses on healthcare coding, billing, and reimbursement issues. She has practical, in-the-trenches experience with coding and billing issues. She has served as an outpatient multi-specialty surgery coder, hospital-based outpatient coder and a compliance coordinator for a large multi-specialty medical group. As an attorney she advises clients proactively on complex reimbursement questions and has guided multiple clients through extensive Medicare and OIG audits and investigations.

The information in this session is intended to be educational and is not legal advice. No attorney-client relationship is created by way of this informational session.
Overview

- Basic Telehealth Prescribing Rules
- PHE Flexibilities
- The Ryan Haight Act
- Status of Pending DEA Rules
State law largely lays the framework for basic rules surrounding prescribing medications during a telehealth service.
Licensing

Ensure provider has appropriate licensure in the state where the patient is located.
Provider Patient Relationships

Kansas

Missouri

- Standard of Care
- Technology Sufficient to Establish Informed Diagnosis as though interview and physical examination were performed in person
- Questionnaire is not sufficient
Telemedicine encounters in this state shall not be used to establish a valid physician-patient relationship for the purpose of prescribing opiates, synthetic opiates, semisynthetic opiates, benzodiazepine or carisprodol, unless the encounter is used to prescribe:

• Opioid antagonists or partial agonists pursuant to Sections 1-2506.1 and 1-2506.2 of Title 63 of the Oklahoma Statutes; or

• A Schedule III, IV, or V controlled dangerous substance approved by the United States Food and Drug Administration for medication assisted treatment or detoxification treatment for substance use disorder.
Unprofessional conduct includes … Prescribing or administering a drug or treatment without **sufficient examination** and the establishment of a valid physician-patient relationship and not prescribing in a safe, medically accepted manner.

Abortion-inducing drugs shall not be provided directly to the patient through the mail, telemedicine or otherwise outside of the parameters of the Oklahoma Abortion-Inducing Drug Certification Program.
In Person Examination Requirement

- Kansas
- Missouri

But, see [Medicaid Update](#) for Behavioral Health:

2.6 In-Person Requirements Post Federal Declaration of Public Health Emergency (PHE)

- Individuals who have only received telemedicine and/or audio-only services must receive an in-person service within 6 months of their last service. After the initial 6-month in-person visit, all individuals must be seen in person, at minimum, once every 12 months.
- All new individuals being served via telemedicine and/or audio-only require an in-person service within 6 months of beginning services and then every 12 months following.
In Person Examination Requirement

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- Missouri

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Federal statute and DEA regulations generally require an in-person evaluation before prescribing controlled medications.

Ryan Haight Act
State Law and Federal Law

- Federal law affects DEA controlled substance licensure
- State law impacts professional licensure
- Neither are *payment rules*
• No controlled substances can be delivered, distributed, or dispensed by internet without valid prescription
• Valid prescription
  — Legitimate medical purpose
  — In the course of professional practice
  — by a practitioner who has conducted at least 1 in-person evaluation; or a covering practitioner
• In-person: in the physical presence of the practitioner
• Covering practitioner evaluates patient at the request of another practitioner who has conducted at least 1 in-person evaluation, or evaluation through telemedicine, within previous 24 months and who is temporarily unavailable to evaluate
The DEA exercised its broadened powers under the PHE declaration to waive in-person visit requirements prior to prescribing controlled substances via telehealth.
No in-person exam was required if:

• Prescription for legitimate medical purpose
• Practitioner acting in usual course of professional practice
• Audio visual, real-time, two-way interactive communication system
Nearing the End of the PHE

March 1, 2023 DEA Proposed Rule

21 USC 802(54)(G) allows prescribing controlled substances via telemedicine “under any other circumstances that the Attorney General and the Secretary have jointly, by regulation, determined to be consistent with effective controls against diversion and otherwise consistent with the public health and safety”
March 1, 2023 DEA Proposed Rule

Would authorize telemedicine under the CSA where:

- **the prescribing practitioner** has not conducted an in-person medical evaluation with the patient;
- the prescription was issued pursuant to a telemedicine encounter; **and**
- the telemedicine encounter results in a prescription for controlled medications

*Criteria for this authorization on next slide*
March 1, 2023 DEA Proposed Rule

Criteria to prescribe controlled substances under Proposed Rule, without an in-person visit:

• Prescriptions are in accordance with state and federal law
• Practitioners have active DEA registration in state in which practitioner is located
• Limit to initial 30-day supply
• Would be required to examine in-person within 30 days
• Would include a notation on the face of the prescription or on the electronic script order that script was issued via telemedicine
Alternatively, if the prescribing practitioner receives a qualifying telemedicine referral for the patient in the manner described herein, the practitioner may rely on the referring practitioner's in-person medical evaluation in order to prescribe the controlled substance via telemedicine.
March 1, 2023 DEA Proposed Rule

Non-narcotics

- New term ‘telemedicine prescription’ would be created for scripts of Schedule III-V non-narcotics
- must arise out of a telemedicine communication that occurs directly between the prescribing practitioner and that patient
- practitioner must be located within the United States
- practitioner must be authorized to prescribe the basic class of controlled substances under that practitioner’s DEA registration
- prescription must clearly indicate that it is being issued based on a telemedicine encounter
- Review PDMP data in state where patient is located
Nearing the End of the PHE

March 1, 2023 DEA Proposed Rule

Special Registration Process

• Rural area
• Qualifying original sites

Not likely adopted at this time
Note: Prescription of SUD narcotics for maintenance and detoxification treatment via telemedicine are subject to separate rulemaking.
The DEA has not issued a final rule following its March 2023 proposals

Status of Pending DEA Rules
Second temporary rule **October 10, 2023**
“Further extending existing DEA regulations for new practitioner relationships”

September 12 and 13, 2023  **DEA Telemedicine Listening Sessions**
• Extended PHE flexibilities surrounding prescriptions of controlled substances via telehealth through December 31, 2024
Status of Pending DEA Rules

Second temporary rule October 10, 2023
“Further extending existing DEA regulations for new practitioner relationships”

September 12 and 13, 2023  DEA Telemedicine Listening Sessions
• Day 1 Transcript
• Day 2 Transcript
Second temporary rule October 10, 2023
“Further extending existing DEA regulations for new practitioner relationships”

• Authorizes all DEA-registered practitioners to prescribe schedule II–V controlled medications via telemedicine through December 31, 2024

• Whether or not the patient and practitioner established a telemedicine relationship on or before November 11, 2023
Questions?

Available Through Heartland Telehealth Resource Center for Technical Assistance

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