

# Telemedicine and COVID-19



Healthcare

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## About Markel's Risk Solution Services team

**Risk Solution Services** provides technical insight related to existing and potential insured risk at Markel. The team partners with our customers, claims, and underwriters to educate on both current and future risk trends and supports our clients with a broad offering of risk management solutions.

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Telemedicine has proven to be a critical tool for the safe and effective management of patients during the pandemic. Its adoption has truly been explosive. Many state and federal laws and regulations have been rapidly enacted to accommodate virtual patient care during the pandemic. The numbers of telemedicine visits projected to occur in 2020 may reach as high as one billion, dramatically upward of pre-pandemic projections of 20 million visits.<sup>1</sup> With more virtual patient encounters comes more risk.

### Telemedicine: virtually perfect for the pandemic

Patients with mild COVID-19 symptoms have been able to use telemedicine visits to see practitioners and thereby reduce the strain on physicians' offices and emergency departments. Patients can be safely triaged to determine which ones need in-person care, coordinate testing, and answer questions. For other conditions, telemedicine has proven to be highly effective in promoting continuity of care as well as maximizing patient and provider safety while maintaining a flow of revenue to practices and health care organizations. However, telemedicine can present challenges for some patients. Virtual visits are dependent on internet capacity, an issue of availability in rural areas, and affordability in many urban neighborhoods. Thus there is the potential for poor image quality, dropped calls, and delays. Training staff has also been a major challenge.<sup>2</sup>



### Key federal law and regulatory revisions due to COVID-19



At the federal level, the Office for Civil Rights (OCR) of the Department of Health and Human Services (DHHS) issued bulletins in February and March 2020 expanding circumstances where sharing information is permissible and stating that it will waive penalties for HIPAA violations of privacy rules against providers caring for patients by use of “everyday communications technologies”. There was a list of acceptable video chat vendors published such as Skype, FaceTime, Facebook Messenger, Zoom, among others.<sup>3</sup>

The Centers for Medicare & Medicaid Services (CMS) in March 2020 significantly broadened payment for “office, hospital and other visits...that generally occur in-person” by telehealth communications, including in the residences of patients. This expansion was done on a “temporary and emergency basis”.<sup>4</sup> CMS also waived requirements for certain aspects of physician credentialing and privileging by health care organizations, especially hospitals, in order to maximize care capabilities.<sup>5</sup>

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## Key state law and regulatory revisions due to COVID-19

Most states and the District of Columbia have revised their telemedicine oversight laws. Chiefly these changes have permitted Medicaid programs to cover telemedicine services provided by telephone or in a patient's home. More states are now requiring commercial payers to cover telemedicine services at similar rates to in-person visits.



Most states have issued full waivers of in-state licensing requirements for health care providers utilizing telemedicine during the pandemic, although there may be limitations.<sup>6</sup> A number of states have also expedited the process for obtaining licenses for those out-of-state physicians wishing to provide telemedicine services and also for retired or inactive physicians.<sup>7</sup>

It is too early to know if the temporary revisions of federal and state laws will continue in effect after the pandemic abates. There are lobbying efforts by providers to that effect. Many think telemedicine has already become a critical and permanent component of the health care delivery system.

## Risk management and telemedicine

The pandemic has accelerated the evolution of telemedicine. Input from insurance carriers and defense attorneys indicates that the frequency of claims related to telemedicine prior to the pandemic was quite low. But with the dramatic increase in patient encounters due to COVID-19 comes more exposure. The chief exposure is diagnostic error, but there are others. Crossing state lines makes defending telemedicine malpractice cases more complex due to potential differences in law as to jurisdictional issues, standard of care, statute of limitations, damage caps, patient compensation funds, and other related issues.

There are effective ways to mitigate telemedicine risk.<sup>8</sup>



**Get good legal advice.** Telemedicine is extraordinarily complex from a legal and regulatory standpoint. The laws are changing rapidly so it is essential to obtain good legal advice before proceeding.



**Determine which patients can be appropriately seen by video encounter.** Patient selection criteria must be researched and created. This includes which visits must be in-person, which patients can use the technology. Specialty society positions and guidelines should be resourced.

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**Train the staff in use of the technology.** Training should encompass practicing patient encounters from start to finish including documentation. Coach staff initially and support infrequent users. Train on all types of modalities employed and how to troubleshoot technical issues.



**Verify patient identity.** Check driver’s license; ask appropriate questions about previous visits/history.



**Document the video encounter in the electronic medical record.** Include such key aspects as test ordering and results, communication of them, and any other communications including with family, and coordination with other providers. Especially document any technical issues that affected the encounter.



**Document informed consent.** Particularly document that the patient understands the limitations of a video exam. Note that some states have telehealth-specific informed consent laws.



**Obtain legal review of telemedicine practice guidelines and forms.** Be aware of applicable specialty society guidelines or others (e.g. American Telemedicine Association) that may apply. Avoid verbiage that sets too high of an internal standard of care. A few states define a telemedicine standard of care.



**Verify liability insurance coverage.** Crossing state lines changes medical professional liability (MPL) risk and therefore the insurance coverage. Existing MPL insurance policies should be reviewed by legal counsel and the agent or broker. Notify the carrier whenever there is a change in telemedicine practices across state lines or internationally.



**Promote patient privacy.** Train staff in telemedicine-specific health care privacy and security. Review how telemedicine services will affect existing privacy and security guidelines, policies and procedures, and workflow.



**Delineate the maintenance of equipment.** Contracts with equipment vendors must clearly specify the responsibility for equipment maintenance and include such issues as backup plans, preventive maintenance, software, and technical updates.

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