

# COVID-19 Regulatory Update: The Latest on Waivers and More

Presented by:

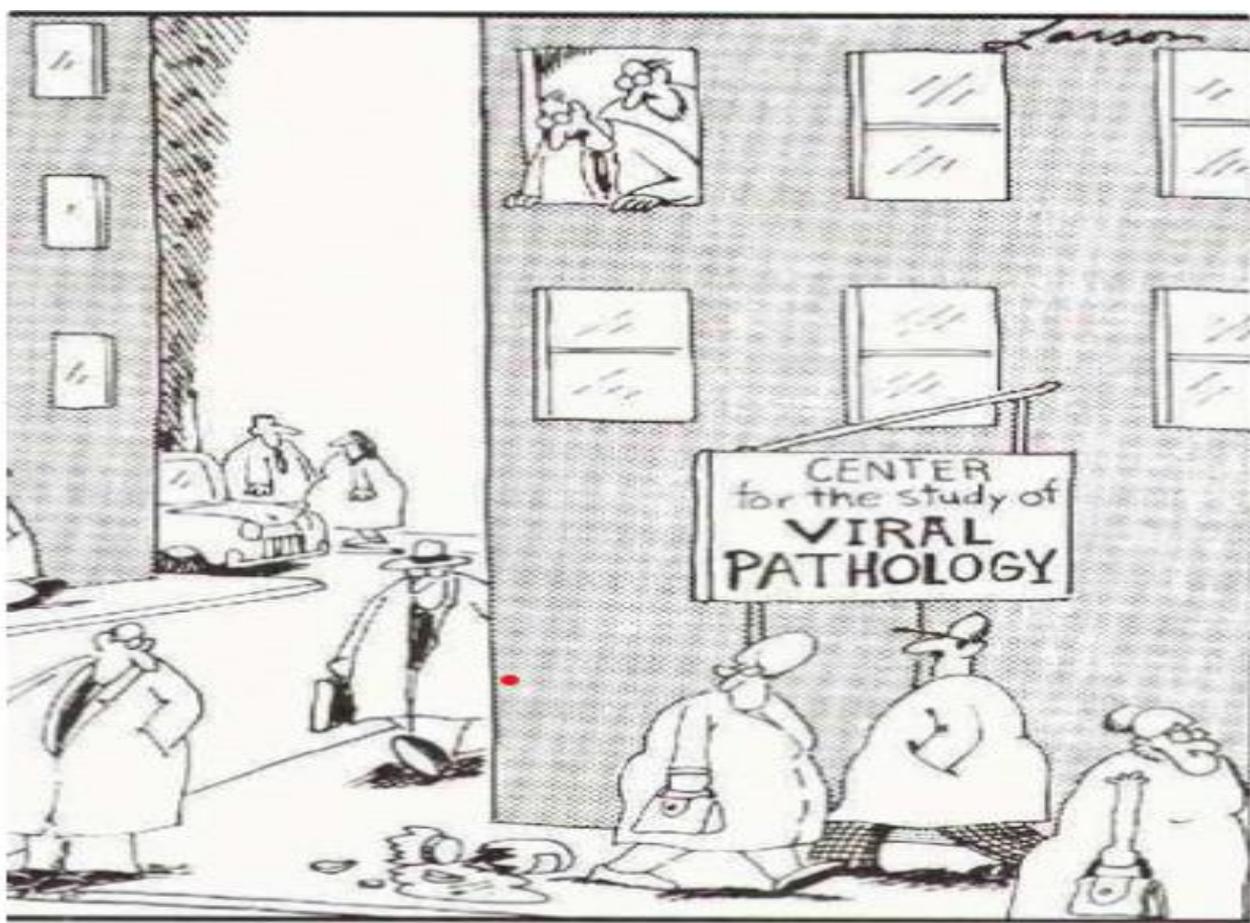
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**Fredrikson**  
BYRON, P.A.







"Uh-oh."

# Overview

- Waivers issued by HHS
  - “Real” waivers.
  - “Permission to ask.”
- CARES Act changes. Mostly Money.
  - 500 or fewer employees? Stay ‘til the end!
- State law still matters?!
- Most of this applies only during the emergency!

# Links

- <https://www.cms.gov/about-cms/emergency-preparedness-response-operations/current-emergencies/coronavirus-waivers>
- <https://www.congress.gov/bill/116th-congress/house-bill/748/text#toc-H7CAF75A99DA145498EEC76D9FE55E295>
- <https://www.congress.gov/bill/116th-congress/house-bill/6074/text>
- <https://www.cms.gov/files/document/covid-19-blanket-waivers-section-1877g.pdf>
- <https://www.cms.gov/files/document/qso-20-15-hospital-cah-emptala-revised.pdf>

# Acronyms

- PHE = Public Health Emergency.
- IFC = Interim Final Rule with Comment Period.
- CTBS = Communication Technology-Based Services.
- IRF = Inpatient Rehabilitation Facility.

# Acronyms

- PHE = Public Health Emergency.
- IFC = Interim Final Rule with Comment Period.
- WTF = You know.
- CTBS = Communication Technology-Based Services.
- IRF = Inpatient Rehabilitation Facility.

# Stark

- Purportedly a “blanket waiver.”
- “For each blanket waiver, the waiver of Section 1877(g) is limited to the circumstances described in the individual blanket waiver, and healthcare providers must satisfy all conditions of the blanket waiver in order to rely on the blanket waiver.”
- Remuneration and referrals must be “solely related to COVID-19 purposes.”
- No duty to report, must make documents available upon request.
- Effective 3/1/20.

# Six Stark Permissible Purposes

- Diagnosis/treatment of COVID-19, regardless of confirmed diagnosis.
- Securing services of physicians/other professionals to provide medically necessary care, including services unrelated to COVID-19.
- Ensuring ability of healthcare providers\* to meet need.
- Expanding the capacity of healthcare providers\*.
- Shifting diagnosis and care to appropriate alternative settings.
- Addressing medical practice or business interruption to maintain the availability of medical care.

# 18 Blanket Waivers

- Above or below fair market value comp to a physician.
- Various below market rental charges.
- Excessive incidental medical staff benefits/non-monetary comp.
- Loans.

# 18 Blanket Waivers

- Expansion of physician-owned hospitals.
- Failure to satisfy the same building requirement including services in patients' homes.
- Family member ownership in a rural area.
- Missing writing/signatures.

# EMTALA

- No major changes since our last webinar.
- Flexibility for transfers, not really for discharge.
- Flexibility on where screenings are necessary. Can be sent from ED to other locale, even off-campus.

# EMTALA

- Only clinic staff should send someone FROM the ED. Non-clinical staff can assist at other doors/locations to direct patients to COVID testing.
- Off-site testing that isn't under hospital control is not subject to EMTALA, even if hospital staff participate.

# Expanding “Telehealth”

- Pre COVID-19: Medicare “telehealth” is:
  - Treatment via “audio/visual, interactive, real-time telecommunication technology.”
  - Distinguishable from Communication Technology-Based Services (“CTBS”).
  - Discrete set of codes.
  - Limited set of locations.
  - Only statutorily authorized practitioners.
  - Originating site facility fee + professional fee; Place of Service code 02.

# Know Your Device

- CMS' current position is that “telehealth” cannot be done on a “dumb” phone, like a rotary dial, old time flip phone, or one of those crank thingies. That would be “telephone.”

# First “Telehealth” Expansion

- As of March 6, 2020, CMS will pay for telehealth services furnished anywhere, including patient’s residence.

# Additional “Telehealth” Expansion

- 3/30/2020 interim final rule.
  - Instructs practitioners billing for telehealth to report the POS code that would have been reported if the service was furnished in person.
  - CMS is assuming the costs of services typically incurred by the originating site are, during COVID-19, incurred by the practitioner furnishing telehealth as if the visit was in-person).

# Expansion of “Telehealth” Codes during COVID-19

- For dates of service beginning March 1, 2020, through the end of the declared Public Health Emergency (“PHE”), including any subsequent renewals, the “telehealth” codes include:

# “Telehealth” Allowed For:

- Emergency Department Visits, Levels 1-5 (CPT codes 99281-99285).
- Initial and Subsequent Observation and Observation Discharge Day Management (CPT codes 99217-99220; 99224-99226; 99234-99236).
- Initial Hospital Care and Hospital Discharge Day Management (CPT codes 99221-99223; 99238-99239).

# “Telehealth” Allowed For:

- Initial Nursing Facility Visits, All Levels (Low, Moderate, and High Complexity) and Nursing Facility Discharge Day Management (CPT codes 99304-99306; 99315-99316).
- Critical Care Services (CPT codes 99291-99292).
- Domiciliary, Rest Home, or Custodial Care Services, New and Established (CPT codes 99327-99328; 99334-99337).

# “Telehealth” Allowed For:

- Home Visits, New and Established, All Levels (CPT codes 99341-99345; 99347-99350).
- Inpatient Neonatal and Pediatric Critical Care, Initial and Subsequent (CPT codes 99468-99473; 99475-99476).
- Initial and Continuing Intensive Care Services (CPT codes 99477-994780).
- Care Planning for Patients with Cognitive Impairment (CPT code 99483).

# “Telehealth” Allowed For:

- Group Psychotherapy (CPT code 90853)
- End-Stage Renal Disease Services (CPT codes 90952-90953; 90959; 90962).
- Psychological and Neuropsychological Testing (CPT codes 96130-96133; 96136-96139).

# Therapy and “Telehealth”

- Physical therapists, occupational therapists, and speech-language pathologists are not statutorily authorized to provide “telehealth.”

# Therapy and “Telehealth”

- CMS is putting PT/OT/SLP codes on “telehealth” list for the PHE. But, they will be paid only if performed by a physician or “practitioner” (physician assistant, nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, certified nurse-midwife, clinical social worker, clinical psychologist, registered dietician)

# “Telehealth” Allowed For:

- Therapy Services, Physical and Occupational Therapy, All Levels (CPT codes 97161-97168; 97110; 97112; 97116; 97535; 97750; 97755; 97760-97761; 92521-92524; 92507).
- Radiation Treatment Management Services (CPT code 77427)

# Removal of Frequency Limits

- During the PHE, CMS is removing the frequency limitations for the following services furnished via “telehealth”:
  - Subsequent inpatient visits (CPT 99231-99233).
  - Subsequent nursing facility visits (CPT 99307-99310).
  - Critical care consultation services (G0508-G0509).

# E&M Telephone Services

- 98966-68: non-physician (including LCSW, psychologist, PT, OT, SLP). Therapy uses GO, GP, GN modifier.
- 99441-43: Physician.
- NOT limited to established patients, **despite code description.**

# CTBS: Communication Technology-Based Services

- G2010: remote eval of recorded video/image interp and follow up with patient.
- G2012: brief check in (5-10) minutes.
- Can't be within 7 days post-related\* E&M or cause visit/procedure with 24 hours/soonest available.
- Consent may be documented by auxiliary personal under general supervision, but **MUST** be documented.

# Selecting E&M During Telehealth

- Use MDM or time.
- Time can be used even if no counselling.
- No reimbursement need to document history or exam!! (So what's the problem with telephone?)

# Copays and Deductibles

- OIG allows waiver of all cost sharing for telehealth during the emergency.
- Can, but, need not, collect.
- Private plans are all over.

# CARES on Pricing

- Must list COVID test cash price on website.
- Insurer must pay either the contracted rate or listed price.

# Remote Direct Supervision

- Changing 42 CFR 410.32 to add “During a PHE...the presence of the physician includes virtual presence through audio/video real-time communications technology when use of such technology is indicated to reduce exposure risks for the beneficiary or health care provider.”
- Must the link be open, or is availability enough?

# Remote Direct Supervision

- “*Direct supervision* in the office setting means the physician must be **present** in the office suite and **immediately available** to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician must be present in the room when the procedure is performed.” (bold/underlining added).
- Availability should be enough.

# Home Health

- Still can't substitute technology for an in-person visit.
- But you may provide more services via technology in conjunction with in-person visits.
- May also report the costs of the telecommunications technology as allowable administrative and general (A&G) on the cost report.

# Home Health

- CARES Act authorizes nurse practitioners (NPs) and physician assistants (PAs) to order home health for Medicare (if permitted by state law).

# Who is “Homebound” during the PHE?

- During the PHE, a person may be “homebound” for home health purposes if a physician has determined it is medically contraindicated for the patient leave home b/c of
  - (1) a confirmed or suspected case of COVID-19; or
  - (2) a condition that may make the patient more susceptible to contracting COVID-19.

# Hospice

- Face-to-face encounters for recertification for hospice may be done by “telehealth” during the PHE.

# Inpatient Rehab Facilities (IRFs)

- During the PHE
  - CMS is removing the post-admission physician evaluation within 24 hours requirement.
  - The required 3 face-to-face physician visits per week during the PHE may be furnished via “telehealth.”

# Inpatient Rehab Facilities (IRFs)

- During the PHE, removing the “current industry standard” expectation of 3 hours of therapy per day, 7 consecutive days, if IRF program is impacted by the PHE (e.g., staffing disruptions, infection, etc.)

# Clinical Lab Specimen Collection

- \$23.46 for homebound and non-hospital inpatients.
- \$25.46 for SNF or done for HHA.

# Teaching Physician/Residents

- 42 CFR 415.172 gets “During the Public Health Emergency...if a resident participates in a service furnished in a teaching setting, physician fee schedule payment is made if a teaching physician is present during the key portion of the service using interactive telecommunications technology for any service or procedure for which payment is sought.”

# Teaching Physician/Residents

- “*General rule.* If a resident participates in a service furnished in a teaching setting, physician fee schedule payment is made only if a teaching physician **is present** during the key portion of any service or procedure for which payment is sought.”
- Availability is inadequate.

# Teaching Physician/Residents

- Services by a moonlighting resident to a hospital inpatient can be reimbursed if not part of the residency program.
- Time spent in a resident's or patient's home or a car can count toward the program time, even though it is outside of the hospital.

# Opioid Treatment Programs (OTPs)

- During the PHE, CMS is allowing therapy and counseling portions of the weekly bundle of services by OTPs, and add-on codes for additional counseling or therapy, to be furnished by audio-only telephones (i.e., no need for A/V technology).

# NCD/LCD Changes

- Face to face waived, unless statutorily required (power chairs).
- CMO can authorize other professionals to substitute for “Physician.”
- Waiver of NCDs and LCDs on respiratory-related devices, oxygen and oxygen equipment, home infusion pumps and home anti-coagulation therapy.

# Clinical Indications Waived For:

- NCD 240.2 Home Oxygen.
- NCD 240.4 Continuous Positive Airway Pressure for Obstructive Sleep Apnea.
- LCD L33800 Respiratory Assist Devices (ventilators for home use).
- NCD 240.5 Intrapulmonary Percussive Ventilator.
- LCD L33797 Oxygen and Oxygen Equipment (for home use).

# Clinical Indications Waived For:

- NCD 190.11 Home Prothrombin Time/International Normalized Ratio (PT/INR) Monitoring for Anticoagulation Management.
- NCD 280.14 Infusion Pumps.
- LCD L33794 External Infusion Pumps.

# Alternative Payment Models

- CMS: “We will consider undertaking additional rulemaking, including possibly another interim final rule, to amend or suspend APM QPP policies as necessary to ensure accurate and appropriate application of Quality Payment Program policies in light of the PHE due to COVID-19.”

# Hospital Services Under Arrangements

- “Routine services” were not to be provided outside the hospital “under arrangements.”  
Can for now.
- Cost-based hospital sends patient to IPPS hospital, but cost-based treats it as “under arrangements.”

# Physician Supervision for Outpatient Hospital Therapeutic NSEDT Services

- During the PHE, all outpatient hospital therapeutic services that are “non-surgical extended duration therapeutic services” need only general supervision.

# Advance Payments to Suppliers

- Can request accelerated payment of 100%, rather than 80% of anticipated payment.
- Repayment starts after 120 days.
- Generally, hospitals have up to one year from the date the accelerated payment to repay.
- All other Part A providers and Part B suppliers will have 210 days.

# Ambulance Origin and Destination Requirements

- During the PHE, a covered destination includes a general ambulance transport from any port of origin to a destination equipped to treat the condition of the patient, including alternative site determined to be part of a hospital, CAH or SNF, community mental health centers, FQHCs, RHCs, physician offices, urgent care facilities, ASCs., and the beneficiary's home.

# Appeals

- CMS giving MACs/QICs ability to grant extensions.
- Note this is permissive/discretionary.
- Additional flexibility on Appt. or Rep.

# Various Waivers

- Ability to lease auxiliary personnel and bill them “incident to.” (Wasn’t that always true?)
- Hospital services can be under the care of NPs or PAs consistent with the state’s emergency preparedness or pandemic plan.
- MIPS may apply and request re-waiting of MIPS.
- Adding new improvement activity or a clinical trial to treat COVID-19 patients and reporting clinical data.

# Various Waivers

- Medicare and Medicaid do not require a state license, though state rules still apply. Exclusion still applies.
- Opted-out physicians may reenroll.
- All revalidation suspended.
- Signature and proof of delivery requirements for Part B drugs and DME waived if documentation shows due to COVID-19.

# CJR Changes

- 3 month extension for PY5 (Mar. 31, 2021).
- Broadens extreme and uncontrollable circumstances policy:
  - All participant hospitals qualify for the financial safeguards during the emergency period.
  - Impacts episodes with an anchor hospitalization within 30 days of the emergency period through the termination of the emergency.

# Payroll Protection Program

- Eligibility:
  - Businesses with 500 or fewer employees can apply.\*
- Max. Loan Amount:
  - 2.5 x Avg. “Payroll Costs” from prior 12 months, plus EIDL loan amounts from January 31 – April 3, 2020; or \$10M.
  - Payroll calculations are capped – any compensation of an individual employee in excess of an annual salary of \$100,000 cannot be included.

\*Businesses in certain industries can have more than 500 employees if they meet applicable SBA employee-based size standards for those industries.

# PPP – Loan Terms

- Loan Terms:
  - 2 year maturity
  - 1.00% fixed rate
- Permissible Uses:
  - Payroll costs, including benefits (75% requirement);
  - Interest on mortgage obligations;
  - Rent; and
  - Utilities.

# PPP – Payroll Costs

- Salary, wages, commissions, or tips (capped at \$100,000 on an annualized basis for each employee and excluding those with a principal place of residence outside the US);
- Employee benefits including costs for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payments required for the provisions of group health care benefits including insurance premiums; and payment of any retirement benefit;
- State and local taxes assessed on compensation; and
- For a sole proprietor or independent contractor: wages, commissions, income, or net earnings from self-employment (capped at \$100,000 on an annualized basis).

# PPP – Forgiveness

- Potentially fully forgivable, but:
  - 75% of loan proceeds need to be used towards payroll.
  - Proportionally reduced by any decrease in FTE.
  - Reduced by any decrease in salaries/wages by more than 25% (for employee making < \$100,000).
- Rehire:
  - You have until June 30, 2020 to restore your full-time employment and salary levels for any changes made between February 15, 2020 and April 26, 2020.



# Questions for the Presenters:



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