

## Privacy and Telehealth

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## Agenda

- ◆ Telehealth during the pandemic
  - ▶ Reimbursement policy promoting telehealth
  - ▶ Additional regulator action affecting remote practice
  - ▶ OCR enforcement discretion
- ◆ Practical considerations: remaining HIPAA compliant during pandemic
- ◆ What does the future of telehealth look like (and what should be done to meet privacy and security requirements)?

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### **Care during the Pandemic:**

*How have flexibilities and rule changes, granted during the COVID-19 public health emergency (PHE), led to a rapid expansion in the adoption of telehealth?*

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### **Care During the Pandemic: Telehealth**

- ◆ *Medicare reimbursement*
  - ▶ CMS waived requirement that the “originating site” be in a rural or health professional shortage area
  - ▶ Applies not only to services relating to cases of COVID-19, but to all covered telehealth services
  - ▶ Practitioners utilize place of service (POS) codes that would have been reported had the services been provided in person

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## Care During the Pandemic: Telehealth

### ◆ *Medicare reimbursement (cont'd.)*

- ▶ CMS waived requirement that healthcare professional be licensed in the state in which they provide services for purposes of Medicare reimbursement
- ▶ “Established patient” limitations lifted
- ▶ Significant expansion of covered services, such as ER visits, discharge and home visits

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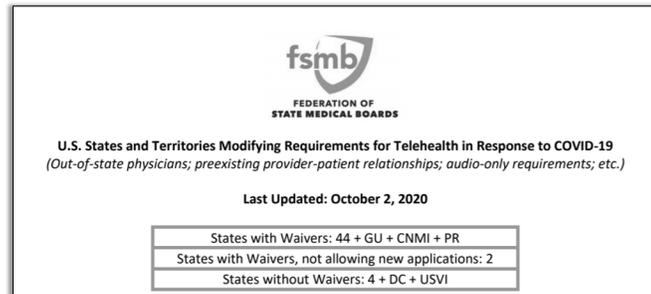
## Care During the Pandemic: Telehealth

### ◆ *State-level changes*

- ▶ States have taken considerable action regarding flexibilities such as –
  - Waiving requirements for preexisting provider-patient relationship
  - Permitting physicians and NPPs licensed in “home” state temporarily to furnish telehealth care to patients in the state without additional license
  - Allowing “remote” supervision of midlevel practitioners
  - Requiring commercial payors to cover telehealth services

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## State level action – waiver of licensure requirements



*Practical impact?*

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## Care During the Pandemic: Telehealth

- ◆ *Additional regulator action*
  - ▶ CMS has granted state waivers of certain Medicaid program reimbursement requirements for telehealth
  - ▶ DEA-registered practitioners may issue prescriptions for certain controlled substances without in-person evaluation if certain requirements are met
  - ▶ OIG will not bring enforcement action for waiver of cost-sharing obligations during PHE

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## HIPAA during the PHE

- ◆ Section 1135 waiver authority (HIPAA)
  - ▶ Limited in practical impact (hospitals only, limited duration)
- ◆ OCR Enforcement Discretion (more impactful)
  - ▶ Will not impose penalties against covered healthcare providers for noncompliance with privacy, security and breach notification rules in the ***good faith provision of telehealth*** during the COVID-19 pandemic

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## HIPAA during the PHE

- ◆ OCR enforcement discretion for good faith provision of telehealth:
  - ▶ Not applicable to health plans
  - ▶ Is separate from CMS telehealth waivers (*i.e.* OCR enforcement discretion applies to all telehealth regardless of payor)
  - ▶ Applies whether or not the care is directly related to COVID-19 treatment/prevention

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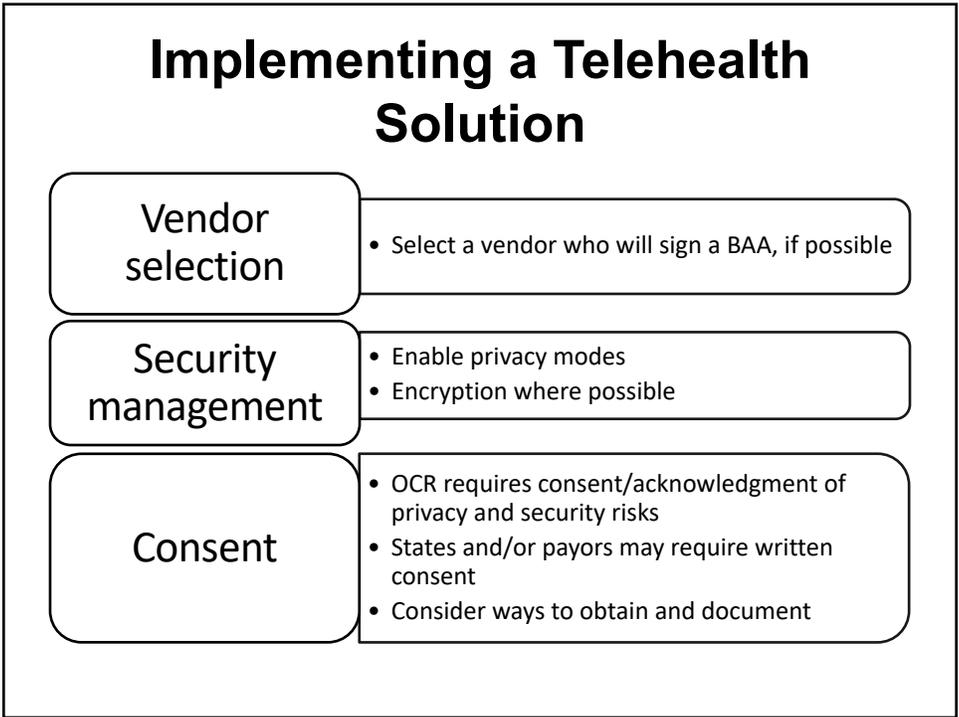
## Telehealth and the PHE

- ◆ OCR enforcement discretion for good faith provision of telehealth (cont'd.)
  - ▶ OCR will not impose penalties against covered health care providers for the lack of a BAA with video communications vendors
  - ▶ Platform may not be public-facing (such as Facebook Live, TikTok, or Twitch)
  - ▶ Conducted in a private setting

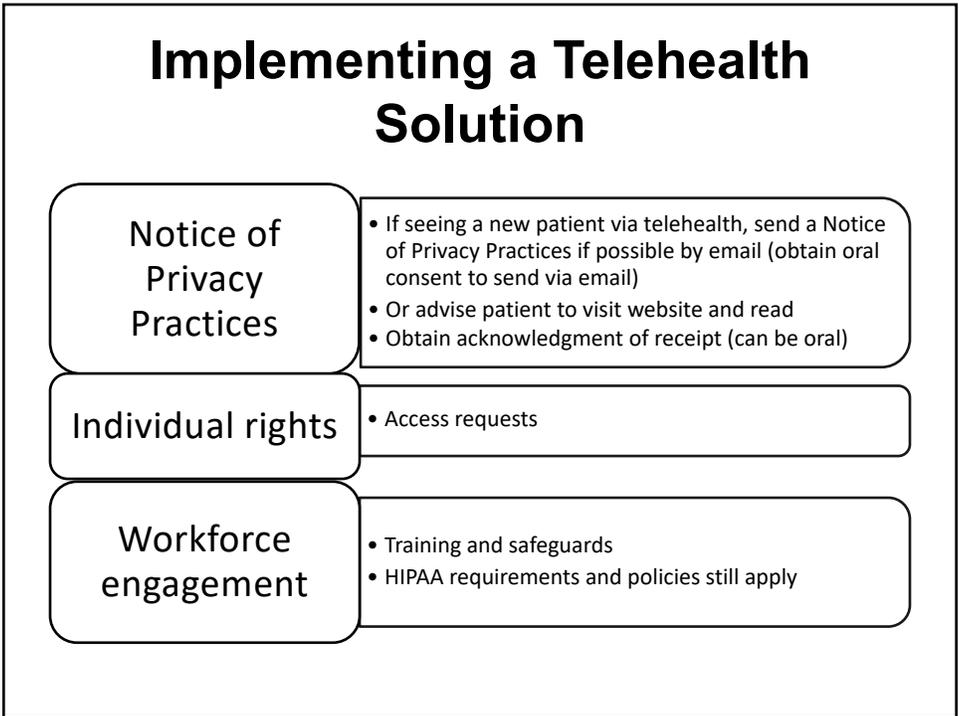
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*What are best practices for remaining HIPAA compliant in the use of telehealth during the PHE?*

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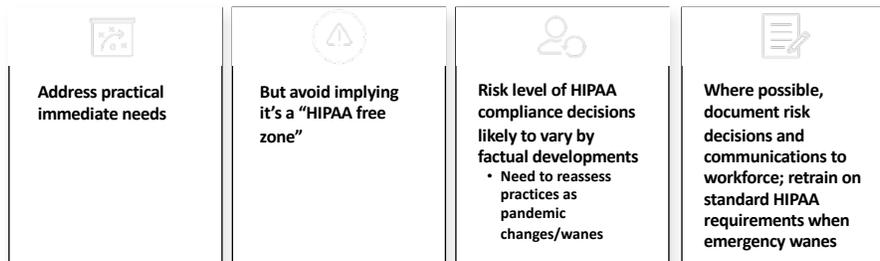
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## What if there is a breach?

- ◆ OCR “will not pursue otherwise applicable penalties for breaches that result from the good faith provision of telehealth services...”
- ◆ Best practices
  - ▶ Advise/train providers to report any known non-permitted use or disclosure
  - ▶ Notify affected individuals (consider state law)
  - ▶ Implement reasonable and appropriate safeguards

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## Risks to Consider and Manage



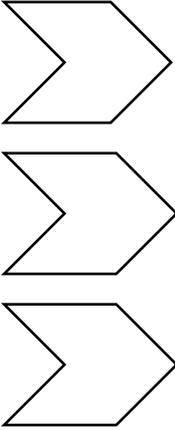
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**Care after the pandemic:**

*Considerations for telehealth and privacy after the PHE, both immediate and far-reaching*

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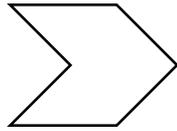
## HIPAA Compliance in Telehealth after the PHE



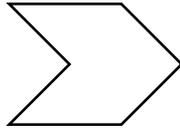
- Obtain BAAs with technology vendors if not already in place
- Review permitted uses and disclosures of PHI (e.g. public health reporting)
- Terminate relationships where vendor cannot or will not sign a BAA
- Where relationship is terminated, request/ensure return or secure destruction of PHI

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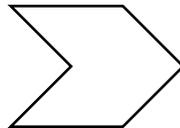
## HIPAA Compliance in Telehealth after the PHE



- Review/inquire about security and privacy settings for any telehealth platforms and vendors in use.



- Ensure encryption is enabled.



- Track and review any security incidents arising from use of telehealth during PHE.

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## Future of Telehealth

- ◆ CMS proposes:
  - ▶ To keep certain codes on the approved telehealth list even after the PHE is over
  - ▶ To not continue payment for audio-only services
  - ▶ Allowing direct supervision of NPPs to include the virtual presence of a physician
  - ▶ Removing its position that telephone, fax and email do **not** constitute interactive telecommunications system

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# Future of Telehealth



Sec. 5. Expanding Flexibilities Beyond the Public Health Emergency. Within 60 days of the date of this order, the Secretary shall review the following temporary measures put in place during the PHE, and shall propose a regulation to extend these measures, as appropriate, beyond the duration of the PHE:

- (a) the additional telehealth services offered to Medicare beneficiaries; and
- (b) the services, reporting, staffing, and supervision flexibilities offered to Medicare providers in rural areas.

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# Future of Telehealth

"President Trump is delivering on his promise of an affordable, patient-centered healthcare system for all Americans," said HHS Secretary Alex Azar. "Telehealth use has skyrocketed during the pandemic thanks to the President's actions, and the telehealth revolution is here to stay. The new gold standard for healthcare will be patients and providers deciding on the right blend of in-person and virtual care, when and where it makes sense for them. The President is now directing HHS to keep charging ahead on giving Americans better access to the doctors of their choice, including via telehealth. The President's executive order on rural health will help transform care for forgotten Americans who deserve better healthcare and better access to their doctors."

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## Privacy and the Future of Telehealth

- ◆ Policies and procedures
- ◆ Training and safeguards
- ◆ Security risk assessments (and security investment generally)
- ◆ Right of access initiatives
- ◆ Information blocking considerations
- ◆ Additional items
  - ▶ Contractual considerations
  - ▶ Malpractice insurance

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## Questions?

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