Telemedicine: State Legislation Update

On May 27, 2017, Texas Governor Greg Abbott signed Senate Bill 1107, which sets forth guidelines for telemedicine and telehealth service delivery within the State of Texas.\(^1\) Upon the governor’s signature, Texas became the last state to grant physicians the ability to establish a physician-patient relationship via telemedicine platforms.\(^2\) Specifically, the legislation details three conditions for establishing a physician-patient relationship via telemedicine medical services:

1. The physician must have “a preexisting practitioner-patient relationship with the patient”;\(^(3)\)
2. The physician must “communicate[ ], regardless of the method of communication, with the patient pursuant to a call coverage agreement in accordance with Texas Medical Board Rules”; and,\(^(4)\)
3. The physician must provide telemedicine services through either “synchronous audiovisual interaction” or “asynchronous store and forward technology…in conjunction with synchronous audio interaction.”\(^(5)\)

In addition to these guidelines, the new legislation gives the Texas Medical Board jurisdiction over the law, including the right to:

1. “Ensure that patients using telemedicine medical services receive appropriate, quality care”;\(^(6)\)
2. “Prevent abuse and fraud in the use of telemedicine medical services, including rules relating to the filing of claims and records required to be maintained in connection with telemedicine medical services”;\(^(7)\)
3. “Ensure adequate supervision of health professionals who are not physicians and who provide telemedicine medical services”; and,\(^(8)\)
4. “Establish the maximum number of health professionals who are not physicians that a physician may supervise through a telemedicine medical service.”\(^(9)\)

Other notable mandates from the legislation include:

1. A health professional providing a telemedicine medical service is “subject to the standard of care that would apply to the provision of the same health care service or procedure in an in-person setting.”\(^(10)\)
2. Payors cannot reject the reimbursement of telemedicine services on the basis that the service “is not provided through an in-person consultation.” However, audio-only or visual-only platforms are not protected under this rule.\(^(11)\)
3. Providers cannot “prescribe[ ] an abortifacient or any other drug or device that terminates a pregnancy” if a physician-patient relationship is to be established via telemedicine medical services.\(^(12)\)
4. At this time, a physician-patient relationship via telemedicine medical services cannot be established for mental health services.\(^(13)\)

This legislation is anticipated to end a two-year antitrust lawsuit between Dallas-based telehealth vendor Teladoc and the Texas Medical Board.\(^(14)\) Teladoc filed suit against the Texas Medical Board arguing that the state’s original laws requiring in-person meetings between physicians and patients “dramatically restrict[s] telehealth services in Texas” and is anti-competitive under section 1 of the Sherman Act.\(^(15)\) With the new legislation repealing this in-person requirement, the direct-to-consumer telehealth market is expected to increase in Texas. Teladoc and some of its competitors, such as American Well, MDLive, and Doctor on Demand, have already announced plans to expand their business enterprises within the state in response.\(^(16)\)

Texas is not the only state experiencing a shift in its telemedicine landscape. In 2016, 44 states introduced over 150 pieces of legislation addressing a wide array of telemedicine-related issues.\(^(17)\) Specifically, states have passed laws relating to telemedicine reimbursement and standards of care for telemedicine service delivery. For example, Vermont recently passed legislation requiring insurers to cover telemedicine consultations that occur outside of healthcare organizations, such as the home or workplace, effective October 1, 2017.\(^(18)\) Additionally, New Jersey is considering passing a law that would subject health practitioners providing telemedicine consultations to the same standards of care and rules as those practitioners providing an in-person consultation.\(^(19)\)

As Texas and other states experience increases in telemedicine utilization, lawmakers will likely continue

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to introduce and revise laws centered on regulating its standard of care and reimbursement policies.

In addition to state initiatives, attempts have been made on the federal level to promote telemedicine use. For example, the 21st Century Cures Act, signed into law in 2015, gives the Centers for Medicare and Medicaid Services (CMS) the authority to identify telemedicine's potential through demonstration projects. The Expanding Capacity for Health Outcomes Act (ECHO) mandates that the Department of Health and Human Services (HHS) researches and reports on the usefulness of telemedicine in rural and underserved areas. However, despite the progress that has been made to promulgate laws related to telemedicine across the U.S., there remains a patchwork of laws, which vary from state to state. This trend is especially pronounced in regards to parity laws (i.e., laws that require private payors to reimburse for telemedicine services at rates comparable to in-person services), in which only 33 states and the District of Columbia have passed to some degree. Further, Medicaid coverage of telemedicine services also differs, with 48 state Medicaid programs providing coverage, but to varying degrees. The ideologically divisive views on healthcare reform in the U.S. have resulted in the majority of telemedicine reform measures occurring at a state, rather than a federal, level.

With telemedicine market proliferation comes the opportunity for the development of health services in areas that lack access to health providers. Specifically in Texas, numerous lawmakers, companies, and legal professionals have argued that “Texas’ continued requirement of the initial face-to-face encounter has stunted the growth of telemedicine in a state that is well positioned to benefit from telemedicine's ability to connect patients in underserved or rural areas without immediately access to the right healthcare providers that the patient needs the most.” With Texas ranking 46th in the U.S. in the number of primary care physicians per capita, millions of residents will now have convenient access to medical care via telemedicine services. The increase in telemedicine usage does not only have positive implications for Texas, but for other states as well. Over 6,000 Health Professional Shortage Areas (HPSAs) have been identified across the U.S., affecting 60 million people. It is estimated that over 8,000 primary care physicians would be needed to alleviate these shortages. Increasing access to, and encouraging the use of, telemedicine services through legislation may be one of the viable solutions to addressing this critical shortage.

4. Ibid.
5. Ibid.
6. Ibid.
7. Ibid.
8. Ibid.
14. Ibid.
16. Ibid.
21. Ibid.
25 Eric Wicklund, May 31, 2017
27 Ibid.
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