New Jersey Governor Phil Murphy Signs Emergency Legislation into Law Providing Greater Access to Healthcare During the COVID-19 Emergency and Issues Directives

Legal Alert

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Practitioners Are Permitted to Use Telehealth or Telemedicine & Out-Of-State Practitioners Can Obtain Expedited Licenses

On March 19, 2020, Governor Phil Murphy signed two bills into law (A-3860 and A-3862), which expand patient access to telemedicine and telehealth services by healthcare practitioners. Out-of-state healthcare practitioners can obtain expedited licenses or certifications to practice telehealth or telemedicine in New Jersey.

A-3860 Establishes Waivers to Provide Telehealth and Telemedicine:

Under A-3860, any healthcare practitioner is authorized to provide and bill for services using telehealth or telemedicine during the COVID-19 emergency. During this crisis, A-3860 waives New Jersey's existing telehealth and telemedicine law, which required all licensing boards to enact regulations. It provides that healthcare providers must meet the standard of care "to the extent appropriate" when treating COVID-19 patients.

The new law suspends the 2017 telehealth and telemedicine provisions establishing a licensee-patient relationship, specifying what technologies should be used, detailing standards for prescriptions, specifying what records should be maintained and requiring privacy notices. Although the Board of Medical Examiners' telehealth and telemedicine regulations, which were proposed on May 16, 2019, have not been adopted and are now waived, we recommend that all healthcare practitioners (such as physicians, advanced practice nurses, and psychologists) consult with knowledgeable healthcare counsel about compliance with the new law. Healthcare practitioners should thoroughly document their patient encounters despite the relaxation of the telehealth and telemedicine provisions. For example, practitioners should consider documenting what equipment or medium was used (i.e. FaceTime) and noting that they have obtained the patients' consent to treatment using technology that may not maintain their privacy.

A-3860 also provides that healthcare practitioners not licensed or certified in New Jersey may provide telehealth or telemedicine services if they are licensed or certified in good standing in another state. The services must be consistent with the practitioners' authorized scope of practice. Services should be limited to screening, diagnosing or treating COVID-19. Fees charged under the law should be "reasonable and consistent with the ordinary fees typically charged." The Commissioner of Health and the Division of Consumer Affairs (DCA), a unit within the Department of Law and Public Safety that licenses healthcare providers, are authorized to waive the telehealth and telemedicine law's requirements. Most importantly, they can waive privacy requirements, including those that limit certain technologies.

A-3862 Permits Out-of-State Healthcare Practitioners to Obtain an Accelerated License:

A-3862 permits out-of-state healthcare practitioners to obtain a temporary expedited license upon the completion of a one-page application (attached) submitted to the DCA certifying that they are licensed in another state. It authorizes the out-of-state licensees to receive accelerated healthcare licenses by reciprocity during the COVID-19 emergency. Fees and criminal history background checks are waived for practitioners with licenses or certifications in good standing in another state. The DCA has created the attached one-page "Certification in Support of Application" that applicants may complete online. This will make it easier for "healthcare professionals to offer telemedicine and telehealth services." The waivers will also facilitate the work of National Guard healthcare providers who have been deployed to New Jersey. These new laws and Governor Murphy's Directives, summarized below, are consistent with the Center for Medicare & Medicaid Services' (CMS) telehealth and telemedicine Medicare waiver in response to President Donald Trump's emergency declaration. We have also included a summary of the DCA Guidance to healthcare practitioners treating COVID-19 patients.

Directives from Governor Murphy Implementing Laws:

On March 22, 2020, Governor Murphy issued the attached directives to various government agencies to "ensure New Jerseyans have access to telehealth and tele-mental health services to the greatest extent possible during the COVID-19 outbreak." Specifically, he directed the DCA to:

- Waive certain statutory and regulatory provisions for the duration of the declared state of emergency to reduce barriers for practitioners to engage in telemedicine
- Eliminate restrictions that prevent practitioners from establishing a doctor/patient relationship using telemedicine or telehealth
- Remove requirements that patients be physically present at a specific address in order to engage in telehealth or telemedicine
- Encourage licensees to utilize alternative technologies for telehealth such as audio-only telephone or video technology commonly available on smartphone and other devices

Healthcare practitioners now have the flexibility to use all available and appropriate technological devices to offer telehealth or telemedicine as long as the services rendered to COVID-19 patients meet the applicable standards of care.

DCA Guidance for Outpatient Providers Evaluating Patients for COVID-19:

In addition, the DCA has issued the attached Guidance for all healthcare practitioners treating patients with COVID-19. Practitioners should review these clinical standards and "exercise their best clinical judgments" so that they do not overwhelm the system by "recommending inappropriate referrals and testing." The Guidance establishes standards for treating asymptomatic patients, initial assessment for symptoms of symptomatic patients, treatment of medically stable symptomatic patients, and treatment of medically unstable symptomatic patients.

Federal Directive Permits Medicare Beneficiaries to Access Telehealth Services:

As indicated before, A-3860 waives the state's telehealth and telemedicine law, which is consistent with President Trump's directive that healthcare practitioners may provide Medicare beneficiaries with telehealth visits, virtual check-ins and e-visits in order to limit the community spread of COVID-19. For instance, practitioners may use technologies such as FaceTime and Skype. Penalties for violating the Health Insurance Portability and Accountability Act will be waived for practitioners who serve "patients in good faith." The Center for Medicare & Medicaid Services (CMS) will pay for office, hospital and other visits provided via telehealth effective March 6, 2020. CMS has issued a "General Provider Telehealth and Telemedicine Tool Kit" for providers, which can be accessed by clicking here.

ATTORNEYS MENTIONED

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