



THE FUTURE OF TELEHEALTH - PART 3

The federal government recently ended the three-year national public health emergency declaration regarding COVID-19. The declaration relaxed Medicare and Medicaid telehealth coverage requirements and expanded the population eligible to receive telehealth services.¹ However, the end of the public health emergency will create a more restricted telehealth environment for providers and patients.

This is especially true for fraud enforcement and investigations into federal and state reimbursements for telehealth and other remote health care services, which have enjoyed an unparalleled boom in popularity over the past three years of Covid-forced lockdowns and societal changes.

The U.S. Office of the Inspector General (“OIG”) has been putting the public and providers on notice that oversight has ramped up considerably. The OIG in April said it recently “conducted dozens of investigations of fraud schemes involving companies and individuals that purported to provide telehealth, telemedicine, or telemarketing services and exploited the growing acceptance and use of telehealth.”²

The increasing oversight responds to instances of large-scale fraud in telehealth that have been uncovered during the pandemic. A study by the U.S. Department of Health and Human Services (“HHS”) and the Centers for Medicare and Medicaid Services (“CMS”), released in September 2022, determined that more than 1,700 doctors and health providers billed more than \$128 million in problematic claims that the OIG identified as high risks of fraud.³ **The HHS report recommended “strong, targeted oversight of telehealth services.”⁴**

“We’re really looking at practices that indicate a high probability of fraud, waste or abuse,” said Andrew VanLandingham, the HHS inspector general’s senior counselor for policy.⁵

1. Prior to the emergency declaration, telehealth services for Medicare patients was largely restricted to people who sought medical care through video and audio connections in rural health clinics. The national declaration of public health emergency and numerous related waivers of federal and state regulations allowed for a significant expansion of telehealth to new and exponentially larger populations. See “Guardrails’ needed? Telehealth Fraud Cost Medicare \$128M in First Year of COVID Pandemic, Feds Say,” Ken Alltucker, USA Today, Sept. 11, 2022. Available at <https://www.usatoday.com/story/news/health/2022/09/11/covid-telehealth-fraud-medicare-hhs/8013711001/>.

2. Telehealth Featured Topic, Office of Inspector General, U.S. Department of Health and Human Services, updated April 24, 2023, available at <https://oig.hhs.gov/reports-and-publications/featured-topics/telehealth/>.

3. “Medicare Telehealth Services During the First Year of the Pandemic: Program Integrity Risks,” OIG, Sept. 2, 2022. Available at <https://oig.hhs.gov/oei/reports/OEI-02-20-00720.asp?hero=telehealth-program-integrity-hero>.

4. “Medicare Telehealth Services During the First Year of the Pandemic: Program Integrity Risks,” OIG, Sept. 2, 2022. Available at <https://oig.hhs.gov/oei/reports/OEI-02-20-00720.asp?hero=telehealth-program-integrity-hero>.

5. “Guardrails’ needed? Telehealth Fraud Cost Medicare \$128M in First Year of COVID Pandemic, Feds Say,” Ken Alltucker, USA Today, Sept. 11, 2022. Available at <https://www.usatoday.com/story/news/health/2022/09/11/covid-telehealth-fraud-medicare-hhs/8013711001/>.

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Accordingly, Federal prosecutions have started. In April 2023, the U.S. Department of Justice (the “DOJ”) announced criminal charges against eighteen (18) defendants in nine federal districts, a healthcare fraud scheme which the DOJ asserted resulted in more than \$490 million in COVID-related false billings.⁶ Previously, the U.S. Department of Justice charged more than thirty (30) defendants with telehealth fraud, which allegedly attempted to defraud government healthcare insurance programs of more than \$1.5 billion dollars.⁷

Christi A. Grimm, the HHS Principal Deputy General, explained in a statement that HHS believes it “is important that new policies and technologies with potential to improve care and enhance convenience achieve these goals and are not compromised by fraud, abuse, or misuse.” Consequently, OIG is conducting “significant oversight work assessing telehealth service.”⁸

In a similar vein, OIG issued a “Special Fraud Alert” that identified certain practices that should highlight risks for practitioners when entering into telehealth arrangements.⁹ For instance, OIG has identified frequent schemes where telehealth, telemedicine, or telemarketing services pay practitioners “kickbacks to generate orders or prescriptions for medically unnecessary durable medical equipment, genetic testing, wound care items, or prescription medications,” which result in fraudulent claims to Medicare, Medicaid, and other federal health care programs.¹⁰ Many of these telehealth and telemedicine companies (the “Telemedicine Companies”) pay practitioners “in exchange for or ordering or prescribing services: (1) for purported patients whom the [practitioners] have limited or no interaction; and (2) without regard to medical necessity.”¹¹ These telemedicine companies instruct the practitioners that it is not necessary to contact the purported patient or that the practitioner does not need to speak to the patient by phone or otherwise.¹²

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The OIG in its Special Fraud Alert listed seven “suspect characteristics” in practitioners’ relationships with telemedicine companies which, when “taken together or separately, could suggest an arrangement that presents a heightened risk of fraud and abuse.”¹³ The OIG identified the following characteristics as concerning:

- “The purported patients for whom the practitioner orders or prescribes items or services were identified or recruited by the Telemedicine Company, telemarketing company, sales agent, recruiter, call center, health fair, and/or through internet, television, or social media advertising for free or low out-of-pocket cost items or services.
- “The practitioner does not have sufficient contact with or information from the purported patient to meaningfully assess the medical necessity of the items or services ordered or prescribed.
- “The Telemedicine Company compensates the practitioner based on the volume of items or services ordered or prescribed, which may be characterized to the practitioner as compensation based on the number of purported medical records that the practitioner reviewed.
- “The Telemedicine Company only furnishes items and services to federal health care program beneficiaries and does not accept insurance from any other payor.
- “The Telemedicine Company claims to only furnish items and services to individuals who are not federal health care program beneficiaries but may in fact bill federal health care programs.

6. “Justice Department Announces Nationwide Coordinated Law Enforcement Action to Combat COVID-19 Health Care Fraud,” Office of Public Affairs, Department of Justice, April 20, 2023. Available at <https://www.justice.gov/opa/pr/justice-department-announces-nationwide-coordinated-law-enforcement-action-combat-covid-19>.

7. “Operation Rubber Stamp: Major Health Care Fraud Investigation Results in Significant New Charges,” Southern District of Georgia, United States Attorney’s Office, October 7, 2020. Available at <https://www.justice.gov/usao-sdga/pr/operation-rubber-stamp-major-health-care-fraud-investigation-results-significant-new>.

8. “Principal Deputy Inspector General Grimm on Telehealth,” Christi A. Grim, Office of Inspector General, U.S. Department of Health and Human Services, February 26, 2021. Available at <https://oig.hhs.gov/coronavirus/letter-grimm-02262021.asp>

9. “Special Fraud Alert: OIG Alerts Practitioners to Exercise Caution When Entering Into Arrangements with Purported Telemedicine Companies,” Office of Inspector General, U.S. Department of Health and Human Services, July 20, 2022. Available at <https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf>.

10. “Special Fraud Alert: OIG Alerts Practitioners to Exercise Caution When Entering Into Arrangements with Purported Telemedicine Companies,” Office of Inspector General, U.S. Department of Health and Human Services, July 20, 2022. Available at <https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf>.

11. “Special Fraud Alert: OIG Alerts Practitioners to Exercise Caution When Entering Into Arrangements with Purported Telemedicine Companies,” Office of Inspector General, U.S. Department of Health and Human Services, July 20, 2022. Available at <https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf>.

12. “Special Fraud Alert: OIG Alerts Practitioners to Exercise Caution When Entering Into Arrangements with Purported Telemedicine Companies,” Office of Inspector General, U.S. Department of Health and Human Services, July 20, 2022. Available at <https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf>.

13. “Special Fraud Alert: OIG Alerts Practitioners to Exercise Caution When Entering Into Arrangements with Purported Telemedicine Companies,” Office of Inspector General, U.S. Department of Health and Human Services, July 20, 2022. Available at <https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf>.

- “The Telemedicine Company only furnishes one product or a single class of products (e.g., durable medical equipment, genetic testing, diabetic supplies, or various prescription creams), potentially restricting a practitioner’s treating options to a predetermined course of treatment.
- “The Telemedicine Company does not expect practitioners (or another practitioner) to follow up with purported patients nor does it provide practitioners with the information required to follow up with purported patients (e.g., the Telemedicine Company does not require practitioners to discuss genetic testing results with each purported patient).”¹⁴

Any practitioners who are offered arrangements with any of these characteristics should seek legal advice and exercise caution. Arrangements with these characteristics, according to the OIG, could place the practitioner in danger of “criminal, civil, or administrative liability depending on the facts and circumstances.”¹⁵

In short, the dangers of telehealth fraud, and related scrutiny from the federal and state government agencies, has increased substantially as telehealth services have been far more widely made available, and practitioners must be aware of the changing legal landscape.

For legal advice regarding laws and regulations relating to telehealth, telemedicine, reimbursement, and related investigations, please reach out to your Lashly & Baer attorney with any questions.

Please watch the Lashly & Baer web site for updates on the proposed new regulations, status of telehealth waivers, and related issues. Furthermore, our healthcare attorneys are available to answer your specific questions about these pending new regulations and will help you implement any requirements as they continue to develop.

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14. “Special Fraud Alert: OIG Alerts Practitioners to Exercise Caution When Entering Into Arrangements with Purported Telemedicine Companies,” Office of Inspector General, U.S. Department of Health and Human Services, July 20, 2022. Available at <https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf>.

15. “Special Fraud Alert: OIG Alerts Practitioners to Exercise Caution When Entering Into Arrangements with Purported Telemedicine Companies,” Office of Inspector General, U.S. Department of Health and Human Services, July 20, 2022. Available at <https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf>.

This summary and legal alert is an overview of the new developments in the health care industry. It is not intended to be, and should not be construed as, legal advice for a specific factual situation.



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