



CMS' Interim Final Rule on COVID-19 & Regulatory Relief Recently Announced

April 9, 2020

This update focuses on CMS' Interim Final Rule (IFR) issued in response to the COVID-19 pandemic and CMS' regulatory announcements not previously covered. We reiterate the caveats that the legislative and regulatory environment is very fluid, and this information is accurate, as of the date above.

Details

CMS' IFR released on 3/30/20 is effective on its release and retroactive to 3/1/20, and key points include the following (note these changes are effective during the pendency of the public health emergency [PHE]):

- **Telehealth:** CMS is directing that clinicians use the place of service (POS) that would have been used if the services had been in person, along with the -95 modifier.
 - The HHS OCR has waived the HIPAA penalties for good faith use of services such as Skype, Facetime, Zoom, or Webex as the platform for Telehealth (T/H) during the PHE—a formal T/H service with a fully HIPAA compliant platform is not currently mandated.
 - T/H services will be reimbursed by Medicare (with patient cost sharing waived) and Medicare Advantage for evaluation and management (E/M) services for emergency dept. (ED) visits, office POS, urgent care centers (UCCs), in-patient and critical care (this was specified in the Families First Coronavirus Response Act (COVID-19 2.0)).
 - More than one (1) critical care consult per day will be allowed via telehealth.
- **Office and outpatient (OP) E/M codes via T/H:** During the PHE, CMS has allowed that office and OP code choices using T/H may be determined on time or medical decision making (MDM) and “to remove any requirements regarding the documentation of history and/or exam in the medical record.” MDM requirements have not changed, however, and must be observed if time is not used for determining the code choice.
- **Teaching physician (TP) supervision of residents by interactive telecommunications technology:** CMS is amending their regulations that the TP presence for a “key portion” of the E/M service rendered by a resident may be met by audio and video, as well as TP's supervision of the resident's diagnostic radiology and diagnostic testing services. CMS will continue to require TP review of the resident's diagnostic interpretations.
- **Resident's “moonlighting” outside of their graduate medical education (GME) programs:** In addition to their longstanding allowance for “moonlighting” for outpatient (OP) services, CMS has now expanded that residents may moonlight outside of their residency program for in-patient (IP) services as well. The resident must be fully licensed in the state in which the services were performed, and the “moonlighting”



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services were not part of the resident's GME program, (e.g., services performed outside of the hospital system where the resident's GME program is based).

- **Verbal Orders and Medical Records:** CMS is providing flexibility related to verbal orders where read back clarification is required but authentication may occur later than 48 hours. CMS has now waived their previous requirements that all orders, including verbal orders, are dated, timed and authenticated promptly by the ordering practitioner or another practitioner who is responsible for patient care. Regarding written medical records, CMS is permitting flexibility for completion of the medical record within 30 days following the discharging of the patient from the hospital.
- **Medical staff:** While we have previously detailed the Medicare and Medicaid enrollment exceptions associated with the global pandemic (see also below), CMS is now permitting physicians whose privileges would expire to continue to practice at a hospital and will permit new physicians to be able to practice before the full medical staff/governing body review and approval.
- **"Stark Law" Waivers:** The physician self-referral law (a.k.a. "Stark Law") prohibits a physician from referring certain "designated healthcare services" reimbursable by the government programs to entities with which the physician or family member has an interest. One requirement that physicians pay "fair market value" for items or services provided by the hospital will be waived during the PHE. CMS has now exempted the following that may have implicated this prohibition but for the waiver:
 - The hospital may provide free space to the physician at no charge for patients who seek care at the hospital but are screened away from the emergency dept. for suspected COVID-19 testing and treatment;
 - Daily meals, laundry and/or childcare services may be provided by the hospital at little or no cost to the physician.
- **Anesthesia Services:** CMS is waiving requirements that a certified registered nurse anesthetist (CRNA) is under the supervision of a physician. CRNA supervision will be at the discretion of the hospital and state law. This waiver applies to hospitals, CAHs, and Ambulatory Surgical Centers (ASCs). These waivers will allow CRNAs to function to the fullest extent of their licensure and may be implemented so long as they are not inconsistent with a state's emergency preparedness or pandemic plan.
- **Medicare Direct Physician Supervision Requirements:** For services requiring direct supervision by the physician or other practitioner, that physician supervision can be provided virtually using real-time audio/video technology.



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Additional CMS Announcements Regarding Regulatory Relief:

Hospitals Without Walls: A new initiative during the PHE, hospitals may provide services in facilities and sites not currently part of the healthcare facility, or temporary expansion sites to address urgent patient care needs, (e.g., tents or off campus buildings) for screening possible COVID-19 positive patients. Hospitals are also given flexibility to separate positive COVID-19 patients from non-positive patients to address infection control and to preserve PPE (see EMTALA waivers below).

EMTALA Waivers: The Secretary of HHS issued a Section 1135 PHE waiver for EMTALA and then CMS followed it with further provisions to define the waiver. The waiver is retroactive to 3/1/20. It is limited to the ability to refer the patient's medical screening exam (MSE) to an off campus alternative medical screening site, (e.g., a tent or separate building), in accordance with the state's pandemic and emergency preparedness plans. The waiver did not suspend or make EMTALA inapplicable — sanctions were waived during the PHE. EMTALA related investigations may still be conducted.

Provider Enrollment: CMS is waiving certain screening requirements, postponing revalidation actions, permitting clinicians to render T/H services from their home without reporting their home address on their Medicare enrollment and has permitted clinicians to bill Medicare for services outside of their state of enrollment for services in another state.

Additional Resources:

- [CMS Interim Final Rule \(IFR\)](#)
- [Physicians and Other Clinicians: CMS Flexibilities to Fight COVID-19](#)

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