

# PUBLICATION

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## Making Sense of the Varying End Dates of Telehealth Waivers and Flexibilities When the PHE Ends on May 11th

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With the COVID-19 Public Health Emergency (PHE) ending on May 11th, providers and practitioners must carefully consider the dates when various telehealth waivers and flexibilities end. This requires understanding the authority for each waiver or flexibility and any recent extensions. At the beginning of the PHE, several mechanisms were used to make it easier to provide telehealth services in response to the pandemic. These included legislation, 1135 waivers, and interim final rules. Providers need to understand how various waivers and flexibilities originated, and whether more recent legislation and rulemaking extended these policies or made them permanent to get clarity regarding when longstanding regulations go back into effect.

Below is a summary of the end dates of several telehealth waivers and flexibilities that were frequently relied upon by providers and practitioners to facilitate the use of telehealth during the PHE:

### May 11, 2023 (the end of the PHE)

- Hospitals Without Walls waiver authority ends and beneficiaries' homes cannot be made provider-based temporary expansion locations of hospitals. Hospitals will no longer be able to bill for certain outpatient therapy, partial hospitalization program (PHP), counseling, and educational services furnished by hospital clinical staff to beneficiaries in their homes.
- Subsequent hospital care visits will be limited to one every three days, and telehealth critical care consults will be limited to one consult per day.
- Outside of rural training sites, teaching physicians will no longer be able to be virtually present to meet requirements to bill for services furnished with residents.
- Licensure as a condition of payment goes back into effect.
- End of OIG enforcement discretion waiving requirements to bill for covered telehealth services and to reduce or waiver beneficiary cost-sharing ends.
- End of OCR enforcement discretion not to impose penalties for noncompliance with regulatory requirements under HIPAA in connection with good faith provision of telehealth.

### December 31, 2023

Unless further extensions are made through the CY 2024 Medicare Physician Fee Schedule (MPFS) Final Rule, the following flexibilities will end on December 31, 2023:

- Distant site practitioners will be reimbursed based on the MPFS facility rate for all telehealth services (services furnished by practitioners in office settings will no longer be paid at the rate they would be paid if the services were furnished in person).

- Immediate availability for direct supervision cannot be via telehealth.
- Telehealth services added to the Medicare Telehealth List on a Category 3 basis will come off the list (\*services that were added temporarily, but not on a Category 1, 2, or 3 basis will come off the Telehealth List on October 9, 2023 (151 days after the PHE ends, unless further extended)).

### **December 31, 2024**

Fortunately, several of the more challenging Medicare payment restrictions were extended through December 31, 2024, by the Consolidated Appropriations Act (CAA), 2023. Due to the CAA extension, Medicare will continue to pay for telehealth services:

- Furnished to Medicare beneficiaries in urban sites and in their homes.
- Furnished by physical therapists, occupational therapists, speech-language pathologists, audiologists, and federally qualified health centers (FQHCs).
- Furnished using audio-only technology.
- Furnished to beneficiaries in their homes for the purposes of diagnosis, evaluation, or treatment of mental health disorders without an in-person visit within six months before the first telehealth visit and every 12 months thereafter.

On May 9th, the DEA and SAMHSA issued a [Temporary Rule](#) to extend temporary exceptions to the Ryan Haight Act and the DEA's implementing regulations, which have allowed practitioners to prescribe controlled substances without a prior in-person evaluation during the PHE. Telehealth flexibilities regarding the prescription of controlled substances would have expired May 11, 2023, but the Temporary Rule will keep them in place through November 11, 2023. Additionally, for any practitioner-patient telemedicine relationships that have been or will be established on or before November 11, 2023, these telemedicine flexibilities will continue to be permitted via a one-year grace period through November 11, 2024. In the meantime, the DEA and SAMHSA will review comments on the two proposed rules issued on March 1, 2023, and will determine the appropriate policies to finalize with respect to the use of telemedicine to prescribe controlled substances. The stated goal of the temporary rule is to ensure a smooth transition, and to allow time for providers to come into compliance with any new standards or safeguards that the DEA and/or SAMHSA promulgate in subsequent final rules.

For more detailed information about the specifics of the aforementioned waivers and flexibilities or others that apply to different provider types or telehealth arrangements, please get in touch with [Allison M. Cohen](#) or any other members of the Baker Donelson [Telehealth team](#).