

CARES ACT CARES FOR HOME HEALTH AND HOSPICE

As the nation has followed the back and forth effort to pass a massive stimulus bill related to the COVID-19 crisis, there has been a significant focus on the size of the stimulus. This has included focus on the amount of checks to taxpayers, subsidies and loans to businesses, unemployment benefits and more. Most home health agencies (“HHAs”) and hospice providers were not expecting any relief specific to their industries, but it appears that at least one long-term issue has been resolved and a couple of other short-term fixes are included as well.

The CARES Act (“the Act”) was signed by the President on March 27, 2020.

HOME HEALTH CERTIFICATIONS AND FACE-TO-FACE ENCOUNTERS

The Act includes a provision for “Improving Care Planning for Medicare Home Health Services.” This provision amends the eligibility requirements for HHAs to allow for involvement of nurse practitioners, clinical nurse specialists and physician’s assistants. As amended, an individual no longer has to be solely under the care of a physician. The Act allows an individual who is under the care of a nurse practitioner, clinical nurse specialist or physician assistant (non-physician practitioner) to qualify as well. The non-physician practitioner must be practicing in accordance with state law and appropriately supervised.

The non-physician practitioner can establish the patient’s plan of care and certify the patient’s eligibility. This will allow the non-physician practitioner to sign the Home Health Certification and Care Plan – Form 485 and interim orders directly. It will eliminate the unnecessary step of having the supervising physician sign orders that were properly given by the non-physician practitioner. This is not only a long-overdue recognition of the non-physician practitioner’s important role in patient care but will be extremely important in helping the industry to respond to the COVID-19 crisis.

The amendment allows the non-physician practitioner to perform the face-to-face encounter after a date set by the Secretary, but, in no case, later than six months after passage of the Act. This will eliminate the need for the non-physician practitioner to communicate their findings to the physician. Once regulations are passed, the non-physician practitioner can simply perform the face-to-face and certify it themselves. Given the current crisis, it is not clear how quickly regulations will be forthcoming, but it would seem Centers for Medicare & Medicaid Services (“CMS”) could simply amend their regulations in the same manner Congress has amended the Social Security Act.

TELEHEALTH FOR HOSPICE FACE-TO-FACE

Another significant change in the Act is contained in Section 3706, “Use Of Telehealth To Conduct Face-To-Face Encounter Prior To Recertification Of Eligibility For Hospice Care During Emergency Period.” This section addresses an issue for which many providers have submitted a Section 1135 Waiver request – the inability of hospices to use telehealth to perform face-to-face encounters during the current COVID-19 Crisis.

The Act amends the hospice face-to-face requirement and adds the qualification that “during the emergency period described in section 1135(g)(1)(B), a hospice physician or nurse practitioner may conduct a face-to-face encounter required under this clause via telehealth, as determined appropriate by the Secretary.” This does not simply add telehealth, but gives the Secretary freedom, during the current emergency to allow it. This is important because in a call with stakeholders on March 20, 2020, CMS indicated that they did not believe the hospice face-to-face statute gave them the authority to extend the Section 1135 telehealth waiver to the hospice face-to-face requirement. This change makes it clear that they have the authority. Assuming the Act becomes law without any changes to this section, CMS should be free to allow hospice face-to-face encounters under its Section 1135 Waiver that expanded telehealth during the national emergency.

USE OF TELEHEALTH IN HOME HEALTH

Finally, the Act directs the Secretary of Health and Human Services (“HHS”) to “consider ways to encourage the use of telecommunications systems, including for remote patient monitoring.” Much like the hospice face-to-face telehealth language, this is not an express statutory directive expanding telehealth to home health. Rather, this is a directive to HHS to consider a broader use during the COVID-19 emergency. As the industry has reached out to CMS seeking waivers to allow broader use of telehealth for home health and hospice visits, CMS has expressed a concern that it lacked the authority to expand telehealth under its Section 1135 Waiver authority. This section of the Act

appears to give HHS clear authority to consider telecommunications options, but only during the COVID-19 emergency.

Although it expressly directs HHS to consider ways to encourage the use of telecommunications, it does not rescind, or temporarily suspend the statutory prohibition on home health visits occurring by telehealth. This may limit what CMS concludes it has authority to waive, but it is a clear direction to CMS to consider technology as a means to address some of the issues the industry will face, and already is facing. Providers should continue to seek waivers under Section 1135 related to telehealth and using of telecommunications to reduce visits and patient contact during this crisis. Every visit you can perform by phone or video conference is one less chance to expose your patients and your staff to COVID-19. Even if CMS determines to not fully extend telehealth to home health, this provision is clear guidance to CMS from Congress to expand the industry's ability to use technology to care for patients during the crisis.

PRACTICAL TAKEAWAYS

- This is a major change that will be of significant importance not only during the current national emergency, but going forward. This will make it easier for agencies to obtain plans of care, orders and face-to-face documentation, because an increasing percentage of agency patients are cared for by non-physician practitioners.
- Providers should continue to seek waivers under Section 1135 related to telehealth and using of telecommunications to reduce visits and patient contact during this crisis.

If you have questions or would like additional information about this topic, please contact:

- **Robert Markette** at (317) 977-1454 or rmarkette@hallrender.com;
- **Todd Selby** at (317) 977-1440 or tselby@hallrender.com;
- **Brian Jent** at (317) 977-1402 or bjent@hallrender.com;
- **Sean Fahey** at (317) 977-1472 or sfahey@hallrender.com; or
- Your regular Hall Render attorney.

More information about Hall Render's Post-Acute and Long-Term Care services can be found [here](#).