

TENNESSEE COVID-19 TELEHEALTH FACTSHEET<sup>1</sup>

## State Law Overview

## Telehealth/Telemedicine (“TH”):

- ♦ use of **real-time audio, video or other electronic media and telecommunications technologies that enable interaction** between provider and patient, or **also store-and-forward<sup>2</sup>** telemedicine services
- ♦ for the purpose of diagnosis, consultation, or treatment of a **patient in another location<sup>3</sup>**
- ♦ replicating the interaction of a traditional encounter between a provider and a patient
- ♦ **but not audio-only telephone conversation, email/instant messaging conversation or fax<sup>4</sup>**

Tennessee licensed providers can deliver **most** services within their scope of practice to patients in Tennessee through TH mechanisms, provided that a **provider-patient relationship** is established, and **additional requirements** are met.<sup>5</sup>

## A. Provider-patient relationship:

- ♦ can be established via TH<sup>6</sup>
- ♦ is created by mutual consent and mutual communication between patient and provider, except in an emergency
- ♦ patient consent may be expressed or implied consent<sup>7</sup>

## B. Additional requirements:

1. **Facilitators** are individuals, often affiliated with a local system of care, or a parent/legal guardian of the patient.<sup>8</sup> Facilitators **are required for patients under 18 years of age**, except as otherwise authorized by law.<sup>9</sup> TH requirements vary depending on whether a facilitator is present:

## Facilitator IS present:

## Facilitator must:

- be physically present with the patient
- identify themselves, their role, and their title to the patient and the remote physician
- personally verify patient’s identity
- transmit all relevant health information to provider using at least the level of store-and-forward technology

**Provider** must disclose his or her name, current and primary practice location, medical degree and recognized specialty area, if any, and all additional information required pursuant to Tenn. Code Ann. § 63-1-109 (display of license, etc.)<sup>10</sup>

## Facilitator is NOT present:

## Patient must:

- utilize adequately sophisticated technology to enable provider to verify the patient’s identity and location
- transmit all relevant health information at the level of store-and-forward technology or secure video conferencing

**Provider** must disclose his or her name, current and primary practice location, medical degree and recognized specialty area, if any, and in accordance with Tenn. Code Ann. §§ 63-1-109 (display of license, etc.)<sup>11</sup>

2. **Medical records** must be available for the patient encounter or such information must be obtained during the encounter.<sup>12</sup> The medical record must reflect the TH encounter, including at least: (i) all pertinent data and information gleaned and (ii) the technology used.<sup>13</sup>
3. **Insufficient information** – if the information transmitted is insufficient to form an opinion, the physician must say so and (i) request direct referral of the patient for actual physical examination, (ii) request additional data or (iii) recommend the patient be evaluated by the patient’s primary physician or other local provider.<sup>14</sup>
4. **Standard of care** for TH services is the same as that for in-person encounters.<sup>15</sup>

C. Some services cannot be provided through TH:

- ♦ Abortions<sup>16</sup>
- ♦ Typically\* also not pain management clinics as defined in Tenn. Code Ann. § 63-1-301 and chronic nonmalignant pain treatment<sup>17</sup>

\*However, in response to the COVID-19 pandemic the Governor of Tennessee temporarily has **suspended** the prohibition against TH services by pain management clinics and for chronic nonmalignant pain treatment.<sup>18</sup> Similarly, the Governor also has waived certain Tennessee licensure requirements to give the Commissioner of Health discretion to permit certain professionals licensed in other states to practice in Tennessee during the pandemic but those are beyond the scope of this summary.<sup>19</sup>

## Reimbursement Overview

Being able to provide TH services does not necessarily mean the provider will be reimbursed. Payers have additional requirements.

### A. Medicare

1. **Authorized geographic locations.** Unless part of a federal demonstration project or a special rule noted in Section A.2 below, the **originating site** (*i.e.*, where the *patient* is located) usually\* must be geographically located in a:

- ♦ county outside of a Metropolitan Statistical Area (“MSA”) or
- ♦ rural Health Professional Shortage Area (“HPSA”)<sup>20</sup>

**\*However, the Secretary of Health and Human Services can waive certain requirements under Section 1135 of the Social Security Act.<sup>21</sup> The geographic locations for TH services are waived during the COVID-19 National Emergency as declared by the President (the “Emergency”).<sup>22</sup>** This waiver applies not only to services relating to cases of COVID-19 but to all applicable services provided via TH.<sup>23</sup> CMS says that to the extent the waiver would require an established relationship between provider and patient prior to providing TH services, it is not enforcing an established relationship requirement for TH services provided during the Emergency.<sup>24</sup> Congress also has waived cost-sharing requirements for COVID-19 testing services during the Emergency,<sup>25</sup> and the OIG has said that it will not impose sanctions against physicians and other practitioners solely because they reduce or waive the beneficiary cost-sharing requirement (*i.e.*, coinsurance and deductibles) for covered telehealth services during the Emergency.<sup>26</sup>

2. **Authorized Originating sites** usually\* include:

- |   |  |
|---|--|
| ♦ Physician and practitioner offices  | ♦ Skilled Nursing Facilities   |
| ♦ Hospitals   | ♦ Community Mental Health Centers  |
| ♦ Critical Access Hospitals   | ♦ Renal Dialysis Facilities  |
| ♦ Rural Health Clinics  | ♦ Homes of beneficiaries with End-Stage Renal Disease (“ESRD”) getting home dialysis |
| ♦ Federally Qualified Health Centers  | ♦ Mobile Stroke Units <sup>27</sup>  |
| ♦ Hospital-based or CAH-based Renal Dialysis Centers (including satellites) |  |

Special rules apply for renal dialysis,<sup>28</sup> substance use disorder<sup>29</sup> and acute stroke.<sup>30</sup>

**\*However, during the Emergency,** originating site requirements are waived and TH services can be provided when the patient is in other settings, including the patient’s home.<sup>31</sup>

3. **Authorized Providers** (subject to State law and applicable Medicare billing requirements) include:

- |                              |   |
|------------------------------|---|
| ♦ Physicians                 | ♦ Certified registered nurse anesthetists         |
| ♦ Nurse practitioners        | ♦ Registered dietitians or nutrition professional |
| ♦ Physician assistants       | ♦ Clinical psychologists (CPs) and                |
| ♦ Certified nurse-midwives   | ♦ Clinical social workers (CSWs) <sup>32 33</sup> |
| ♦ Clinical nurse specialists |   |

Providers should confirm with their applicable Medicare Administrative Contractor and billing experts whether there are restrictions applicable to the distant site (*i.e.*, where the provider is located). For instance, a provider’s enrollment with Medicare may specify a practice location.

4. **Technology.** Normally\*, providers must use an *interactive audio and video telecommunications system* that permits *two-way, real-time, interactive communication* between the provider at the distant site and the beneficiary at the originating site.<sup>34</sup> Telephones, fax and email do not qualify.<sup>35</sup>

**\*However, during the Emergency,** the HHS Office for Civil Rights (“OCR”) temporarily is exercising enforcement discretion to not impose penalties for noncompliance with the HIPAA Privacy, Security and Breach Notification Rules, for good faith provision of TH, not just for COVID-19 TH services but for other TH services too, using certain communications technology. Providers may use any **non-public-facing** remote communication product to communicate with patients (FaceTime, Facebook Messenger video chat,

## BASS BERRY ♦ SIMS

Google Hangouts video and Skype are all explicitly permitted). **Providers are encouraged to advise patients of the potential privacy risks and should use all encryption and privacy modes available in such applications.** Providers should obtain consent from the patient for the provision of services via TH, and the patient should acknowledge the potential risks to the privacy of their information if using an unsecured methodology. This consent may be obtained orally and documented in the patient's record if it is not feasible to obtain written consent. Public-facing video application are not permitted (e.g., Facebook Live, Twitch, Tik Tok are expressly excluded). In addition, OCR will not penalize providers for failing to obtain a business associate agreement ("BAA") with the technology vendor during the Emergency. **However, providers should seek, if possible, to use a technology vendor that will, as a matter of course, sign a BAA and has appropriate controls in place to protect the privacy and security of patient health information.**<sup>36</sup> Providers should also evaluate the use of a vendor throughout the Emergency and, where feasible, put in place a BAA when and if time allows.

Note that Virtual Check-Ins/e-Visits differ from what typically is considered TH and are subject to different rules than covered here.

CMS provides a helpful telehealth toolkit: <https://www.cms.gov/files/document/general-telemedicine-toolkit.pdf> and also a helpful COVID-19 toolkit: <https://www.cms.gov/outreach-education/partner-resources/coronavirus-covid-19-partner-toolkit>

## B. TennCare/Commercial Payers

Requirements and reimbursement for TH services vary by contract, but payers, including TennCare managed care organizations ("MCOs"), generally are required to provide TH coverage and to reimburse for TH services that are:

- ♦ provided to a patient
- ♦ at a qualified originating site (or at a school clinic, or public elementary or secondary school, in each case staffed by a healthcare services provider and equipped to engage in the telecommunications)
- ♦ by a provider practicing within their scope of practice
- ♦ located at a different, qualified distant site
- ♦ without any distinction or consideration of the geographic location or governmental designation/classification of the area where the patient is located.<sup>37</sup> Under the applicable state insurance statute:

### **Telehealth** means:

- the provision of healthcare services to a patient at a qualified site
- within the provider's scope of practice
- using real-time, interactive audio, video telecommunications or electronic technology, or
- store-and-forward telemedicine services
- when the provider is at a qualified site other than the site where the patient is located
- **but does not include** an audio-only conversation, email or fax<sup>38</sup>

### **Qualified Site** usually\* means:

- the office of a healthcare services provider,
- a hospital licensed under title 68 (Health, Safety and Environmental Protection)
- a facility recognized as a rural health clinic under federal Medicare regulations,
- a federally qualified health center
- any facility licensed under Title 33 (Mental Health and Substance Abuse and Intellectual and Developmental Disabilities)
- or any location deemed acceptable by the health insurance entity<sup>39</sup>

**\*However, during the Emergency,** TennCare and other payers are implementing modifications, including TennCare permitting the patient's home as a qualified originating site.<sup>40</sup> Congress also has stepped in to require that certain group health plans and health insurance issuers provide coverage for, and not impose cost sharing, prior authorization or certain other medical management requirements regarding, the detection or diagnosis of COVID-19.<sup>41</sup>

TennCare provides a helpful COVID-19 portal: <https://www.tn.gov/tenncare/information-statistics/tenncare-information-about-coronavirus.html>

- <sup>1</sup> This Factsheet is intended as a brief summary, not a comprehensive reference. It is not intended to, nor should it, be used as a substitute for individual legal advice. In response to the COVID-19 pandemic, laws and other requirements may change rapidly. Each provider or healthcare entity utilizing TH should stay up-to-date regarding changes as they may occur and should consult with healthcare legal counsel and applicable licensing Board(s) for questions that may arise.
- <sup>2</sup> Tenn. Code Ann. § 63-1-155(a)(2). Store-and-forward technology is asynchronous electronic communication using a device that records/stores medical data images that then is forwarded via electronic communication to another site for consultation. Tenn. Admin. Code 0880-02-.16(1)(f).
- <sup>3</sup> Tenn. Code Ann. § 63-1-155(a)(2).
- <sup>4</sup> Tenn. Admin. Code 0880-02-.16(1)(g).
- <sup>5</sup> Tenn. Code Ann. § 63-1-155; see e.g., Tenn. Admin. Code 0880-02-.16(6).
- <sup>6</sup> Tenn. Admin. Code 0880-02-.16(1)(d) and at 0880-02-.16(6)(a).
- <sup>7</sup> Tenn. Code Ann. § 63-1-155(b).
- <sup>8</sup> Tenn. Admin. Code 0880-02-.16(1)(a).
- <sup>9</sup> *Id.*, at 0880-02-.16(8).
- <sup>10</sup> *Id.*, at 0880-02-.16(6)(a)2.
- <sup>11</sup> *Id.*, at 0880-02-.16(6)(a)1.
- <sup>12</sup> *Id.*, at 0880-02-.16(6)(b).
- <sup>13</sup> *Id.*, at 0880-02-.16(6)(c).
- <sup>14</sup> *Id.*, at 0880-02-.16(6)(d).
- <sup>15</sup> Tenn. Code Ann. § 63-1-1-155(c)(1)(A).
- <sup>16</sup> Tenn. Code Ann. § 63-6-241.
- <sup>17</sup> Tenn. Code Ann. § 63-1-155(c)(3).
- <sup>18</sup> Executive Order No. 15, 38 (2020).
- <sup>19</sup> Executive Order No. 15, 2 and 38 (2020); if questions, we recommend you contact healthcare legal counsel or the applicable licensing Board(s).
- <sup>20</sup> 42 U.S.C. § 1395m(m)(4)(C).
- <sup>21</sup> 42 U.S.C. § 1320(b)-5.
- <sup>22</sup> *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, Mar. 13, 2020, available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>; *Waiver or Modification of Requirements under Section 1135 of the Social Security Act*, Mar. 13, 2020, available at <https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>; see also, *Medicare Telemedicine Health Care Provider Fact Sheet*, Mar. 17, 2020, available at <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>; and *Medicare Telehealth Frequently Asked Questions (FAQs)*, Mar. 17, 2020.
- <sup>23</sup> *Medicare Telehealth Frequently Asked Questions (FAQs)*, Mar. 17, 2020.
- <sup>24</sup> *Id.*
- <sup>25</sup> Families First Coronavirus Response Act, Pub. L. 116-127, §§ 6002-6004, 6006, 6007(2020).
- <sup>26</sup> *OIG Policy Statement Regarding Physicians and Other Practitioners that Reduce or Waive Amounts Owed by Federal Health Care Program Beneficiaries for Telehealth Services during the 2019 Novel Coronavirus (COVID-19) Outbreak*, Mar. 17, 2020, available at <https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/policy-telehealth-2020.pdf>
- <sup>27</sup> 42 U.S.C. § 1395m(m)(4)(C)(ii).
- <sup>28</sup> Medicare does not apply originating site geographic conditions to hospital-based and CAH-based renal dialysis centers, renal dialysis facilities, and beneficiary homes when practitioners furnish monthly home dialysis ESRD-related medical evaluations. 42 C.F.R. § 410.78(b)(4)(iv); see also, *MLN Booklet TeleHealth Services*, January 2019 available at <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/TelehealthSrvcsfctshst.pdf>. Independent Renal Dialysis Facilities are not eligible originating sites. *MLN Booklet Telehealth Services*, January 2019.
- <sup>29</sup> Beginning July 1, 2019, the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (“SUPPORT”) for Patients and Communities Act removes the originating site and geographic conditions and adds an individual’s home as a permissible originating TH services site for treatment of a substance use disorder or a co-occurring mental health disorder. *Id.*
- <sup>30</sup> Beginning January 1, 2019, the Bipartisan Budget Act of 2018 removed the originating site geographic conditions and added eligible originating sites to diagnose, evaluate, or treat symptoms of an acute stroke. *Id.*
- <sup>31</sup> *Waiver or Modification of Requirements under Section 1135 of the Social Security Act*, Mar. 13, 2020, *Medicare Telemedicine Health Care Provider Fact Sheet*, Mar. 17, 2020, and *Medicare Telehealth Frequently Asked Questions (FAQs)*, Mar. 17, 2020.
- <sup>32</sup> 42 U.S.C. § 1395m(m)(4)(D) and (E).
- <sup>33</sup> CPs and CSWs cannot bill Medicare for psychiatric diagnostic interview examinations with medical services or medical evaluation and management services. They cannot bill or get paid for Current Procedural Terminology (CPT) codes 90792, 90833, 90836, and 90838. *MLN Booklet TeleHealth Services*, January 2019.
- <sup>34</sup> 42 C.F.R. § 410.78(a)(3).
- <sup>35</sup> *Id.*
- <sup>36</sup> *Notification of Enforcement Discretion for telehealth remote communications during the COVID-19 nationwide public health emergency*, Mar. 18, 2020, available at <https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html>
- <sup>37</sup> Tenn. Code Ann. § 56-7-1002.
- <sup>38</sup> *Id.*, at § 56-7-1002(a)(6).
- <sup>39</sup> *Id.* at § 56-7-1002(a)(4).
- <sup>40</sup> *TennCare Memo re: Novel COVID-19 Testing and Telehealth Services for TennCare Enrollees*, Mar. 17, 2020, available at <https://www.tn.gov/content/dam/tn/tenncare/documents/TennCareMCOCOVID19TelehealthDxTestingUpdate.pdf>; see also, *TennCare Memo re: Behavioral Health Telehealth Services for TennCare Enrollees – Novel COVID-19*, Mar. 18, 2020, available at <https://www.tn.gov/content/dam/tn/tenncare/documents/TennCareMCOBehavioralHlthCOVID19TelehealthUpdate3182020.pdf> See also, generally, the *TennCare Information about Coronavirus* website at <https://www.tn.gov/tenncare/information-statistics/tenncare-information-about-coronavirus.html>
- <sup>41</sup> Families First Coronavirus Response Act, Pub. L. 116-127, § 6001 (2020).