

Update on Status of New York and Border State Regulation of Telehealth

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Introduction

In the budget for Fiscal Year 2022, New York state amended section 2999-cc of the Public Health Law related to the definitions of “originating site” and “distant site” for purposes of telehealth services.¹ **The amendment to the statute was effective April 1, 2021.** The following will provide a summary of the changes as well as a review of the status of New York and its bordering states' regulation of telehealth.

Amendment of PHL §2999-cc

Article 29-G of the New York State Public Health Law, titled “Telehealth Delivery of Services,” focuses on reimbursement for Medicaid services and addresses the usage and expansion of telehealth in general. The recent amendment of section 2999-cc (3) altered the definitions of “distant site and “originating site” as follows (**green reflects additions and red indicates removed provisions**):

As used in this article, the following terms shall have the following meanings:

1. **“Distant site” means a site at which a telehealth provider is located while delivering health care services by means of telehealth. Any site within the United States or United States’ territories is eligible to be a distant site for delivery and payment purposes.**

3. **“Originating site” means a site at which a patient is located at the time health care services are delivered to him or her by means of telehealth. ~~Originating sites shall be limited to: (a) facilities licensed under articles twenty-eight and forty of this chapter; (b) facilities as defined in subdivision six of section 1.03 of the mental hygiene law; (c) certified and non-certified day and residential programs funded or operated by the office for people with~~**

¹ There was one other amendment to PHL 2999-cc which was the addition of a “certified peer recovery advocate” to the definition of “telehealth provider.”

~~developmental disabilities; (d) private physician's or dentist's offices located within the state of New York; (e) any type of adult care facility licensed under title two of article seven of the social services law; (f) public, private and charter elementary and secondary schools, school age child care programs, and child day care centers within the state of New York; and (g) the patient's place of residence located within the state of New York or other temporary location located within or outside the state of New York~~

- *Distant Site Definition Change*

The amendment of “distant site” provides a more restrictive definition insofar as it requires a provider to be located within the United States or its territories as opposed to the prior open-ended definition. That said, the clarified definition of originating site will have a minimal, if any, impact on telehealth providers/MLMIC insureds unless they utilize telehealth while outside the county. This does not change long standing requirements for a physician to be licensed in New York state to provide treatment. Sections 6521 and 6522 of the New York Education Law respectively define the practice of medicine as “diagnosing, treating, operating or prescribing any human disease, pain injury, deformity or physical condition” and limit such practice or use of the title physician only to persons “licensed or otherwise authorized under this article.” Therefore, unless an exception applies (discussed below), a physician who intends to treat a patient located in New York state, even by use of telehealth, must be licensed to practice in New York.

- *Originating Site Definition Change*

The definition of “originating site” was broadened by the elimination of an expansive list of locations which previously included a patient’s New York residence or temporary locations outside of the state of New York. Now, a patient can permanently reside outside of the state of New York and still be a recipient of services from a New York state telehealth provider.

However, despite this broad expansion of the definition, we are still presented with the conundrum of out of state licensure requirements for physicians. Unless an exception applies, a New York physician could still be deemed to be practicing without a license and outside of the coverage territory as defined in the MLMIC policy if he or she is not licensed in the state where the patient is located at the time of telehealth services.²

Current Status of Other New York State Telehealth Regulations

New York State’s other regulations relating to telehealth are focused mainly on reimbursement for professional services and were not changed by the government. Section 3217-h of the Insurance Law states that a health insurer shall not exclude coverage for a service that is

² “Coverage territory” as defined in the P&S policy means in part “any state of the United States, the District of Columbia, Puerto Rico or Canada, provided the insured is duly licensed to practice medicine in that jurisdiction.”

otherwise covered under a policy that provides comprehensive coverage because the service is delivered via telehealth. The same requirements for reimbursement are applicable to corporations and health maintenance organizations and can be found in sections 4306-g and 4406-g of the Public Health Law.

New York State Licensure Requirements During COVID-19 Public Health Emergency

Pursuant to Executive Order 202.5 and extended most recently by Executive Order 202.101, New York state has permitted unlicensed healthcare professionals to provide treatment in response to the pandemic. Specifically, to the extent necessary, physicians, registered nurses, licensed practical nurse, nurse practitioners and physician assistants licensed and in good standing in any state in the United States or province or territory of Canada to practice in New York State without civil or criminal penalty for a lack of licensure. **Presently, the Executive Order is to expire on May 6, 2021.**

New York State Statutory Exceptions to Requirement of Licensure

Notably, New York is among the minority of states that permit physicians to practice without a license in certain limited circumstances.³ Specifically, section 6526(2) of the Education Law allows for the practice of medicine by any physician who is licensed in a bordering state and who resides near a border of this state provided such practice is limited in this state to the vicinity of such border and provided such physician does not maintain an office or place to meet patients or receive calls within this state. For New York, those bordering states are Pennsylvania, New Jersey, Connecticut, Massachusetts, and Vermont.

Additionally, any physician who is licensed in another state or country and who is meeting a physician licensed in this state, for purposes of consultation, provided such practice is limited to such consultation is authorized to practice medicine. See Education Law § 6526(3).

While it may be appropriate to practice medicine in New York, there must also be compliance with the bordering state laws.

Border State Licensure Requirements

Similar to New York, border states currently have Executive Orders in effect that allow for exceptions for licensure requirements during the COVID-19 pandemic. The following will provide

³ In addition to New York, Maryland, Virginia and Washington DC provide reciprocity to bordering states. Alabama and Pennsylvania have agreements with other states to grant licenses to out-of-state physicians who have licenses in states that reciprocally accept their home state licenses. In Connecticut, an out-of-state physician can obtain an in-state license based on his or her home state standards. (<https://www.aaaai.org/practice-resources/running-your-practice/practice-management-resources/Telemedicine/state>)

an overview each border state's current status as impacted by an Executive Order as well as the statutory requirements that are in place in the absence of a state of emergency.

Pennsylvania

- To practice telemedicine in Pennsylvania, out-of-state doctors need not obtain a full license to practice medicine in Pennsylvania but must: (1) be an adjoining state and (2) obtain a special extraterritorial license, the granting of which depends on (a) availability of medical care in that area and (b) whether the doctor's resident state reciprocates.⁴
- Pennsylvania's State of Emergency was again extended on February 19, 2021 for an additional 90-days, which expired on May 19, 2021. During this State of Emergency, licensed practitioners in other states can provide services to Pennsylvanians via the use of telemedicine, without obtaining a Pennsylvania license.⁵
 - To comply with this waiver, out-of-state practitioners must:
 - (1) Be licensed and in good standing in their home state, territory or country;
 - (2) provide the Pennsylvania board from whom they would normally seek licensure with the following information prior to practicing telemedicine with Pennsylvanians:
 - (1) their full name, home or work mailing address, telephone number and email address; and
 - (2) their license type, license number or other identifying information that is unique to that practitioner's license, and the state or other governmental body that issued the license

New Jersey

- Under COVID-19 emergency legislation, New Jersey still requires out-of-state physicians to obtain a New Jersey license before they can provide in-person treatment or telemedicine services. However, the process has now become substantially accelerated. By utilizing a temporary "licensure through reciprocity" system, out-of-state practitioners can bypass traditional requirements (such as criminal background checks, submission of malpractice insurance confirmation, etc.), and obtain a New Jersey license through the completion of a one-page form. Following approval, out-of-state clinicians can provide in-person and telemedicine services to patients in New Jersey for COVID-19 treatment, as well as other unrelated conditions. The emergency license is valid until June 30, 2021.⁶
- Absent the State of Emergency, out of state doctor practicing telemedicine must have a full license to practice medicine in New Jersey unless they are merely "taking charge

⁴ 63 PA. STAT. ANN. § 422.34(a)(c)(2)

⁵ <https://www.dos.pa.gov/Documents/2020-03-18-Telemedicine-Summary.pdf>

⁶ <https://njconsumeraffairs.state.nj.us/NJDCA-TempLicense-Verification/>

temporarily, on written permission of the Board, of the practice of a [licensed doctor] during his absence from the State.⁷

- Out-of-State providers can obtain an accelerated temporary license in New Jersey to provide care in person or using telehealth. ... If granted, the provider will be deemed licensed in New Jersey for 180 days, with the possibility of an additional 180-day extension.⁸ Under the New Jersey telemedicine statute, N.J. Stat. §45:1-62, the same requirements applied to a physician practicing telemedicine.

Connecticut

- In response to COVID-19, on July 31, 2020, HB 6001 temporarily modifying insurance and other requirements for the delivery of telehealth services. The modifications remain in effect until April 20, 2021.⁹
- With respect to out of state providers, the Act allows any of these providers to provide telehealth services in Connecticut even without a valid Connecticut license, so long as the provider (1) is licensed or certified in another state or territory of the United States or the District of Columbia; (2) is authorized to practice telehealth under any relevant order issued by the Department of Public Health (“DPH”); and (3) maintains professional liability insurance or other indemnity against liability for professional malpractice in an amount that is equal to or greater than that required for similarly licensed, certified or registered Connecticut health care providers.¹⁰
- The Act explicitly requires any Connecticut entity, institution or health care provider that engages or contracts with a telehealth provider licensed, certified or registered in another state to verify the out-of-state provider’s credentials to ensure the provider is in good standing and carries professional liability insurance or other indemnity at the same level required for similarly licensed, certified or registered Connecticut practitioners.
- Generally, a license is required to practice telemedicine in this state. However, an exception exists when the doctor is providing care on an “irregular basis” with a doctor who is licensed in the state or working at an educational institution.¹¹

Massachusetts

- During the State of Emergency, the Board of Registration in Medicine established an Emergency Temporary License Application for out-of-state physicians to assist in meeting the increased demand for physician services in Massachusetts. To qualify for an Emergency Temporary License a physician was required to hold an active full, unlimited, and unrestricted medical license in good standing in another U.S. state/territory/district.

⁷ N.J. STAT. ANN. § 45:9-21(b) (2006)

⁸ New Jersey’s Telemedicine Act, codified at NJ Rev Stat §45:1-62, *et seq.* (2017)

⁹ <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-10C.pdf>

¹⁰ Bill No. 6001, LCO No. 3696, An Act Concerning Telehealth

¹¹ Conn. Gen. Stat. §20-9(21)(b) (2012)

"Good standing" shall not include a license that has been revoked, cancelled, surrendered, suspended, or is subject to disciplinary restrictions.¹²

- Effective July 10, 2020, applications for temporary licenses are no longer accepted
- Existing Emergency Temporary Licenses are valid until 30 days after the State of Emergency is terminated.
- Prior to COVID-19, Massachusetts did not have any specific laws or policies pertaining to telemedicine licensure.

Vermont

- The Vermont Legislature passed emergency legislation that was signed by Governor Scott on March 30, 2020 that allows individuals who typically cannot practice in Vermont the ability to practice in Vermont during the COVID-19 State of Emergency. **On March 29, 2021 a bill was signed which extended [Act 140](#) through March 31, 2022.**¹³
 - If you hold an out-of-state healthcare professional license in good standing, you may practice in Vermont without a Vermont license under the following circumstances:
 - If you are providing only telehealth to people in Vermont, you do not need a license and you do not have to provide your contact information to the Office of Professional Regulation; or
 - If you are providing services to Vermonters in a licensed facility, you do need to provide your contact information to the Office of Professional Regulation.
 - Only health care professionals are eligible to practice in Vermont without a Vermont license during the COVID-19 State of Emergency.¹⁴
- Generally, to practice telemedicine in Vermont an out-of-state doctor must have a full license to practice medicine in Vermont unless “using telecommunications to consult with a duly licensed practitioner herein”.¹⁵

Florida

- A health care professional not licensed in this state may provide health care services to a patient located in this state using telehealth, if the health care professional registers with the applicable board, or the department if there is no board, and provides health care services within the applicable scope of practice established by Florida law or rule.¹⁶
- Registration requires the practitioner to designate an agent within the state of Florida to for service of process.

¹² <https://www.mass.gov/service-details/important-information-regarding-physician-licensure-during-the-state-of-emergency>

¹³ <https://sos.vermont.gov/opr/about-opr/covid-19-response/out-of-state-licensees-temporary-licensees-telehealth/>

¹⁴ <https://sos.vermont.gov/opr/about-opr/covid-19-response/out-of-state-licensees-temporary-licensees-telehealth/>

¹⁵ VT. STAT. ANN., tit 26 § 1313 (2014)

¹⁶ Laws of Florida, Chapter 2019-137(a)

Interstate Medical Licensure Compact

The Interstate Medical Licensure Compact (“the Compact”) is an agreement among participating U.S. states to work together to streamline and expediate the process for physicians to obtain multiple state licensure. Present membership of the Compact includes twenty-nine states as well as the District of Columbia and the Territory of Guam. New York state is not a member of the Compact. The Compact boasts that it makes the process of obtaining multiple licenses less burdensome and faster as physicians can complete a single application and seek to obtain separate licenses in multiple states. The process is also expedited by member states where a

physician is already licensed will share information that may have been submitted by the applicant in the licensing process. To be clear, there is not a “Compact License” and licensure is still ultimately issued by the individual state.

Only states who have joined the Compact are enabled to participate the streamlined process. To be a participant, a state’s legislature must introduce and pass legislation that authorizes the state to join the Compact.

As noted, New York state is not a member of the Compact. There is a bill which is presently in committee, (S7732) <https://www.nysenate.gov/legislation/bills/2019/s7732> for New York state to approve membership in the Compact. Per Marc Craw, this bill is introduced every year and never gains any traction and dies in committee. Most likely, we can assume that most physician organizations in New York are not supportive of Compact membership. As stated on its website, “the mission of the Compact is to increase access to health care- particularly for patients in in underserved or rural areas.” A shortage of physicians does not appear to be an issue in New York state, especially in the downstate region. It is likely that the benefits of New York physicians being able to seek out of state licensure are outweighed by the risk of more out of state physicians being able to easily obtain a New York license and flood an already competitive marketplace.

With respect to border states and Florida, their participation in the Compact is as follows:

- Vermont is a member;
- Pennsylvania has passed legislation but it has not been implemented;
- New Jersey has introduced legislation;
- Connecticut does not participate and has not introduced legislation;
- Massachusetts does not participate and has not introduced legislation; and

- Florida does not participate.

Additional resources

- https://www.fsmb.org/siteassets/advocacy/key-issues/telemedicine_policies_by_state.pdf
- <https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.pdf>
- <https://www.governor.ny.gov/executiveorders>