Converting Waivers into Statutes

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Health Law

Disclosures

- No relevant conflicts of interests.

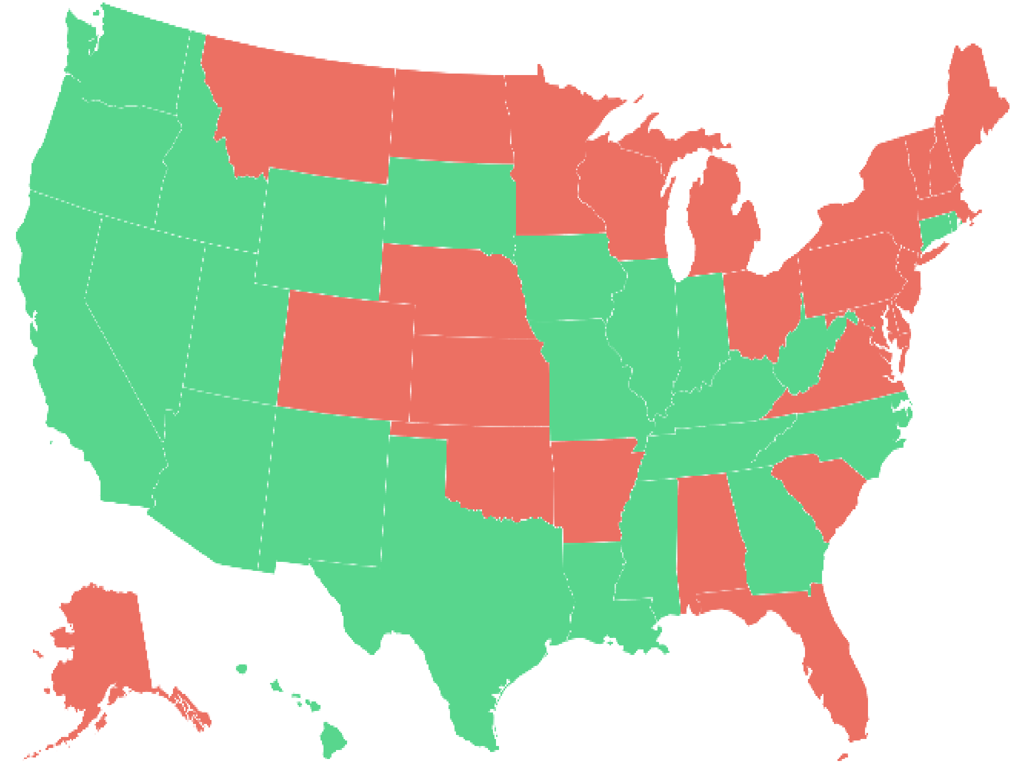
- This is not legal advice.

Map of COVID-19 emergency orders by state

The map below shows the status of COVID-19 emergency orders in all 50 states.

COVID-19 emergency orders

Active Expired



25 active states with active public health emergency orders and 25 expired as of July 19, 2021.

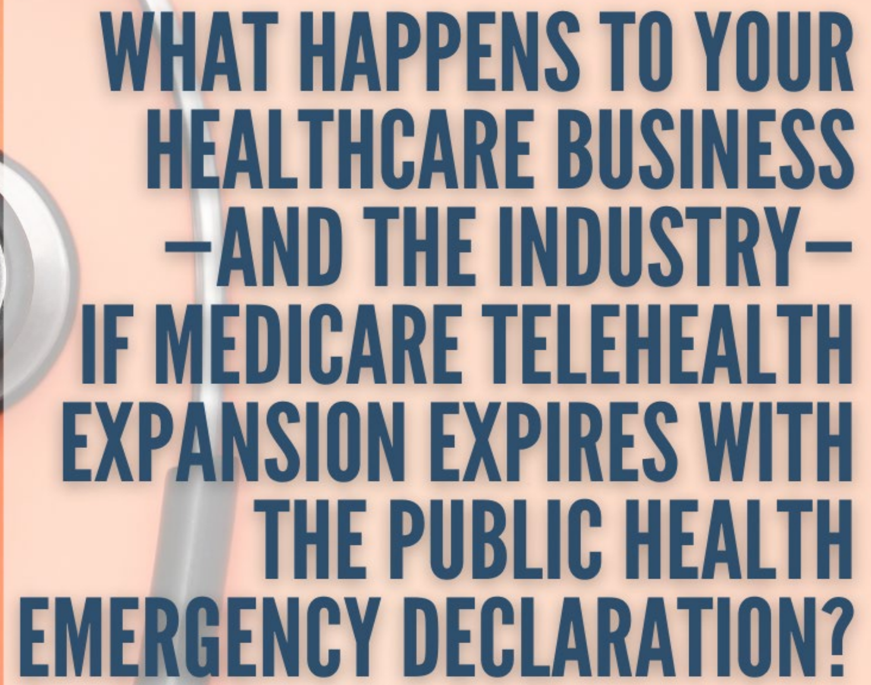
https://ballotpedia.org/State_emergency_health_orders_during_the_coronavirus_(COVID-19)_pandemic,_2021#States_that_have_ended_COVID-19_emergency_health_orders.

U.S. States and Territories Modifying Requirements for Telehealth in Response to COVID-19

(Out-of-state physicians; preexisting provider-patient relationships; audio-only requirements; etc.)

Last Updated: July 19, 2021

States with Waivers: 17 + DC
States with Waivers, not allowing new applications: 0
States without Waivers (or closed waivers): 33
States with long-term or permanent interstate telemedicine: 7 + GU + CNMI + PR + USVI



KHN ON AIR

Listen: Pandemic Shifts Health Care And It May Be Hard To Get Genie Back In Bottle

JUNE 17, 2020

REPUBLISH THIS STORY

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OPINION | COMMENTARY

A Cancer Patient's Brutal Commute

Maki Inada has to drive 5½ hours to see a doctor because of state laws restricting telemedicine.

By Ateev Mehrotra and Barak Richman
July 12, 2021 6:40 pm ET

PRINT TEXT 223

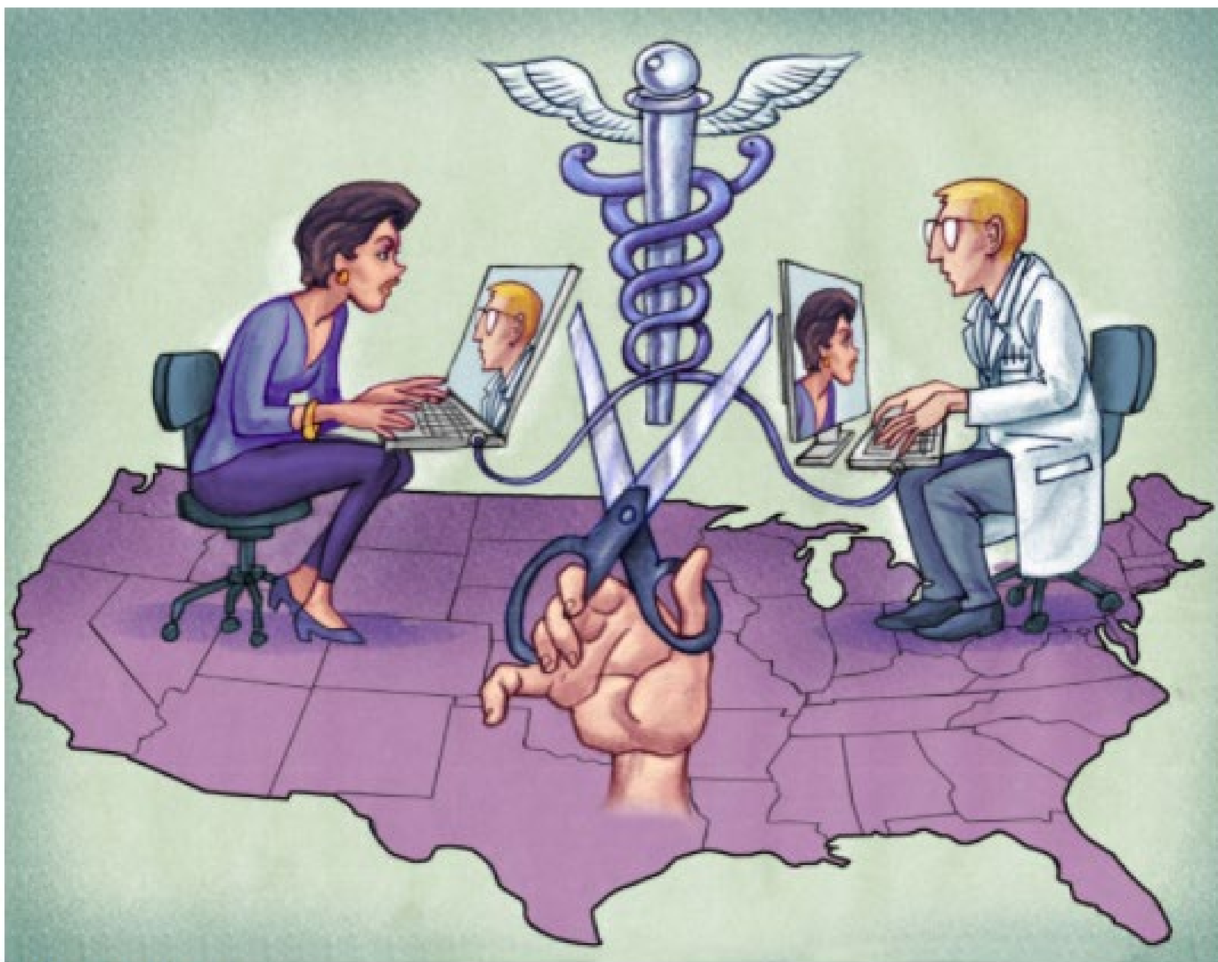


ILLUSTRATION: DAVID KLEIN

Dana-Farber told Ms. Inada she'll have to be physically located in Massachusetts for a visit.

She doesn't have to go all the way to the doctor's office, a 5½-hour drive each way.

She can drive 3½ hours, cross the border into Massachusetts, pull over, and have a telemedicine visit in the car."

Overview

- End of Public Health Emergency Waivers and Surge of Telehealth Legislation
- Reimbursement: Parity, Health Professionals, and Services
- Restrictions: Geographic, Originating Site, Communication, Prescribing
- Privacy and Cybersecurity
- Physician: Doctor-Patient Relationship and Licensing

Public Health Emergency (PHE)

PHE declared on January 31, 2020

Public Health Service Act, Section 319

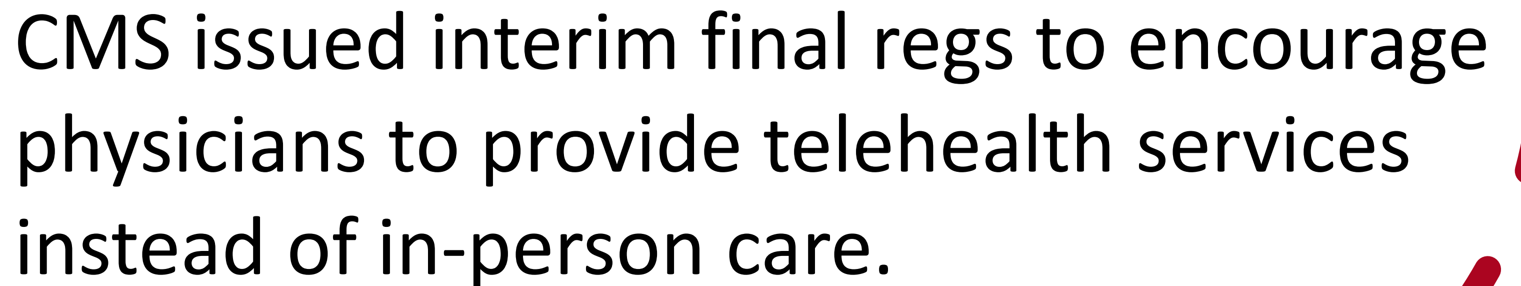
Allows CMS to create methods ("waivers") to help streamline the provision of certain laws and regulate care to those who need it quickly without fear of violations.

Aim: Remove barriers and incentivize providers to adopt telehealth services

Telehealth & Social Distancing

Prior to PHE:

Reimbursement for telehealth services was limited to certain services and by location restrictions.



March 30, 2020:
CMS issued interim final regs to encourage physicians to provide telehealth services instead of in-person care.

DECLARATION OF EMERGENCY

COVID-19

WHEREAS, the World Health Organization declared a Public Health Emergency of International Concern on January 30, 2020, the United States Department of Health and Human Services declared a Public Health Emergency related to the COVID-19 outbreak on January 31, 2020, and the World Health Organization officially declared a pandemic due to COVID-19 on March 11, 2020; and

WHEREAS, globally there are 124,908 total confirmed cases and 4,591 total deaths to-date related to COVID-19, and the situation is rapidly evolving with person-to-person transmission and continued community transmission; and

WHEREAS, COVID-19 was first discovered in Wuhan, China, and is known to cause respiratory illness, which can result in severe disease complications and death; and

WHEREAS, Arizona is proactively leading on the COVID-19 response in the United States, as the third of 39 states that have confirmed cases of COVID-19; and

WHEREAS, the Arizona Department of Health Services and local public health departments have identified 9 cases of COVID-19, including cases spreading in the community, and have additional patients under investigation linked to the global outbreak; and

WHEREAS, COVID-19 poses a serious public health threat for infectious disease spread to Arizona residents and visitors if proper precautions recommended by public health are not followed; and

WHEREAS, the Arizona Department of Health Services in partnership with the Centers for Disease Control and Prevention (CDC) and local public health departments have implemented disease surveillance and testing for confirmed COVID-19 case(s) and patients under investigation; and

WHEREAS, in Arizona, public health and health care systems have identified precautions and interventions that can mitigate the spread of COVID-19; and

WHEREAS, the Arizona Department of Health Services requires a more robust and integrated response to successfully combat the COVID-19 outbreak; and

WHEREAS, the Governor and the Director of the Arizona Department of Health Services have reasonable cause to believe the spread of COVID-19 can lead to severe respiratory illness, disease complications, and death for Arizona residents, particularly those with underlying medical conditions or the elderly; and

WHEREAS, it is necessary and appropriate to take action to ensure the spread of COVID-19 is controlled and that the residents of Arizona remain safe and healthy; and

WHEREAS, the Governor is authorized to declare an emergency pursuant to A.R.S. § 26-303(D) and in accordance with A.R.S. § 26-301(15).

WHEREAS, pursuant to A.R.S. § 26-307(A), a state agency, when designated by the Governor, may make, amend and rescind orders, rules and regulations necessary for emergency functions;

WHEREAS, pursuant to A.R.S. § 36-787(A), during a state of emergency declared by the Governor as a result of an occurrence or imminent threat of illness or health condition caused by an epidemic that poses a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability, the Arizona Department of Health Services shall coordinate all matters pertaining to the public health emergency response of the State; and

WHEREAS, pursuant to A.R.S. § 36-787(B) and (C), during a state of emergency declared by the Governor, the Governor, in consultation with the Director of the Arizona Department of Health Services, may issue orders pertaining to the public health emergency response of the State; and

WHEREAS, pursuant A.R.S. § § 36-788 and 36-789, during a state of emergency declared by the Governor, the Arizona Department of Health Services, to protect the public health, may establish and maintain places of isolation and quarantine and require the isolation or quarantine of any person who has contracted or been exposed to a highly contagious and fatal disease;

WHEREAS, the Legislature has authorized the expenditure of funds in an event of an emergency pursuant to A.R.S. § 35-192; and

WHEREAS, Executive Order 2017-06 establishes the Arizona Emergency Response and Recovery Plan to assist in responding to emergencies including public health emergencies; and

NOW, THEREFORE I, Douglas A. Ducey, Governor of the State of Arizona, by virtue of the authority vested in me by the Constitution and Laws of the State, do hereby determine that the *COVID-19* outbreak presents conditions in Arizona, which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city or town, and which require the combined efforts of the State and the political subdivision, and thus justifies a declaration of a State of Emergency; accordingly, pursuant to A.R.S. §§ 26-303(D) and 36-787, I do hereby:

a. Declare that a State of Emergency exists in Arizona due to the *COVID-19* outbreak, effective March 11, 2020; and

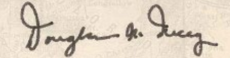
b. Direct that the State of Arizona Emergency Response and Recovery Plan be used, and the Division of Emergency Management to be engaged, as necessary or requested, to assist the Arizona Department of Health Services' coordination of the public health emergency response and authorize the use of state assets as necessary; and

c. Authorize the Director of the Arizona Department of Health Services to coordinate all matters pertaining to the public health emergency response of the State in accordance with A.R.S. Title 36, Chapter 6, Article 9;

This Emergency Declaration will be eligible for termination upon the resolution of the outbreak as determined by the Arizona Department of Health Services.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona.

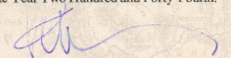
ATTEST:



GOVERNOR

DONE at the Capitol in Phoenix on this 11th day of March in the Year Two Thousand Twenty and of the Independence of the United States of America the Year Two Hundred and Forty-Fourth.

ATTEST:



Secretary of State

telehealth

"HB 2454 IS A WIN FOR PHYSICIANS AND PATIENTS ALIKE. EVERY PATIENT DESERVES ACCESS TO THE APPROPRIATE CARE NEEDED TO TREAT THEIR MEDICAL CONDITIONS. HB 2454 WILL BREAK DOWN UNNECESSARY BARRIERS TO TELEHEALTH AND HELP FACILITATE THE DELIVERY OF HIGH-QUALITY CARE TO PATIENTS ACROSS ARIZONA."

ARIZONA MEDICAL ASSOCIATION PRESIDENT DR. MIRIAM ANAND

HB2454

Overview

- Reimbursement: Parity, Health Professionals, and Services
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July 8: State's pandemic state of emergency ended**.**

July 6: Enacted Senate Bill 212:

- Medicaid program to reimburse for telehealth services at rural health clinics, federally qualified health centers and the federal Indian Health Service at the same rate as for in-person treatment.

- **Expands same rate coverage** to include speech therapy, physical therapy, occupational therapy, hospice care, home health care, and pediatric behavioral health care.

July 1: State's public health emergency expired.

April 13: Preserve Telehealth Access Act of 2021.

- Expands the definitions of "telehealth" and the coverage and reimbursement requirements for telehealth services for both Medicaid and private insurance.
- Reimbursement for a telehealth service on the same basis and rate as in-person delivery of the health care service for **two years.**
- Expands coverage to **include audio-only** telephone conversation until **June 30, 2023**.

June 25: State's public health emergency order was terminated.

- State enacted a package of telehealth reforms that seek to increase access to telehealth services by expanding covered telehealth providers:
    - Unlicensed staff (e.g. Credentialed Alcoholism and Substance Abuse Counselors) to deliver substance use disorder services.
- Eliminated location requirements

Overview

Communication modes – *"meet [patients] where they are"*

Prior to PHE:

Audio-only services were generally permissible only if the healthcare provider had an existing relationship with the patient and audio-visual communication was not reasonably available.

Telemedicine during the coronavirus pandemic exposes the divide between the haves and the have-nots

Effect of Race and Neighborhood Disadvantage on Patient Engagement with a Home-Based COVID-19 Remote Monitoring Program

June 4, 2021: SB 5 allows the delivery of telehealth services through audio-only interactions and allows providers to establish a patient relationship through telehealth.

June 30: State's public health emergency ended.

November 2020: Enacted HB 5046/SB 5080

- Mandates that payers cover telehealth services and directs the state Medicaid program to continue covering audio-only phone services.

- Eliminate originating site restrictions and the requirement that the patient be accompanied by a care provider during the telehealth session.

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Privacy and Security under HIPAA

HIPAA Privacy and Security Laws

- No disclosure of **Protected Health Information** (PHI) unless (a) authorized; (b) required for treatment, operations or payment purposes; or (c) permitted by law or regulations;
- All information is to be encrypted and protected

Telehealth: “Good Faith Use”

Waives HIPAA Penalties

Utah Telehealth Act, includes allowing HIPAA exceptions (with proper notice).

A medical provider may offer telehealth services that do not comply with HIPAA, so long as the provider:

(1) informs the patient the telehealth service does not comply with HIPAA;

(2) give the patient an opportunity to decline use of the telehealth service; and

(3) take reasonable care to ensure security and privacy of the telehealth service.

NURX

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The Patient Company

hims & hers

NIST SPECIAL PUBLICATION 1800-30

Securing Telehealth Remote Patient Monitoring Ecosystem

Includes Executive Summary (A); Approach, Architecture, and Security Characteristics (B) and How-To Guides (C)

Jennifer Cawthra*
Nakia Grayson
Bronwyn Hodges
Jason Kuruvilla*
Kevin Littlefield
Julie Snyder
Sue Wang
Ryan Williams
Kangmin Zheng

*Former employee; all work for this publication done while at employer.

SECOND DRAFT

This publication is available free of charge from
https://www.nccoe.nist.gov/projects/use-cases/health-it/telehealth

NIST
National Institute of Standards and Technology
U.S. Department of Commerce

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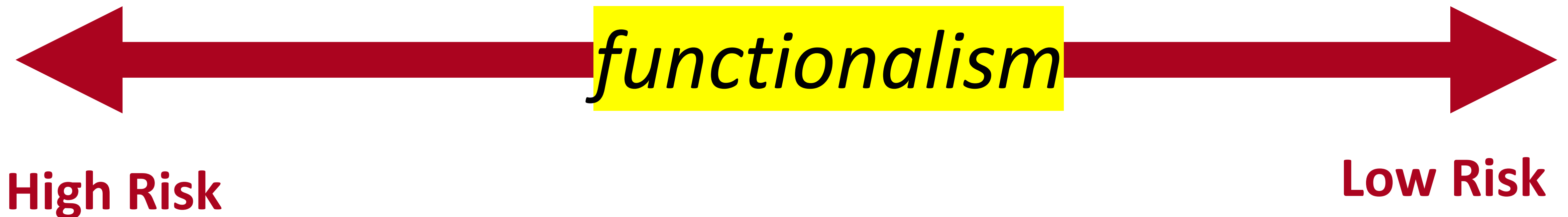
Establishment of a healthcare relationship

The origin of legal, ethical, and professional duties

The rise of permanent interstate telehealth – creating a process for licensure.

Potential Legal Positions on Formation

"Healthcare relationships can be established in any way that is reasonable and appropriate for the circumstances and purposes."



If require in-person visit:

Doctor protectionism or patient welfare?

- Increasing costs and restricting access justified?

- Considerations: patient-centered care? provider shortage?

- Competency and standard of care should suffice
(Federal Trade Commission)

ECONOMY

Biden launches assault on monopolies

The sweeping executive order takes aim at concentrated markets in industries including agriculture, airlines, broadband and banking — and includes efforts to lower drug prices and protect privacy.

The order will also urge the FTC and the Justice Department to challenge overly broad job licensing requirements imposed by state governments.

During the PHE, half of U.S. states agreed to modify their occupational licensing requirements to allow out-of-state physicians and health care workers to work in the state or offer telehealth services.

VA » Office of Public and Intergovernmental Affairs » News Releases

Office of Public and Intergovernmental Affairs

VA Expands Telehealth by Allowing Health Care Providers to Treat Patients Across State Lines

May 11, 2018, 08:59:00 AM

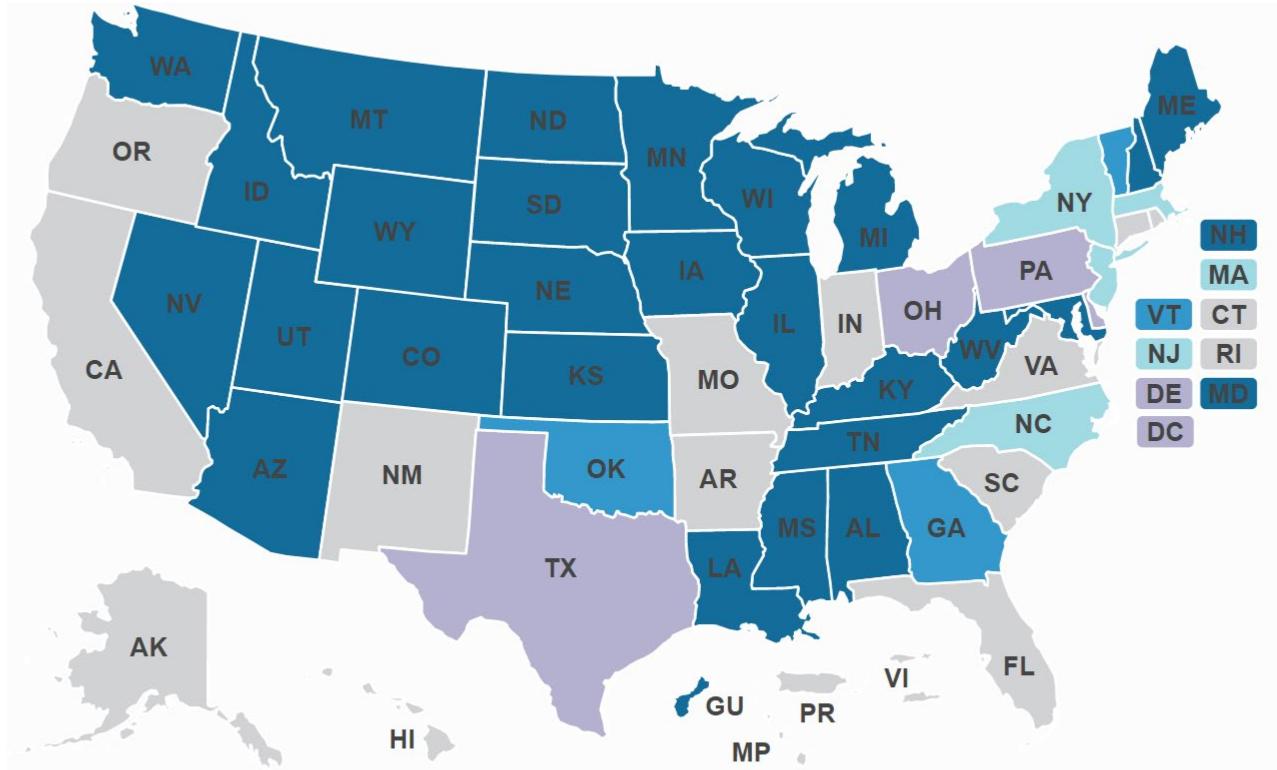
Harness the spending power of Medicare to mandate that a physician licensed in any state can care for a Medicare beneficiary anywhere in the U.S

→ Push states to act

Out-of-State Licensure Process:

Issues state telemedicine licenses to providers who hold a full, unrestricted license in another state to provide services via telemedicine to New Mexico residents.

State Licensure & Interstate Medical Licensure Compact (IMLC)



Between April 2017 and June 2021
Applications received = 14,350
Licenses issued = 21,057

= Compact Legislation Introduced
= IMLC Member State serving as SPL processing applications and issuing licenses*
= IMLC Member State non-SPL issuing licenses*
= IMLC Passed; Implementation In Process or Delayed*

Legislators Throughout the Southwest are Moving Towards Institutionalizing Telehealth Services

By Kirin Goff on Jul 07, 2021

https://southwesttrc.org/blog/2021/legislators-throughout-southwest-are-moving-towards-institutionalizing-telehealth

Thank you

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