

## **TAX AND WEALTH ADVISOR ALERT: BREAKING NEWS-IRS SAYS EXPENSES PAID WITH FORGIVEN PPP LOANS ARE DEDUCTIBLE**

Businesses can now deduct expenses paid for with the proceeds of a forgiven Paycheck Protection Program (PPP) loan. The IRS, in Revenue Ruling 2021-2 issued today, reversed its original position that prohibited businesses with PPP loans from “double-dipping” by paying expenses with a forgivable loan, then writing off those expenses. Congress, in the latest COVID-19 relief bill, as we explained further [here](#), explicitly stated that such expenses were deductible, forcing the IRS to reverse course.

This ruling is sure to provide a significant tax benefit and relief for many small business owners who had availed themselves of the PPP program and found themselves saddled with unexpected tax liabilities as a result of the IRS’s original position.

O’Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state law tax changes. For questions or further information relating to taxation under the CARES Act and the new relief bill, please contact Attorney [Britany E. Morrison](#).

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## **TAX AND WEALTH ADVISOR ALERT: NEW COVID RELIEF BILL SAYS EXPENSES PAID WITH FORGIVEN PPP LOANS ARE DEDUCTIBLE**

Late Monday, Congress passed a \$900 billion COVID-19 relief bill that includes a provision that allows business owners to claim tax deductions for expenses covered by Paycheck Protection Program (PPP) loan proceeds. The bill goes to President Donald Trump today, who is expected to sign it into law.

Among other tax provisions, the bill specifies that business expenses paid with forgiven PPP loans are tax-deductible. This supersedes IRS guidance (as we previously discussed [here](#)) that such expenses could not be deducted and brings the policy in line with what the American Institute of Certified Public Accountants (AICPA) and hundreds of other business associations have argued was Congress’s intent when it created the original PPP as part of the \$2 trillion CARES Act.

This congressional action is sure to provide a significant tax benefit for many small business

owners who had availed themselves of the PPP program and found themselves saddled with unexpected tax liabilities.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state law tax changes. For questions or further information relating to taxation under the CARES Act and the new relief bill, please contact Attorney [Britany E. Morrison](#).

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## **TAX AND WEALTH ADVISOR ALERT: IRS CLARIFIES STANCE ON DEDUCTIBILITY OF EXPENSES COVERED BY PPP LOANS**

Yesterday, the U.S. Treasury Department and Internal Revenue Service released guidance clarifying the tax treatment of expenses funded with forgiven Paycheck Protection Program loans. This guidance, Revenue Ruling 2020-27 and Revenue Procedure 2020-51, strengthened the Treasury's prior position in Notice 2020-32, as we previously wrote about [here](#), which stated that expenses funded with forgiven PPP loan funds are not deductible.

In Revenue Ruling 2020-27, the IRS answered the question of whether a taxpayer who paid otherwise deductible expenses with PPP funds can deduct those expenses in the taxable year in which the expenses were paid or incurred if, at the end of that taxable year, the taxpayer reasonably expects to receive forgiveness of the PPP loan. The answer according to the IRS is "no," regardless of whether the taxpayer has submitted an application for forgiveness of the loan by the end of that taxable year.

The Treasury provided its rationale for this in a subsequent press release yesterday, stating "[s]ince businesses are not taxed on the proceeds of a forgiven PPP loan, the expenses are not deductible. This results in neither a tax benefit nor tax harm since the taxpayer has not paid anything out of pocket."

Nevertheless, if desired, Congress could override the Treasury's stance by passing a law that explicitly allows the deductions. Additionally, it is possible a taxpayer may decide to challenge this position in court.

However, based upon these current rulings, it is important for all taxpayers that are seeking PPP loan forgiveness to understand whether or not, and when, they can deduct expenses incurred with the loan proceeds and the tax impact that may arise from the lack of deductibility if the loan is forgiven. For questions or further information, please contact attorney [Britany E. Morrison](#).

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# HEALTH CARE LAW ADVISOR ALERT: VACCINE INJURY CLAIMS AND THE FEDERAL VACCINE COURT

As the development of a potential COVID-19 vaccine continues, so too do questions about the types of vaccines being developed and how they will be administered. Vaccines offer overwhelming public health benefits, but a small number of individuals who receive vaccines are harmed by them. Most claims alleging health problems caused by vaccines must be brought in the “Vaccine Court” of the United States Court of Federal Claims under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1, *et seq.*

The Act creates the National Vaccine Injury Compensation Program to handle vaccine-related claims. The program is administered by a secretary who may compensate a party who has suffered a vaccine-related injury or death. The Act largely preempts traditional tort claims against vaccine administrators or manufacturers for vaccine-related injuries and it limits claimants to only those sustaining injury or their legal representatives.

The Act creates a Vaccine Injury Table listing various vaccines and medical conditions that may result from them. Claimants must show, by a preponderance of evidence, that they suffered an injury listed in the Table or that a vaccine caused or significantly aggravated their injury within the time periods set forth in the Table. *Terran ex rel. Terran v. Sec’y of Health and Human Servs.*, 195 F.3d 1302, 1307 (Fed. Cir. 1999), *cert. denied*, 531 U.S. 812 (2000). If claimants do so for an injury listed in the Table within the time period stated in the Table, they are presumed to be entitled to compensation. *Knutson by Knutson v. Sec’y of Health and Human Servs.*, 35 F.3d 543, 547 (Fed. Cir. 1994). For claims not falling within the Table, claimants must prove the vaccine at issue caused their injury by a preponderance of evidence. *Golub v. Sec’y of Health and Human Servs.*, No. 99-5161, 2000 WL 1471643, at \*2 (Fed. Cir. Oct. 3, 2000). Claimants are limited to a recovery of \$250,000 for pain and suffering, but may recover additional damages for actual and projected un-reimbursable expenses, actual and anticipated lost earnings, and reasonable attorneys’ fees and costs.

Claims made to the Vaccine Court are sent to the office of the Chief Special Master, who then assigns the claim to a special master to review and issue a decision to be entered as a judgment by the Federal Court of Claims. Either party can request that the Federal Court of Claims review this decision, and also can seek further review in the United States Court of Appeals for the Federal Circuit. Judicial review of the special masters’ decision is limited; the decision can be set aside only if either court determines it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. If claimants choose to reject a judgment

by the Vaccine Court, they then may pursue a tort action in state or federal court. However, the Act offers certain defenses and presumptions to defendants facing such claims.

For more information about the Vaccine Court, or other legal issues relating to the COVID-19 pandemic, contact Grant Killoran of O’Neil Cannon at 414-276-5000 or [grant.killoran@wilaw.com](mailto:grant.killoran@wilaw.com).

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## **HEALTH CARE LAW ADVISOR ALERT: TELEHEALTH IN WISCONSIN (PART 2 OF 2)**

### **Medical Malpractice Risk and Telemedicine Policies**

This article is the second of a two-part series on telehealth in Wisconsin. The first article of this series, available [here](#), highlighted basic standards for regulatory compliance in the design of internal telehealth policies. This second article addresses the practitioner’s obligation to minimize patient harm (and thus practitioner liability) with attention to the medical standard of care when assessing when and how telehealth is appropriate for each patient.

#### **A. Maintaining Medical Standard of Care in Telemedicine**

Wisconsin medical providers must critically evaluate whether their use of a telemedicine platform would permit their evaluation and treatment of each patient in compliance with “the standard of minimally competent medical practice.”<sup>[i]</sup> Standards of practice and conduct required for in-person visits, including standards relating to patient confidentiality and recordkeeping, must be observed in the telehealth context.<sup>[ii]</sup>

In view of these standards articulated by the Wisconsin medical examining board, internal telemedicine policies and procedures must preserve the same degree of quality and safety achieved during in person appointments. Clinical leadership must assess whether quality of patient care can be maintained via telehealth, an evaluation which is dependent upon the provider’s area of specialty, the patient’s condition, and other factors. For example, the use of telemedicine is not suitable for conditions where physical examinations are necessary, because of extreme symptoms, forceful interventions, or in the case of medical procedures for which certain protocols need to be followed.<sup>[iii]</sup>

Clinical guidelines specific to telemedicine can serve as important indicators as to whether

your practice should incorporate telemedicine for specific patient encounters or diagnostic evaluations.[iv] However, guideline compliance does not guarantee accurate diagnosis or safe and effective medical care meeting the standard of care. Local circumstances must be considered, and the practitioner is ultimately responsible for all decisions regarding the appropriateness of a specific course of action.[v] Published guidelines for every clinical scenario and application simply do not exist and so by necessity may need to be developed in-house.[vi] The policies of each medical practice should delineate between circumstances in which various telehealth platforms can, and cannot, preserve the quality of care for patients. Providing treatment recommendations, including issuing a prescription, based only on a static electronic questionnaire does not meet the standard of minimally competent medical practice.[vii]

Sometimes the proper standard of care is reflected in government reimbursement decisions. For example, the Wisconsin Department of Health Services' ("DHS") expansion of telehealth coverage will exclude comprehensive assessment and care planning for children with complexities, since this requires an in-person assessment. However, case management for children with complex medical needs will be covered. Certain, but not all, dental evaluations will be covered. Certain therapy services will be covered.[viii]

Where clinical leadership determines that telehealth is appropriate, workflow must be re-evaluated in the telehealth context to maintain the standard of care. For example, staff responsibilities may require adjustment for telehealth encounters to ensure that updates to the medical record, physician orders and the "after visit summary" are properly recorded in connection with each telehealth encounter. Providers may consider requiring immediate scheduling of patients who express symptoms that require in-person evaluation during a telemedicine visit to promote patient safety and minimize liability. Providers might also consider whether patient/family coaching regarding medication administration is properly handled in the telehealth context.

## **B. Telephone and Texting: Risk Mitigation**

While the use of synchronous audio and video visits has exploded in the wake of the COVID-19 pandemic, physicians have provided routine medical advice by phone for decades, responding to patient calls reporting a change in condition and advising medication changes by phone communications. Surveys of patients since the COVID-19 pandemic indicates that texting is a preferred method of communication over phone calls.[ix] In addition to health care privacy and security issues (outside of the scope of this article), what are some of the legal considerations for such telephone and texting encounters?

First, practitioners must observe the criteria for government and private insurer reimbursement of telehealth, unless their practice is limited to self-pay. In the case of Medicaid reimbursement, the Wisconsin Medical Assistance Program generally covers

consultations through “interactive telehealth” and certain asynchronous telehealth services and remote patient monitoring.[x] The Wisconsin Statutes delegate authority to DHS to determine whether to include telephone encounters within the definition of “telehealth.”[xi] DHS is temporarily providing coverage for certain telephone visits during COVID-19 pandemic, and the agency may ultimately decide to continue coverage of certain telephone communications as part of its permanent policy.[xii] Audio-only telephone communications must be delivered with the functional equivalency of a face-to-face encounter in order to be covered by Wisconsin Medicaid during the COVID-19 pandemic.[xiii]

If the patient will be located out-of-state, the provider must assess whether the applicable state’s criteria for Medicaid telehealth reimbursement differs from the requirements imposed by Wisconsin Medicaid.[xiv] If federal Medicare will instead serve as payor, the Centers for Medicare and Medicaid Services (“CMS”) will reimburse certain audio-only phone visits during the COVID-19 public health emergency. For reimbursement purposes, CMS distinguishes “telephone visits” from “services that “would normally occur in person.” Telephone visits are “not paid as though the service occurred in person,” and reimbursement may be bundled into a pre- or post-service if the phone encounter falls within the previous seven days of a prior visit or leads to a subsequent evaluation/management service.[xv]

Because audio-only telephone and texting encounters are inherently more limited with respect to patient evaluation capabilities, providers should exercise caution when using these modes of telehealth in circumstances that would usually *or could* warrant a physical evaluation of the patient based upon medical history or the symptoms described when scheduling an appointment. In addition to introducing risk of medical malpractice claims, providers risk non-compliance with criteria for reimbursement, such the standard of “functional equivalency to the face-to-face service” required by state Medicaid for reimbursement. The “functional equivalency standard” applicable to state government reimbursement is higher than the “the standard of minimally competent medical practice” generally applicable to the practice of telemedicine in the state.[xvi]

### **C. Updates to Telehealth Policies and Procedures**

Irrespective of whether government reimbursement is in play, your medical practice policies and procedures should be updated to mitigate risk to patient care and safety in the telehealth context. Your internal policies and procedures should delineate when telemedicine is (and is not) appropriate based upon a critical assessment of each of the several evaluative and diagnostic services provided by your practice. Staff, including schedulers and nurses, should be trained as to when scheduling a telemedicine appointment poses risk to your patients and your practice. Your policies should incorporate customized procedures designed to preserve the standard of care and the medical recordkeeping requirements imposed by the Wisconsin medical examining board for the practice of telemedicine. In addition, physicians practicing telemedicine should confirm that their

medical malpractice insurance coverage applies outside of the traditional health care facility settings.

OCHDL's health care practice group will continue to monitor telehealth regulations and related guidance as the standard of care for telemedicine evolves. For more information on this topic, contact Marguerite Hammes at 414-276-5000 or [marguerite.hammes@wilaw.com](mailto:marguerite.hammes@wilaw.com).

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[i] See WIS. ADMIN. CODE § MED 24.06.

[ii] See WIS. ADMIN. CODE § MED 24.05. (requiring the same standard of practice and conduct regardless of whether health care services are provided in person or by telemedicine). The standard of care that is required of all Wisconsin health care providers is defined as the degree of skill, care, and judgment which reasonable health care providers who practice the same specialty would exercise in the same or similar circumstances, having due regard for the state of medical science at the time. *Nowatske v. Osterloh*, 198 Wis.2d 419, 543 N.W.2d 25 (1996), *abrogated on other ground by Nommensen v. American Continental Ins. Co.*, 246 Wis.2d 132, 629 N.W.2d 132 (2001); Wis. J.I. Civil No. 1023.

[iii] Secure Medical, Best Telemedicine Clinical Guidelines (April 13, 2018), available at <https://www.securemedical.com/telemedicine/best-telemedicine-clinical-guidelines/>

[iv] *E.g.*, American Telemedicine Association, Practice Guidelines Archives, available at [https://www.americantelemed.org/resource\\_categories/practice-guidelines/](https://www.americantelemed.org/resource_categories/practice-guidelines/) ; Pantanowitz, Liron et al. "American Telemedicine Association clinical guidelines for telepathology." *Journal of pathology informatics* vol. 5,1 39. 21 Oct. 2014, doi:10.4103/2153-3539.143329; Krupinski, Elizabeth A, and Jordana Bernard. "Standards and Guidelines in Telemedicine and Telehealth." *Healthcare (Basel, Switzerland)* vol. 2,1 74-93. 12 Feb. 2014, doi:10.3390/healthcare2010074.

[v] Elizabeth A. Krupinski and Jordana Bernard, Standards and Guidelines in Telemedicine and Telehealth, *Healthcare* 2014, 2, 74-93; doi: 10.3390/healthcare2010074, at 81.

[vi] See Standards and Guidelines in Telemedicine and Telehealth, *Healthcare*, supra note 5, at 81.

[vii] See WIS. ADMIN. CODE § MED 24.07 (2).

[viii] See Brook Anderson, Wisconsin DHS Benefits Policy Section Chief, Telehealth Expansion: Acute and Primary Services, available at <https://www.dhs.wisconsin.gov/telehealth/telehealth-expansion-all-provider.pdf> (revised July 30, 2020).

[ix] SR Heath, Patient Communication Preferences: the COVID-19 Impact, July 30, 2020, available at <https://mhealthintelligence.com/resources/white-papers/patient-communication-preferences-the-covid-19-impact>  
eid=CXTEL000000554482&elqCampaignId=16139&utm\_source=ded&utm\_medium=email&utm\_campaign=dedicated&elqTrackId=607a1670c3c349349ac195f03c60cba2&elq=362f09f490fe41169f2fc16dbcab5410&elqaid=16904&elqat=1&elqCampaignId=16139

[x] See WIS. STAT. § 49.46(2)(b)(21)-(22).

[xi] See WIS. STAT. § 49.45(61)(a)(4); §49.46(2)(b)(23).

[xii] See ForwardHealth Update 2020-12, "Temporary Changes to Telehealth Policy and Clarifications for Behavioral Health and Targeted Case Management Providers" (revised May 8, 2020), available at <https://www.forwardhealth.wi.gov/kw/pdf/2020-12.pdf>

[xiii] See *id.*

[xiv] See Center For Connected Health Policy, State Telehealth Laws and Reimbursement Policies (Fall 2020), available at <https://www.cchpca.org/sites/default/files/2020-10/CCHP%2050%20STATE%20REPORT%20FALL%202020%20FINAL.pdf>

[xv] See, e.g., Centers for Medicare and Medicaid Services, COVID-19 Frequently Asked Questions (FAQs) on Medicare Fee-For-Service (FFS) Billing (revised October 20, 2020), at 63-79, available at <https://www.cms.gov/files/document/03092020-covid-19-faqs-508.pdf>

[xvi] Compare Wisconsin ForwardHealth Telehealth Expansion and Related Resources for Providers, available at [https://www.forwardhealth.wi.gov/WIPortal/content/html/news/telehealth\\_resources.html.spage](https://www.forwardhealth.wi.gov/WIPortal/content/html/news/telehealth_resources.html.spage), with WIS. ADMIN. CODE § MED 24.06.

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## TAX AND WEALTH ADVISOR ALERT: NEW STREAMLINED FORGIVENESS FOR PPP LOANS UP TO \$50,000

Late last week, the Department of Treasury and Small Business Administration (SBA) jointly released a new loan forgiveness application for Paycheck Protection Program loans of \$50,000 or less. This new streamlined application removes calculations required on prior forms and simplifies documentation requirements, relieving both borrowers and lenders of the prior compliance burdens present in the older form.

Pursuant to an [interim final rule](#), the simpler one-page application form, SBA Form 3508S, does not require borrowers to reduce their forgiveness amount for any reductions in full-time equivalent (FTE) employees or in salaries or wages. Additionally, the new form does not require borrowers to show calculations used to determine their loan forgiveness amount. With that said, the SBA could request additional information and documents as part of its loan review process.

While simpler overall, the application still requires the borrower to make certain certifications regarding the accuracy of the information reported. Further, the application requires the borrower to submit documentation supporting the fact that the use of the loan proceeds was for eligible costs. Borrowers who, together with their affiliates (as determined under SBA rules), received loans of \$2 million or more are ineligible to use the new streamlined application. For example, if an entity has a loan of \$50,000 and its parent corporation has a loan of \$1.95 million, the former would not be able to use Form 3508S to apply for loan

forgiveness.

Form 3508S and its accompanying instructions are posted on the SBA's website.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the new streamlined application for PPP loans under \$50,000, please contact the author of this article, Attorney Britany E. Morrison.

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## **HEALTH CARE LAW ADVISOR ALERT: TELEHEALTH IN WISCONSIN (PART 1 OF 2)**

### **I. Expansion of Telehealth to Meet Clinical Need**

Federal and state governments have resolved traditional barriers to telehealth – including complexity of billing, lower reimbursement and privacy and security concerns – to facilitate the safe provision of medical services during the COVID-19 pandemic.[i] The first article in this two-part series highlights basic standards for regulatory compliance in the design of telehealth policies. The second article will address the practitioner's obligation to minimize patient harm (and thus practitioner liability) with attention to the medical standard of care when assessing when and how telehealth is appropriate for each patient.

### **II. Mechanics of Telehealth Compliance**

#### **A. Minimum Standards for Telehealth Practice**

A Wisconsin physician planning to provide treatment recommendations (including a prescription) by use of a website-based platform must observe requirements promulgated by the Wisconsin medical examining board to comply with state law and (when applicable) to receive payment from Wisconsin Medicaid.[ii] While the requirement that the physician be licensed to practice medicine in the state has been suspended during the COVID-19 emergency,[iii] the following formalities must still be observed during the pandemic to protect the integrity of the telemedicine encounter:

1. Physician's name and contact information must be made available to the patient;
2. Informed consent must be obtained;[iv]
3. A documented evaluation (including a medical history) must be performed. If needed to satisfy standards of minimally competent medical practice, an examination, evaluation, and/or diagnostic tests are also required.

4. A patient health care record must be prepared and maintained.[v]

Under permanent Wisconsin telemedicine regulations, a physician-patient relationship may be initially established by use of two-way electronic communications, but not by use of audio-only telephone, email messages or text messages.[vi] Conditioning treatment of a patient upon the use of telehealth is expressly prohibited.[vii]

## **B. Reimbursable Telehealth Services**

### **1. Wisconsin Medicaid and Telehealth**

Wisconsin lawmakers began expanding the services and communications that may be provided by telehealth prior to the COVID-19 pandemic. The Wisconsin Department of Health Services (“DHS”) continues to broaden the range of medical services covered by the state’s medical assistance program when delivered remotely, both during the public health emergency and beyond.[viii] DHS is adding Medicaid coverage for *currently covered services* when provided using a telehealth platform if *functionally equivalent to an in-person visit* (interactive synchronous technology).[ix] DHS’s criteria for “face-to-face equivalence” for interactive telehealth services includes the use of “audio, video, or telecommunication technology,” but only if there is “no reduction in quality, safety, or effectiveness.”[x] Audio-only phone communication that can be delivered with a functional equivalency to face-to-face service will be covered during the COVID-19 pandemic.[xi] DHS emphasizes that documentation must support the service rendered.[xii] For further explanation of these policies, visit ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers.[xiii]

Telehealth coverage expansion applies to all services currently indicated in topic (#510) of the ForwardHealth Online Handbook (permanent policy), and additional services temporarily allowed for telehealth are published in ForwardHealth Updates.[xiv] For example, ForwardHealth is expanding coverage to include certain synchronous (real-time) and asynchronous (not real-time) services such as remote patient monitoring and provider-to-provider consultations. DHS also plans to roll out expansion updates particular to specific services areas, such as therapy and behavioral health. DHS will use a phased approach to its expansion of telehealth services, keeping providers informed of expansion of coverage via the ForwardHealth website described above.

In addition to coverage criteria relating to the mode of telehealth services, a provider must be mindful of rules governing the logistics of telehealth visits. Wisconsin Medical Assistance (Medicaid) places no restriction on the location of the provider (permanent policy), which may include physicians, nurse practitioners, Ph.D. psychologists, psychiatrists and others.[xv] Beginning in March 2020, ForwardHealth began allowing coverage irrespective of the location of the patient (permanent policy).[xvi] However, only the following sites are currently eligible

for a facility fee: hospitals, including emergency departments, office/clinics, and skilled nursing facilities.[xvii]

## **2. Federal Medicare and Telehealth**

The Centers for Medicare and Medicaid Services (“CMS”) greatly expanded access to Medicare telehealth services based upon the regulatory flexibilities granted under Social Security Act § 1135 waiver authority and the Coronavirus Preparedness and Response Supplemental Appropriations Act. Currently, Medicare will reimburse both synchronous video visits and also brief communication technology-based services (“CTBS”) for responses to Medicare Part B beneficiaries by telephone, audio/video, secure text messaging or by use of a patient portal.[xviii] Reimbursement for CTBS is limited to patients with an established (or exiting) relationship with a physician or certain practitioners. The billing codes for CTBS represent **brief, patient-initiated** communication services and do not replace full evaluation and treatment services covered under the Medicare benefit and described by existing CPT codes. To meet the criteria for medical necessity, CTBS must require clinical decision-making and not be for administrative or scheduling purposes. The patient must verbally consent to these types of services at least annually.

To be covered by Medicare, the CTBS must not be related to a medical visit within the previous seven (7) days and cannot lead to a medical visit within the next twenty-four (24) hours (or soonest appointment available).[xix] For Medicare reimbursement, providers must confirm that the particular diagnostic benefit falls within the description of CTBS codes. For example, CTBS codes do not include the audiology diagnostic benefit category.[xx] DHS applies similar requirements to billing for “telephone evaluation and management services” covered under Wisconsin Medicare.[xxi]

During the COVID-19 pandemic, Medicare will reimburse telehealth services at the same rate as regular, in-person visits. The level of reimbursement that is approved following the public health emergency will impact the availability of telehealth services.

### **C. Documentation Requirements**

DHS policy (published via ForwardHealth updates available online) is to require that all services provided via telehealth be thoroughly documented in the member’s medical record in the same manner as services provided face-to-face.[xxii] Providers must develop and implement their own methods of informed consent to confirm that a member agrees to receive services via telehealth. ForwardHealth considers verbal consent to receiving services via telehealth an acceptable method of informed consent when it is documented in the member’s medical record.[xxiii] Documentation for originating sites (patient location) must support the member’s presence in order to submit a claim for the originating site facility fee. In addition, if the originating site provides and bills for services and also the originating site

facility fee, documentation in the member's medical record should distinguish between the unique services provided.[xxiv]

DHS is temporarily allowing supervision requirements for paraprofessional providers to be met via telehealth. Supervision must be documented according to existing benefit policy.[xxv]

### **III. Additional Considerations for Telehealth**

***E-Prescribing*** - Many states limit the prescribing of controlled substances based solely on telehealth examination. Generally speaking, the U.S. Drug Enforcement Administration ("DEA") requires a telemedicine provider to have an in-person medical evaluation of a patient prior to prescribing a controlled substance for the patient, absent an exception. However, the DEA issued notice in March 2020 that this requirement is waived for the duration of the COVID-19 public health emergency.[xxvi]

***Privacy and Security*** - The Office for Civil Rights announced on March 17, 2020 that they will not impose penalties for noncompliance with the Health Insurance Portability and Accountability Act of 1996 regulatory requirements for remote communications technologies in connection with the good faith provision of telehealth during the national COVID-19 public health emergency. DHS has issued an update clarifying guidance regarding federal enforcement of the Health Insurance Portability and Accountability Act of 1996 regulatory requirements during the COVID-19 pandemic.[xxvii]

***Practicing Telehealth Across State Lines*** - Wisconsin has adopted the Federation of State Medical Boards' Interstate Licensure Compact, which aims to expediate physician licenses for uses like telemedicine in states that adopt the compact. Wisconsin providers serving patients in other states must consult local state laws governing the physician-patient relationship and the use of telemedicine.

When a Wisconsin provider provides telemedicine services to a patient located outside of the state, legal review for choice of law and choice of forum should be undertaken. For example, the laws of the state in which each patient is located should be evaluated for: (1) statute of limitations; (2) standard of care; (3) limitations of liability; and (4) unique provisions governing the establishment or termination of the physician/patient relationship. To manage these challenges in a large telemedicine practice, a provider may need to consider establishing different legal entities for the practice of medicine in different states.

OCHDL will continue to monitor changes in regulations and policy impacting telemedicine. Our next blog post will address medical malpractice risk and telemedicine policies. For more information on these topics, contact [Marguerite Hammes](mailto:marguerite.hammes@wilaw.com) at 414-276-5000 or [marguerite.hammes@wilaw.com](mailto:marguerite.hammes@wilaw.com).

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[i] SR Health, A Complete Guide to Seeing Patients Virtually and Getting Paid for It, available at <https://www.srhealth.com/resources/telemedicine-guide>

[ii] See WIS. ADMIN. CODE § MED 24.07 (1).

[iii] In the ordinary course, a physician practicing telemedicine in Wisconsin must be licensed to practice medicine and surgery by the medical examining board as required by Wis. Admin. Code § MED 24.04. See Wis. Admin. Code § MED 24.07 (1). However, Wis. Admin. Code § MED 24.04 (requiring a physician practicing medicine in Wisconsin to be licensed by the medical examining board) and 24.07(1)(a) (applying licensing requirements to medical practice by telemedicine in the state) have been suspended during the COVID-19 emergency. See Governor Tony Evers Emergency Order #16 Related to Certain Health Care Providers and the Department of Safety and Professional Services Credentialing, dated March 27, 2020.

[iv] WIS. ADMIN. CODE § MED 24.07 (1) (citing WIS. STAT. § 448.30 and Ch. MED. 18).

[v] WIS. ADMIN. CODE § MED 24.07(1) (citing ch. MED. 21).

[vi] See *id.* § MED 24.03.

[vii] ForwardHealth Update No. 2020-09, “Changes to ForwardHealth Telehealth Policies for Covered Services, Originating Sites, and Federally Qualified Health Centers” (March 18, 2020).

[viii] See WIS. STAT. § 49.45(61)(b); § 49.46(2)(b)(21)-(23). DHS is expanding the permanent definition of telehealth to encompass the “practice of health care delivery, diagnosis, consultation, treatment, or transfer of medically relevant data by means of audio, video, or data communications that are used either during a patient visit or consultation or are used to transfer medically relevant data about a patient.” See ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers, available at [https://www.forwardhealth.wi.gov/WIPortal/content/html/news/telehealth\\_resources.html.spage](https://www.forwardhealth.wi.gov/WIPortal/content/html/news/telehealth_resources.html.spage) See also Letter to ForwardHealth Providers from Jim Jones, State Medicaid Director, re: Wisconsin Medicaid Response to the COVID-19 Outbreak; ForwardHealth #510.

[ix] See ForwardHealth Update 2020-09, *supra* note vii (permanent policy); ForwardHealth Update 2020-12, “Temporary Changes to Telehealth Policy and Clarifications for Behavioral Health and Targeted Case Management Providers” (Revised May 8, 2020); ForwardHealth Update 2020-15, “Additional Services to be Provided Via Telehealth” (Revised May 8, 2020) (temporary expansion policy). See also Brooke Anderson, Benefits Policy Section Chief, Telehealth Expansion: Acute and Primary Services, available at <https://www.dhs.wisconsin.gov/telehealth/telehealth-expansion-all-provider.pdf>

[x] See ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers, *supra* note viii. See also Brooke Anderson, Benefits Policy Section Chief, Telehealth Expansion: Acute and Primary Services, *supra* note ix.

[xi] ForwardHealth Update 2020-12, *supra* note ix.

[xii] ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers, *supra* note viii.

[xiii] For further explanation of these policies, visit ForwardHealth, Telehealth, Telehealth Expansion and Related Resources for Providers, *supra* note viii. See also Brooke Anderson, Benefits Policy Section Chief, Telehealth Expansion: Acute and Primary Services, *supra* note ix.

[xiv] ForwardHealth Update 2020-15, *supra* note ix.

[xv] ForwardHealth Update 2020-12, *supra* note ix (permanent policy with respect to provider location but temporary with respect to other policy changes).

[xvi] ForwardHealth Update 2020-09, *supra* note ix (permanent policy changes).

[xvii] ForwardHealth, Topic 510, Telehealth, available at <https://www.forwardhealth.wi.gov/WIPortal/Subsystem/KW/Print.aspx?ia=1&p=1&sa=1&s=2&c=61&nt=Telehealth>

[xviii] Centers for Medicare and Medicaid Services, Medicare Telemedicine Health Care Provider Fact Sheet, available at <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>

[xix] *See id.*

[xx] American Speech-Language-Hearing Association, Use of Communication Technology-Based Services During Caronavirus/COVID-19 (June 6, 2020), available at <https://www.asha.org/Practice/reimbursement/medicare/Use-of-E-Visit-Codes-for-Medicare-Part-B-Services-During-Coronavirus/>

[xxi] ForwardHealth Update 2020-09, *supra* note vii.

[xxii] ForwardHealth Update 2020-12, *supra* note ix (citing Wis. Admin. Code § DHS 106.02(9); ForwardHealth Online Handbook #201 (Financial Records), #202 (Medical Records); #203 (Preparation and Maintenance of Records); #204 (Records Retention); #1640 (Availability of Records to Authorized Personnel)).

[xxiii] *See* ForwardHealth Update 2020-15, *supra* note ix.

[xxiv] *See* ForwardHealth Update 2020-12, *supra* note ix.

[xxv] *See id.*

[xxvi] DEA Press Release, DEA's Response to COVID-19 (March 20, 2020), available at <https://www.dea.gov/press-releases/2020/03/20/deas-response-covid-19>

[xxvii] *See* ForwardHealth Update 2020-12, *supra* note ix.

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## TAX AND WEALTH ADVISOR ALERT: IRS REMINDS SELECT TAXPAYERS OF OCTOBER 15TH TAX FILING DEADLINE

The IRS has reminded taxpayers who filed an extension that the October 15, 2020 due date to file their 2019 tax return is near. Taxpayers should file their tax returns on or before the October 15, 2020 deadline. Moreover, taxpayers with tax due should pay as soon as possible to reduce any penalties and interest. However, certain taxpayers may have more time to file

and pay. Taxpayers with more time to file or pay include the following:

- service members and others serving in a combat zone who typically have 180 days after they leave the combat zone to file returns and pay any taxes due; and
- taxpayers in federally declared disaster areas who already had valid extensions.

Further, taxpayers can make their federal tax payments online through various [methods](#) such as a bank account withdrawal or via debit card or credit card. Additionally, taxpayers unable to make full payments can meet their tax obligations in monthly installments by applying for a [payment plan](#). Alternatively, taxpayers can find out if they qualify for an [offer in compromise](#)—a way to settle tax debt for less than the full amount or even request a [temporary delay on collection](#) until their financial situation improves.

The IRS also reminded those with little or no income who are not required to file a tax return ([non-filers](#)) that they could be eligible to receive an Economic Impact Payment.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state tax filing deadlines. For questions or further information relating to the upcoming October 15, 2020 deadline, please contact Attorney [Britany E. Morrison](#).

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## ATTORNEY JOSEPH GUMINA FEATURED IN MERIT SHOP CONTRACTOR

Recently, the *Merit Shop Contractor* magazine featured Attorney Joseph Gumina's article entitled "COVID-19 and Liability." In the article, Attorney Gumina emphasizes methods for construction employers to prevent and control worksite hazards relating to COVID-19. The article also discusses general safety and health mandates a construction employer should follow in order to help protect themselves from possible COVID-19 litigation. This article is a must read for all construction employers.

Read the full article [here](#).

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## HEALTH CARE LAW ADVISOR ALERT:

# VIDEOCONFERENCING CONSIDERATIONS FOR HEALTH CARE LITIGATORS

These days, litigators are routinely taking depositions and participating in hearings over Zoom or other videoconferencing apps and software. Frequently, these depositions and hearings are set up using videoconferencing systems chosen, hosted, and controlled by a court, an arbitrator, or a court reporter. There has been significant discussion and administrative guidance about the use of videoconferencing by health care providers since the pandemic began. Health care litigators should also consider the implications of video depositions or hearings on HIPAA security obligations.

Zoom reports that it is HIPAA compliant. However, these features must be requested by the subscriber, typically through a Zoom for Healthcare subscription. Microsoft Teams also reports it is capable of HIPAA compliance, as does Google Meet.

Litigators who anticipate protected health information (PHI) may be discussed or contained in documents shared through a videoconferencing platform for purposes of a deposition or hearing should inquire with the host about the type of subscription and system capabilities. Some court reporters offer special HIPAA-compliant rooms with certain features disabled.

With the rapid transition to videoconferencing to conduct a substantial amount of litigation tasks, guidance in this area is likely to continue to evolve along with videoconferencing system capabilities. Health care providers and their outside litigators should stay informed and be prepared to ask the right questions to ensure they are not overlooking HIPAA obligations.

The attorneys who contribute to the Health Care Law Advisor are available to assist health care providers with a variety of legal matters. Please contact us if you need assistance navigating the pandemic-related changes to health care litigation.