TELEHEALTH FOR IDAHO HOSPITALS

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Idaho Hospital Association

(7/22)

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Overview

- Recent developments
- Telehealth rules
- Privacy and security
- Credentialing
- Using telehealth to satisfy regulatory obligations
- Liability issues
- Reimbursement

WRITTEN RESOURCES

- .PPT slides
- Idaho Telehealth Access Act, IC 54-5701 et seq.
- Idaho Law re Prescribing Without an Exam, IC 54-1733
- Sample Credentialing by Proxy Agreement

If you did not receive them, contact CECobbins@hollandhart.com.

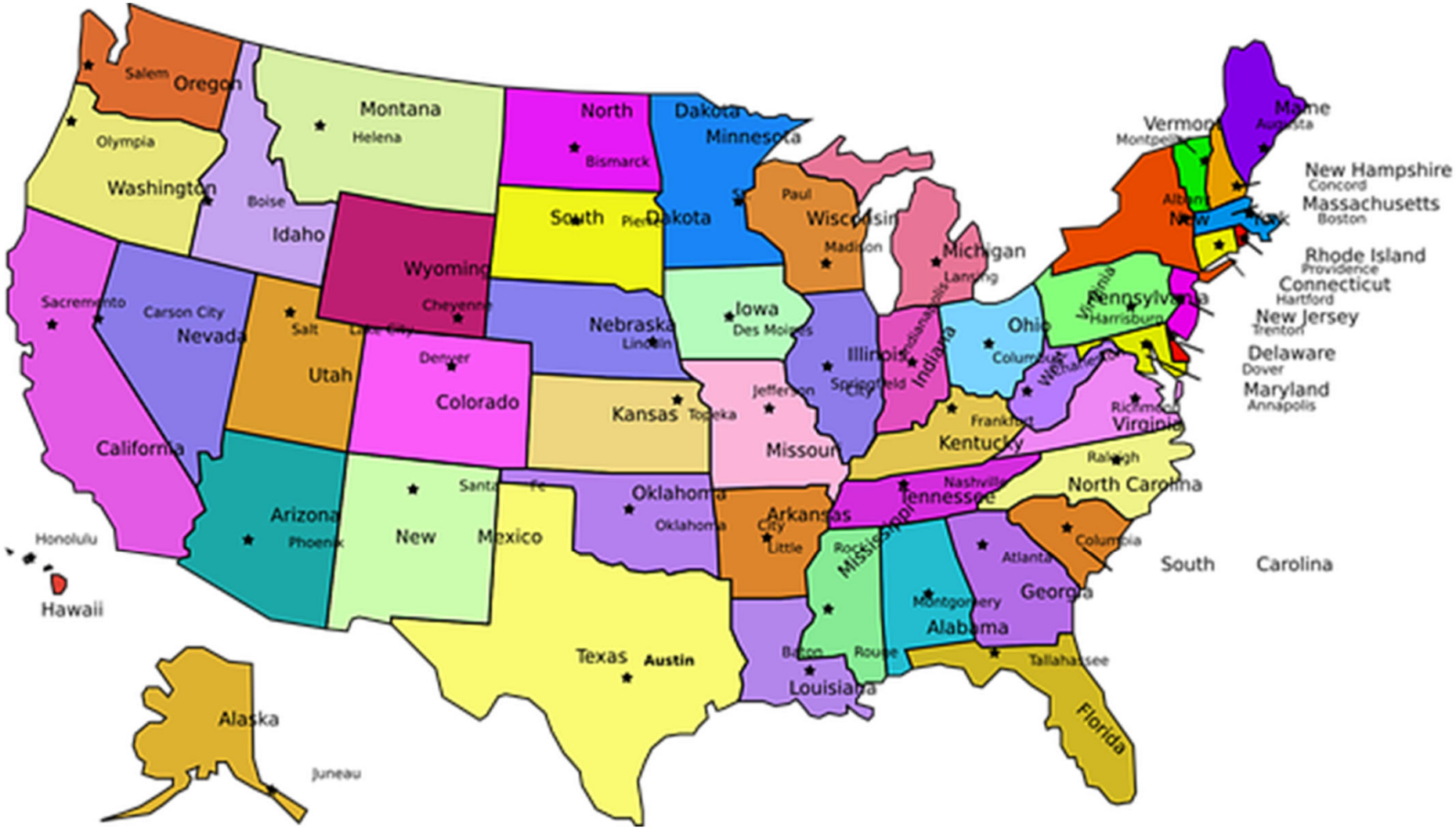
TELEHEALTH: RECENT DEVELOPMENTS

- Federal and state governments relaxed telehealth rules during COVID-19 emergency.
  - Medicare pays for expanded telehealth services.
  - HHS relaxes security rules to allow telehealth through common communication platforms.
  - DEA allows remote prescribing for controlled substances.
  - DOPL allowed out of state providers to render care in Idaho.
- Idaho Division of Occupational Licensure (DOPL) withdrew Board of Medicine telehealth regs.
  - Idaho Telehealth Access Act, IC 54-5701 et seq. sets forth most of the requirements for providers.

TELEHEALTH: RECENT DEVELOPMENTS

- Idaho ends COVID-19 emergency effective April 15, 2022.
  - ➢ Out-of-state providers must be licensed in Idaho.
- Federal COVID-19 emergency extended to October 13, 2022.
  - Federal waivers continue, at least for now.
- Consolidated Appropriations Act of 2022 extends certain Medicare rules 151-days after COVID-19 emergency ends.
- State and federal telehealth legislation floating around…

TELEHEALTH RULES



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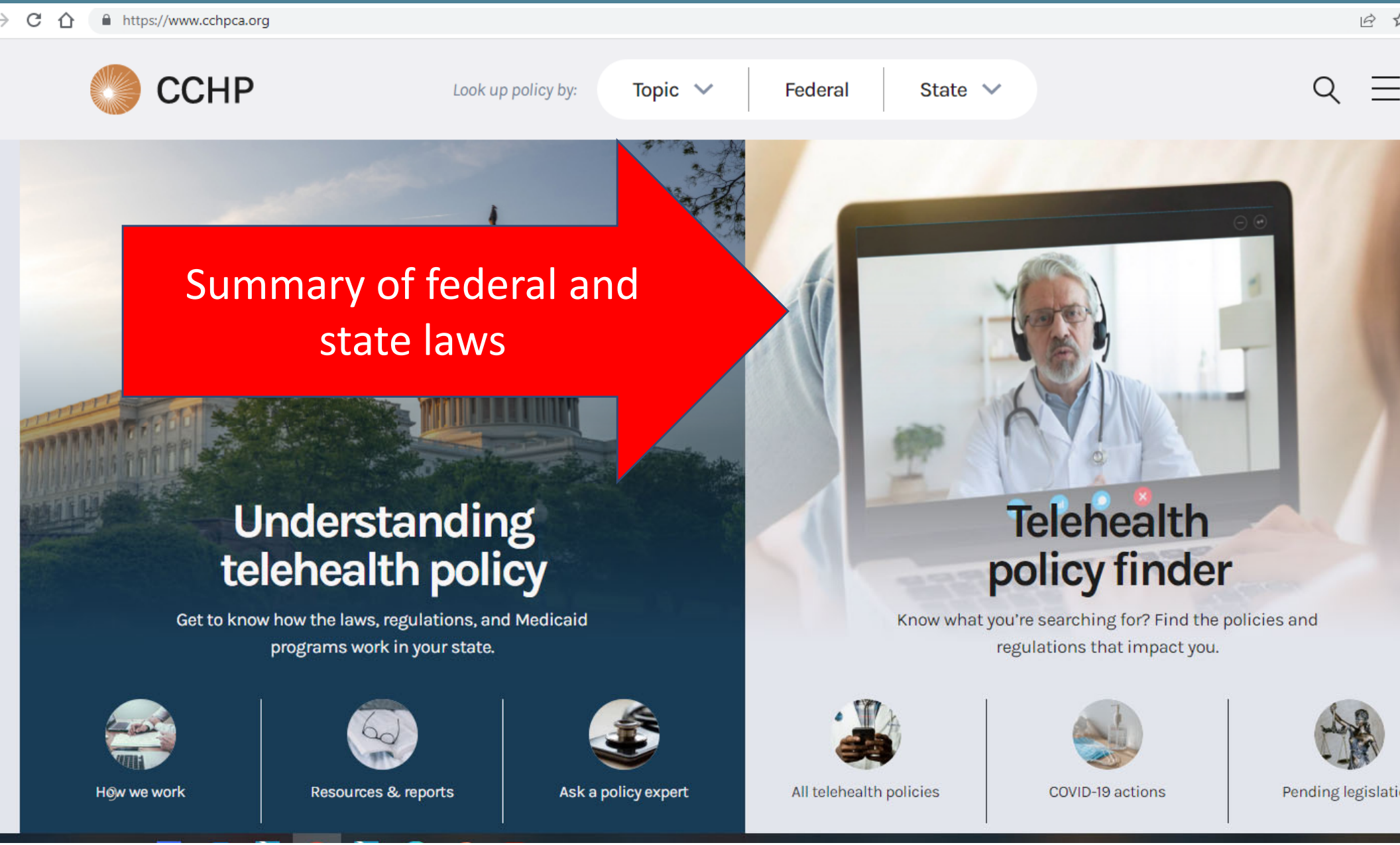
TELEHEALTH RULES

No comprehensive or coordinated national law.

- Federal agencies may have certain requirements
  - E.g., Medicare, VA, DEA, FDA
- Each state has its own requirements,
  - E.g., licensing, telehealth standards, prescriptions, reimbursement, etc.
- Different licensing agencies may have differing requirements.
  - E.g., Physicians and PAs, nurses, psychologists, social workers, etc.
- Each payer may have their own requirements for reimbursement.

➢ *Check the law in the states where you intend to provide services.*

CENTER FOR CONNECTED HEALTH POLICY, HTTPS://WWW.CCHPCA.ORG/



TELEHEALTH RULES: FOR IDAHO HOSPITALS

State

- Idaho Telehealth Access Act, IC 54-5701 et seq.
- Idaho Remote Prescribing Law, IC 54-1733
- Idaho Hospital Regulations, IDAPA 16.03.14
- Medical Practices Act, IC 54-1801 et seq., and similar licensing statutes and regs.
- Medicaid Reimbursement

Federal

- Medicare COPs for Hospitals, 42 CFR part 482
- Medicare COPs for CAHs, 42 CFR part 485
- Ryan Haight Online Pharmacy Consumer Protection Act
- Medicare reimbursement rules

"TELEHEALTH SERVICES"

- ""Telehealth services' means health care services provided by a provider to a person through the use of electronic communications, information technology, asynchronous store and forward transfer or synchronous interaction between a provider at a distant site and a patient at an originating site.
- "Such services include but are not limited to clinical care, health education, home health and facilitation of self-managed care and caregiver support, and the use of synchronous or asynchronous telecommunications technologies by a provider to deliver patient health care services, including but not limited to assessment of, diagnosis of, consultation with, treatment of, and remote monitoring of a patient; transfer of medical data; patient and professional health-related education; public health services; and health administration.
- ""[T]elehealth services' does not include audio in isolation without access to and review of the patient's medical records, electronic mail messages that are not compliant with [HIPAA], or facsimile transmissions.

(IC 54-5703(6))

ORIGINATING AND DISTANT SITE

ORIGINATING SITE: Where the patient is located, including patient's home

Telehealth

DISTANT SITE: Where the remote practitioner is located

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BEWARE APPLICABLE LAW

Patient in Idaho:
comply with Idaho law

- Licensure
- Permissible methods
- Provider-patient relationship
- Standard of care
- Consent
- Prescribing
- Credentialing
- Reimbursement
- Malpractice liability and insurance

Patient in Other State:
comply with law of other state

- Licensure
- Permissible methods
- Provider-patient relationship
- Standard of care
- Consent
- Prescribing
- Credentialing
- Reimbursement
- Malpractice liability and insurance
- Corporate practice of medicine

POTENTIAL PENALTIES FOR VIOLATIONS

- Practicing medicine without a license
  - Fines
  - Prison
- Adverse licensure actions
- Denial of reimbursement or repayment
- Loss of certification or accreditation
- Exclusion from payer programs
- Malpractice
  - Failure to comply with statutes may constitute negligence per se
- Loss of insurance coverage
- Others…

LICENSURE

- State laws generally require that providers be licensed in the state where the patient is located.
- States differ re telehealth licensure.
  - Some permit licensure from another state under an interstate compact
    - E.g., nursing
  - Some allow for limited license.
  - Most require a full license.
  - Some allow for expedited licensure.
    - E.g., physicians under Interstate Medical Licensure Compact, I.C. 54-1842 et seq.

LICENSURE

- Physicians and other providers rendering care to patients in Idaho must generally be licensed in Idaho.

(See, e.g., IC 54-1804(4) and -5703(4))

- Practicing medicine in Idaho without a license =
  - Felony
  - Prison up to 5 years
  - Fine of up to $10,000

(IC 54-1804(4))

➢ *Verify requirements for other licensees.*

LICENSURE

- Exceptions: may practice medicine without an Idaho license if—
  - A medical officer of the US armed forces, US public health service, or VA while engaged in the performance of his official duties;
  - Person residing in and authorized to practice medicine in another state/country who is consulting with a person licensed in Idaho so long as he does not open an office or appoint a place to meet patients or receive calls in Idaho;
  - A person authorized to practice medicine in another state or country while rendering medical care in a time of disaster;
  - A person administering a remedy, diagnostic procedure or advice as specifically directed by a physician.

(IC 54-1804(1))

LICENSURE

- **Idaho Hospital Regs:** "[E]very patient [must] be under the care of a physician licensed by the Idaho State Board of Medicine." (IDAPA 16.03.14.200)
- **Hospital COPs:** "When telemedicine is used and the practitioner and patient are located in different states, the practitioner providing the patient care service must be licensed and/or meet the other applicable standards that are required by State or local laws in both the state where the practitioner is located and the state where the patient is located." (SOM App. A for 42 CFR 482.11(c))
- **CAH COPs:** "[E]ach physician or practitioner who provides telemedicine services to the CAH's patients [must] hold a license issued or recognized by the State where the CAH is located...." (SOM App. W for 485.616(c))

SCOPE OF PRACTICE

- A provider offering telehealth services must:
  - Act within the scope of the provider's license, and
  - According to all applicable laws and rules, including, but not limited to,
    - Idaho Code 54 and
    - The community standard of care.

(IC 54-5704)

- Beware non-physicians.
  - PAs: scope of practice depends on collaborating physician.
  - NPs: amorphous…
  - Others.
- Beware laws and rules applicable to the telehealth provider of which they may be unaware.

STANDARDS FOR TELEHEALTH

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PROVIDER-PATIENT RELATIONSHIP

- "If a provider offering telehealth services does not have an established provider-patient relationship with a person seeking such services, the provider shall take appropriate steps to establish a provider-patient relationship by use of two-way audio or audio-visual interaction."

(IC 54-5705(1))

  - Simply responding to query is not enough.
  - E-mail exchange not enough.

➢ Provider + Patient = Duty → Potential Liability

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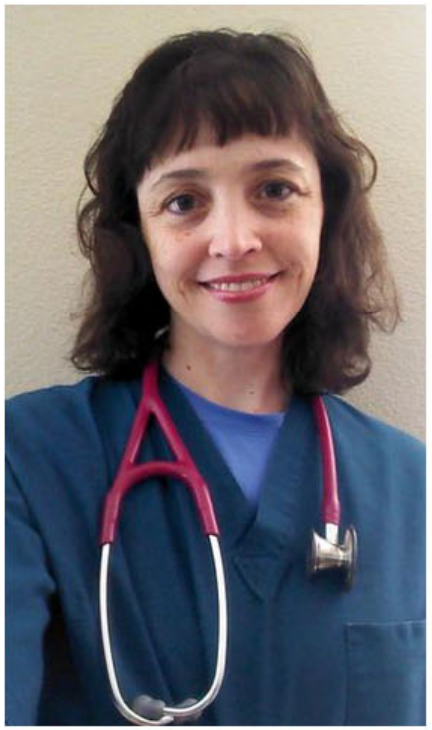
FRIDAY, AUG. 21, 2015, 3:30 P.M.

Doctor fights for her career after Idaho telemedicine sanction

Dr. Ann DeJong has had to sell her house in Wisconsin and is $200,000 in debt. Now her medical career is in jeopardy, all because she was sanctioned by Idaho for prescribing a common antibiotic over the phone.



Dr. Ann DeJong

At the time, Idaho law required a face-to-face exam for a prescription. This year, lawmakers changed that to allow for consultations through telemedicine. DeJong was working for such a company, Consult-a-Doctor, when she prescribed the medication; it subsequently pulled out of Idaho. DeJong says if Idaho doesn't modify its order by October, she'll lose her board certification in family practice, and thus her job and livelihood. "It would keep me from practicing anywhere," said DeJong, who was licensed to practice medicine in eight states including Idaho when she took that call from an Idaho patient through Consult-a-Doctor in 2012.

Idaho House Minority Leader John Rusche, D-Lewiston, a retired physician who sponsored this year's telemedicine legislation, said, "I think the action on the part of the Board of Medicine is excessive. ... It seems to me that this was a statement or an attempt by the members of the Board of Medicine to take on the whole issue of tele-health and telemedicine, and the vehicle that they had was this individual."

PROVIDER-PATIENT RELATIONSHIP

- Not required to establish relationship through two-way audio/visual communication if:
  - Preexisting provider-patient relationship;
  - Between a provider and another provider concerning a patient with whom the other provider has a provider-patient relationship;
  - Provider is taking call on behalf of another provider in the same community who has a provider-patient relationship with the patient; or
  - In an emergency, i.e., a situation in which there is an occurrence that poses an imminent threat of a life-threatening condition or severe bodily harm.

(IC 54-5705)

EVALUATION AND TREATMENT

- "Prior to providing treatment, including a prescription drug order, a provider shall obtain and document a patient's relevant clinical history and current symptoms to establish the diagnosis and identify underlying conditions and contraindications to the treatment recommended."

(IC 54-5706)

- Treat per the standard of care.
- Ensure H&P and appropriate evaluation is documented in the records.

PRESCRIPTIONS

- A provider with an established provider-patient relationship, including a relationship established pursuant to section 54-5705, … may issue prescription drug orders using telehealth services within the scope of the provider's license and according to any applicable laws, rules and regulations, including the Idaho community standard of care;
- The prescription drug shall not be a controlled substance unless prescribed in compliance with title 21 U.S.C.

(IC 54-5707(1))

- Still subject to limits on prescriptive authority imposed by law or the provider's licensing board.

(IC 54-5707(2))

RYAN HAIGHT ONLINE PHARMACY CONSUMER PROTECTION ACT

- Prohibits providers from prescribing controlled substances via telehealth without having previously performed an in-person medical evaluation of the patient.

(21 USC 829; 21 CFR 1306.09)

- During COVID-19 emergency, DEA-registered practitioners may prescribe controlled substances without a prior in-person medical evaluation if evaluate patient through:
  - Telephone, or
  - Use interactive audio-visual communication.

(https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-023)(DEA075)Decision_Tree_(Final)_33120_2007.pdf)

- Must still comply with state law….

PRESCRIPTIONS: PATIENT-PROVIDER RELATION

- A prescription drug order for a legend drug is valid only if it is issued by a prescriber for a legitimate medical purpose arising from a prescriber-patient relationship which includes a documented patient evaluation adequate to establish diagnoses, if applicable, and identify underlying conditions and/or contraindications to the treatment.
- Treatment, including issuing a prescription drug order, based solely on an online questionnaire or consultation outside of an ongoing clinical relationship does not constitute a legitimate medical purpose.

(IC 54-1733)

- Subject to exceptions…

PRESCRIPTIONS: EXCEPTIONS TO PRIOR PROVIDER-PATIENT RELATION

No prior prescriber-patient relationship needed to prescribe in following situations:

- Writing initial admission orders for a newly hospitalized patient;
- For a patient of another prescriber for whom the prescriber is taking call;
- For a patient examined by a physician assistant, advanced practice registered nurse or other licensed practitioner with whom the prescriber has a supervisory or collaborative relationship;
- Medication on a short-term basis for a new patient prior to the patient's first appointment;

(IC 54-1733)

PRESCRIPTIONS: EXCEPTIONS TO PRIOR PROVIDER-PATIENT RELATION

No prior prescriber-patient relationship needed to prescribe in following situations (cont.):

- For an opioid antagonist pursuant to IC 54-1733B;
- In emergency situations where the life or health of the patient is in imminent danger;
- In emergencies that constitute an immediate threat to public health including, e.g., prophylaxis to prevent or control an infectious disease outbreak;
- If a prescriber makes a diagnosis of an infectious disease in a patient, prescribe or dispense antimicrobials to an individual who has been exposed to the infectious person in accordance with clinical guidelines.

(IC 54-1733)

PRESCRIPTIONS

Hospital regulations:

- "Drugs shall be dispensed and administered only upon written or verbal order of a member of the medical staff authorized to prescribe. Verbal orders for drugs shall be given only to those health care practitioners empowered to accept orders under Idaho law and written hospital policies and procedures." (IDAPA 16.03.14.330)
- "Orders for [lab] tests shall be made only by those practitioners legally authorized to diagnose, treat and prescribe." (IDAPA 16.03.14.350)

STANDARD OF CARE

- Treatment recommendations provided through telehealth services are held to the applicable Idaho community standard of care that applies in an in-person setting.

(IC 54-5706)

- "The applicable Idaho community standard of care must be satisfied."

(IC 54-5705(1))

- Treatment based solely on an online questionnaire does not constitute an acceptable standard of care.

(IC 54-5706)

INFORMED CONSENT

- A patient's informed consent for the use of telehealth services shall be obtained as required by any applicable law.

(IC 54-5708)

- To be effective informed consent, must be:
  - Given by competent patient or personal representative.
  - Disclosing relevant facts, risks, and benefits.
  - Understood by patient.

(See IC 39-4501 et seq.)

INFORMED CONSENT

- Consent or refusal or health care is valid if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting (i) the need for, (ii) the nature of, and (iii) the significant risks as to permit a reasonably informed decision.
- Consent shall be deemed valid and so informed if the healthcare provider has made such disclosures and given such advice and considerations as would ordinarily be given under the same or similar circumstances, by a like health care provider of good standing practicing in the same community.

(IC 39-4506)

INFORMED CONSENT FOR TELEHEALTH

Consider discussing:

- Patient's condition
- Proposed treatment
- Risks and benefits
- Alternatives, risks and benefits
- Persons/entities providing services
- Limitations of telehealth
  - Limited evaluation or treatment?
  - Possible disruption?
  - Privacy or security concerns?
- Disclaim liability for contractors
- Other relevant facts?

Depends on what other providers in community would disclose under similar circumstance

INFORMED CONSENT

- It is not essential that the consent be in writing or any other specific form.
- However, when
  - consent is in writing and expressly authorizes the care, treatment or procedures, and
  - the writing has been executed or initialed by a person competent to give such consent,

  Then
  - consent is presumed to be valid for the care, treatment or procedures, and
  - the advice and disclosures of the attending physician and the level of informed awareness of the giver is presumed to be sufficient.

(IC 39-4507)

➢ *Best to have patient sign informed consent.*

CONTINUITY OF CARE

- A provider of telehealth services must be available for follow-up care or to provide info to patients who make use of such services.

(IC 54-5709)

- Once established, provider-patient relationship continues until properly terminated.
  - Notice + sufficient time to transfer care + necessary care until transferred.
- Failure to provide continuing care =
  - Professional misconduct.
  - Patient abandonment.
  - Malpractice.

➢ *Clarify scope of care and confirm expectations for continuing care.*

REFERRAL TO OTHER SERVICES

- A telehealth provider shall be familiar with and have access to available medical resources, including emergency resources near the patient's location, in order to make appropriate patient referrals when medically indicated.

(IC 54-5710)

MEDICAL RECORDS

- A telehealth provider shall generate and maintain medical records for each patient in compliance with any applicable state and federal laws, rules, and regulations, including HIPAA privacy and security rules.
  - To be discussed later.
- Such records shall be accessible to other providers, if the patient has given permission, and to the patient in accordance with applicable laws, rules, and regulations.

(IC 54-5711)

- HIPAA gives patient the right to access.
- HIPAA allows you to disclose to other providers for treatment and payment purposes.
- Info Blocking Rule generally requires you to give access to other providers if requested.

ENFORCEMENT AND DISCIPLINE

- A provider is prohibited from offering telehealth services if the provider is not in full compliance with applicable laws, rules and regulations, including the Idaho Telehealth Access Act and the Idaho community standard of care.
- State licensing boards are authorized to enforce the Telehealth Access Act. A provider who fails to comply with applicable laws, rules and regulations is subject to discipline by his or her licensing board.

(IC 54-5712)

ADDITIONAL REGULATIONS

- Any Idaho licensing board authorized by Title 54 may promulgate rules relating to telehealth services consistent with the Telehealth Access Act.

(IC 54-5713)

- *The Board of Medicine withdrew its regulations for physicians and PAs.*
- *Check applicable licensing rules for providers.*

PRIVACY AND SECURITY

HIPAA PRIVACY RULE

- Provide notice of privacy practices.
  - Do not need to specify telehealth.
- Verify identity of participants.
- Implement reasonable safeguards to minimize risk of improper access or disclosures, e.g.,
  - Private rooms, if reasonably available.
  - Conduct discussions in manner to avoid others overhearing.
  - Safeguard records.
- "Incidental disclosures" are not violations or breaches.

(45 CFR 164.501 et seq.)

HIPAA SECURITY RULE

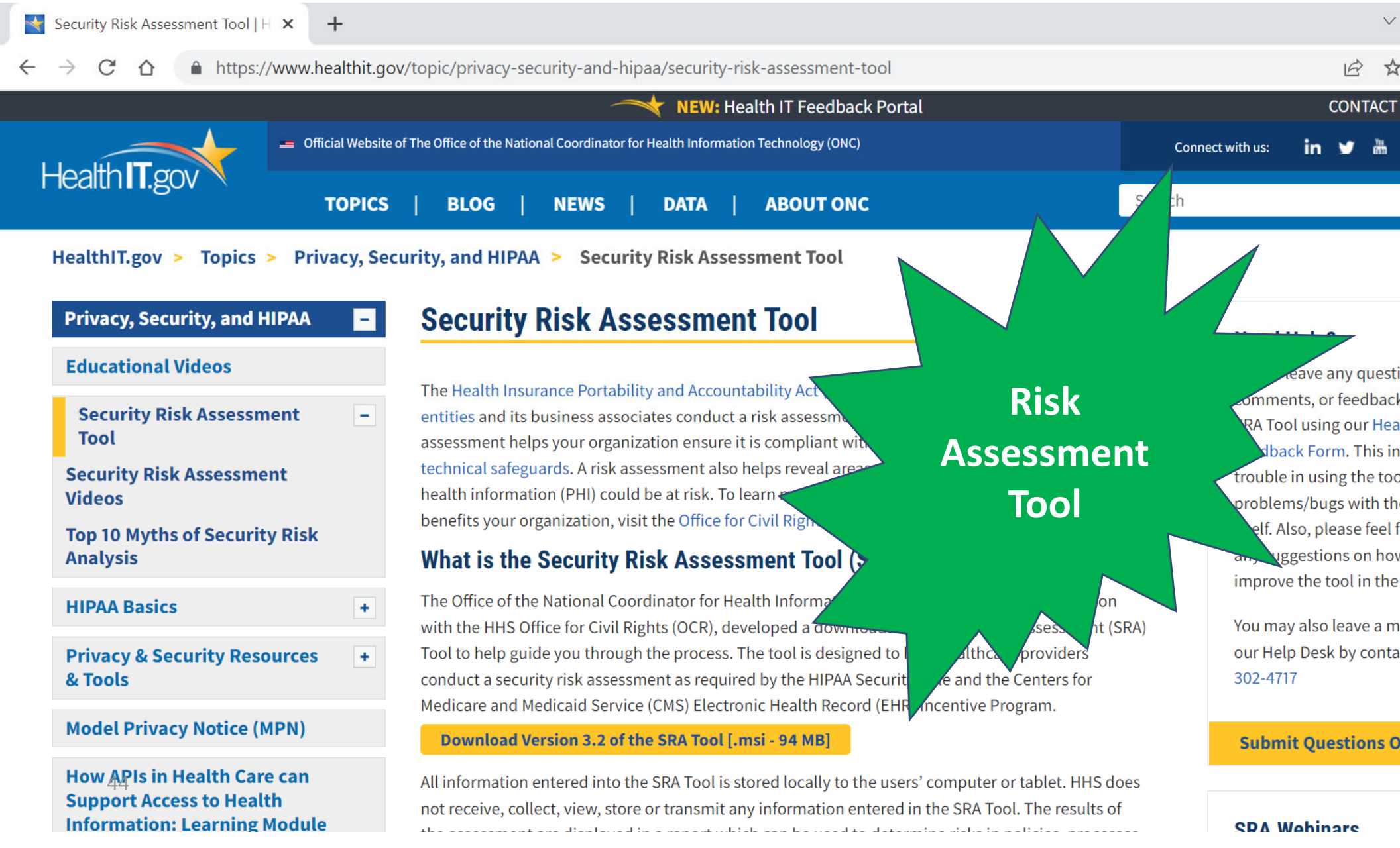
- Risk assessment.
- Implement safeguards.
  - Administrative
  - Physical
  - Technical, including encryption
    - ➢ Ensure you are using a secure platform.
- Execute business associate agreements.

(45 CFR 164.300 et seq.)

Protect ePHI:

- Confidentiality
- Integrity
- Availability

HTTPS://WWW.HEALTHIT.GOV/TOPIC/PRIVACY-SECURITY-AND-HIPAA/SECURITY-RISK-ASSESSMENT-TOOL



COMMUNICATING BY E-MAIL OR TEXT

- General rule: must be secure, i.e., encrypted.
  - To patients: may communicate via unsecure e-mail or text if warned patient and they choose to receive unsecure.

(45 CFR 164.522(b); 78 FR 5634)

  - To providers, staff or other third parties: must use secure platform.

(45 CFR 164.312; CMS letter dated 12/28/17)

  - Orders: Medicare Conditions of Participation and Conditions for Coverage generally prohibit texting orders.

(CMS letter dated 12/28/17)

HIPAA SECURITY RULE

- During COVID-19 emergency:
  - Providers may use any non-public facing remote communication product event though it may not comply with security rule (e.g., FaceTime, Facebook Messenger, Google Hangouts, Zoom, Skype, etc.; NOT Facebook Live, TikTok, etc.).
    - Notify patients of privacy risks.
    - Enable encryption to extent able.

(OCR Notification, 85 FR 22024; *see also* FAQs at https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf)

- Ends when public health emergency ends.

(https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-audio-telehealth/index.html)

AUDIO-ONLY TELEHEALTH

- Audio-only telehealth
  - Must comply with HIPAA rules, e.g.,
    - Implement reasonable safeguards (e.g., use private setting or take action avoid overhearing).
    - Verify identity of individual.
    - Comply with security rule if applicable (e.g., voice over internet protocol (VoIP), record and store tech, etc.)
    - Obtain BAAs if required (e.g., platforms that are not merely conduits for PHI).

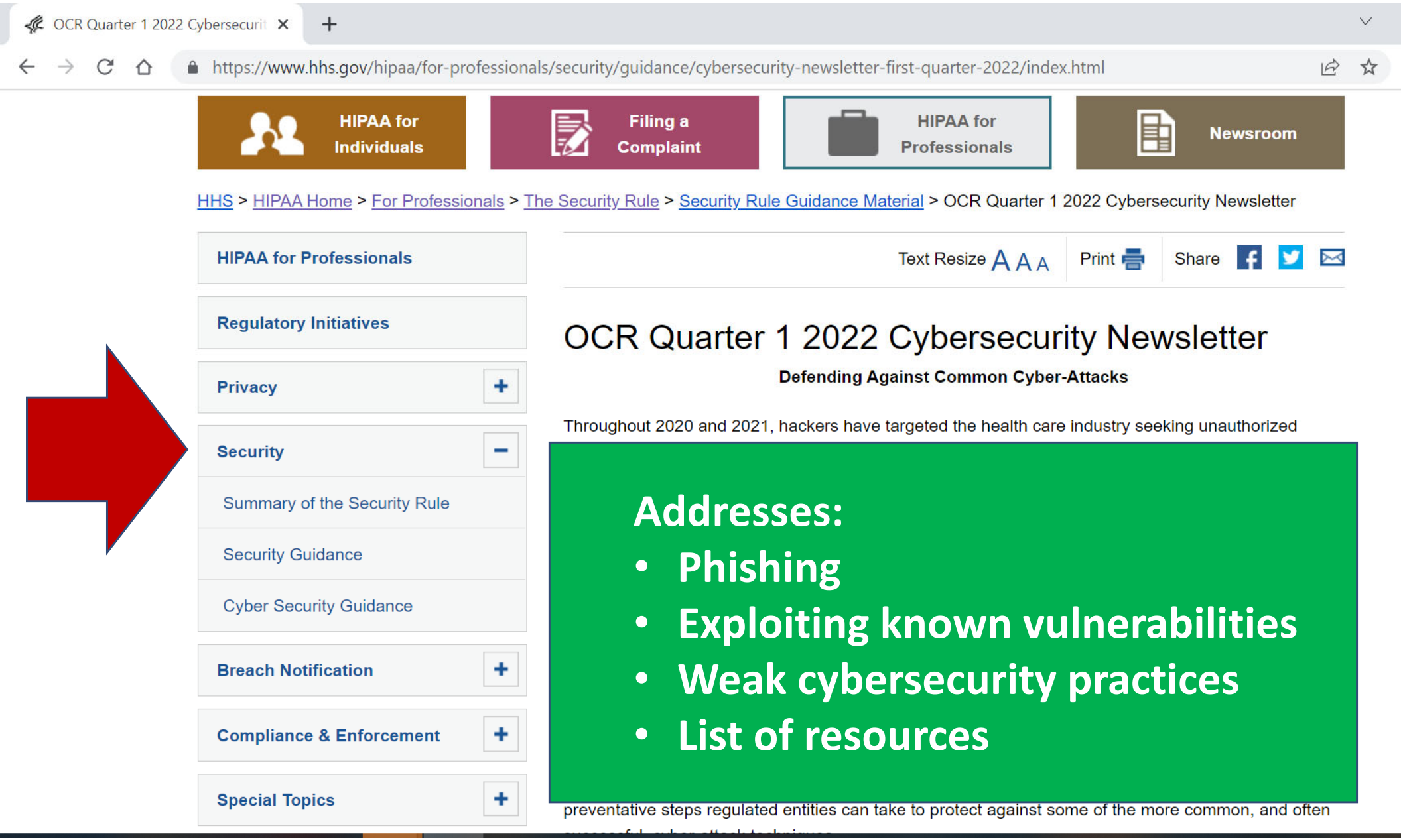
(OCR Guidance re Audio-Only Telehealth, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-audio-telehealth/index.html)

BUSINESS ASSOCIATES

- Other treating providers are not business associates while providing treatment.
- May need business associate agreement (BAA) with vendors or others who assist with telehealth, e.g.,
  - Entity that maintains or transmits ePHI and has regular access to ePHI, not "conduit".
  - Entity that stores PHI.
- Exceptions:
  - Members of workforce.
  - Members of organized health care arrangement ("OHCA")

(45 CFR 164.314, -502, and .504)

HTTPS://WWW.HHS.GOV/HIPAA/FOR-PROFESSIONALS/SECURITY/GUIDANCE/CYBERSECURITY-NEWSLETTER-FIRST-QUARTER-2022/INDEX.HTML



CREDENTIALING AND PRIVILEGING

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CREDENTIALING

Telehealth providers must be credentialed if rendering care.

- Medical staff appointments and reappointments must be made by the governing body upon the recommendation of the active medical staff, include written delineation of all privileges.
- Reappointments to the medical staff must be made at least every two (2) years with governing body approval.

(IDAPA 16.03.14.200, -.250)

- The same procedure applies to nonphysician practitioners who are granted clinical privileges.

(IDAPA 16.03.14.200)

CREDENTIALING

- For telehealth providers, hospital's board may decide whether to credential them:
  - Individually, like other providers; or
  - By proxy if certain conditions are satisfied, i.e., hospital relies on credentialing done by the distant site.
- Credentialing by proxy only applies to those rendering telehealth; it does not apply if telehealth provider renders services personally at the hospital.

CREDENTIALING BY PROXY

- Hospital and CAH CoPs allow hospital to rely on credentialing done by remote hospital/entity if:
  - Hospital bylaws allow it.
  - Have written credentialing agreement with distant site that contains required terms.
  - Distant site complies with CoP standards.
  - Practitioner privileged at distant site.
  - Practitioner licensed in state where services provided.
  - Hospital reviews practitioner's performance and provides results to distant site.

(42 CFR 482.12 and .22, 485.616 and .635)

- Requirements vary depending on whether parties are a CAH, hospital, or other distant site entity.

CREDENTIALING BY PROXY

Hospital COP Survey Procedures § 482.12(a)(8)&(a)(9)

- Ask whether hospital uses telemedicine services. If yes:
- Ask to see a copy of the written agreement(s) with the distant-site entities. Does each agreement include the required elements for credentialing and privileging telehealth providers?
- Does the hospital have documentation indicating that it granted privileges to each telehealth provider?
- Does the documentation indicate that for each telemedicine physician and practitioner there is a medical staff recommendation, including an indication of whether the medical staff conducted its own review or relied upon the decisions of the distant-site hospital or telemedicine entity?

(CMS SOM App. A at 482.12(a)(8)-(9))

CREDENTIALING

- May need to update your medical staff bylaws or policies to address telehealth.
  - Qualifications for medical staff members.
    - e.g., geographic proximity, admissions, etc.
  - Categories of medical staff members.
    - e.g., add telehealth staff category
  - Privileges.
    - e.g., grant telehealth privileges by proxy consistent with COPs.
  - Credentialing process.
    - e.g., allow credentialing by proxy based on COPs.

CREDENTIALING

- "All CAHs must, as a part of their quality assurance program, have an arrangement with an outside entity to review the appropriateness of the diagnosis and treatment provided by each MD/DO providing services to the CAH's patients. This includes MDs and DOs providing telemedicine services to the CAH's patients from a distant-site hospital or distant-site telemedicine entity.

(SOM App. for 586.641(b))

EMERGENCY PRIVILEGES

- Idaho regulations and most bylaws allow facilities to grant temporary or emergency privileges.

(IDAPA 16.03.14.200.03)

  - Granted in limited circumstances, e.g.,
    - While normal credentialing process occurs.
    - Unique patient care need.
  - Subject to limited, preliminary review.
  - Privileges limited to no more than 60 days.

- Unclear how this would coordinate with telehealth COPs.

USING TELEHEALTH TO SATISFY REGULATORY OBLIGATIONS

EMTALA

"Q: Can emergency physicians and other health care practitioners conduct medical screening exams (MSEs) under EMTALA via telehealth?

- "A: Yes. [Qualified medical persons], including emergency physicians, can perform MSEs using telehealth equipment. The QMP may be on-campus and using technology to self-contain or offsite due to staffing shortages. The MSE may be performed solely via telehealth if clinically appropriate....
- "[T]he QMP must be performing within the scope of his/her state practice act and approved by the hospital's governing body to perform MSEs."

(CMS, Frequently Asked Questions for Hospitals and Critical Access Hospitals regarding EMTALA (4/30/20), https://www.cms.gov/files/document/frequently-asked-questions-and-answers-emtala-part-ii.pdf)

PHYSICIAN AVAILABILITY

- Idaho regulations require:
  - Bylaws shall specify that a physician be on duty or on call at all times. (IDAPA 16.03.14.200.01).
  - For emergency services, a physician must be in the hospital or on call twenty-four (24) hours a day and available to see emergency patients as needed. (IDAPA 16.03.14.370.02)

- May this be satisfied through telehealth?

CAH OVERSIGHT

- CAH COPs require that
  - "A doctor of medicine or osteopathy is present for sufficient periods of time to provide medical direction, consultation, and supervision for the services provided in the CAH, and is available through direct radio or telephone communication or electronic communication for consultation, assistance with medical emergencies, or patient referral."

(42 CFR 485.631(b)(2))

CAH OVERSIGHT

- "Being "present" in the CAH means being physically on-site in the CAH. The regulation does not specify a minimum amount of time an MD/DO must spend on-site that applies to all CAHs. Instead, CAHs have the flexibility to develop policies appropriate for their circumstances. With the development of technology such as telemedicine, a CAH may use a variety of ways and timeframes for MDs/DOs to provide the necessary medical direction and oversight."
- "An MD/DO providing telemedicine services to the CAH may be used to fulfill the requirement for availability via telecommunications."

(SOM App. W at 485.631(b))

LIABILITY ISSUES

LIABILITY ISSUES

- Different laws and procedure if cross state boundaries.
- Provider-patient relationship may be established even if not intended.
- May be held to community standard of care for in-person treatment instead of some telehealth standard.
- Beware abandoning patient after telehealth session.
- Malpractice liability insurance may not provide coverage, e.g., practice without license, practice in another state, administrative or criminal actions.
- Ensure claims are properly documented and submitted consistent with applicable laws and regulations.

FRAUD AND ABUSE CONCERNS

- Financial relationships with telehealth providers may trigger Stark, Anti-Kickback Statute, and Civil Monetary Penalties, e.g.,
  - Contracts for services.
  - Use of space, equipment, or personnel for free or at a discount.
  - Provision of free or discounted telehealth equipment to patients.

(42 CFR 411.357 and -1001.952)

- Check with Compliance Officer.

FRAUD AND ABUSE CONCERNS

- OIG and DOJ have focused on fraudulent claims for telehealth services.

THE UNITED STATES DEPARTMENT of JUSTICE

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JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE — Wednesday, July 20, 2022

Justice Department Charges Dozens for $1.2 Billion in Health Care Fraud

Nationwide Coordinated Law Enforcement Action to Combat Telemedicine, Clinical Laboratory, and Durable Medical Equipment Fraud

The Department of Justice today announced criminal charges against 36 defendants in 13 federal districts across the United States for more than $1.2 billion in alleged fraudulent telemedicine, cardiovascular and cancer genetic testing, and durable medical equipment (DME) schemes.

The nationwide coordinated law enforcement action includes criminal charges against a telemedicine company executive, owners and executives of clinical laboratories, durable medical equipment companies, marketing organizations, and medical professionals.

Additionally, the Centers for Medicare & Medicaid Services (CMS), Center for Program Integrity (CPI) announced today that it took adverse administrative actions against 52 providers involved in similar schemes. In connection with the enforcement action, the department seized over $8 million in cash, luxury vehicles, and other fraud proceeds.

"The Department of Justice is committed to prosecuting people who abuse our health care system and exploit telemedicine technologies in fraud and bribery schemes," said Assistant Attorney General Kenneth A. Polite, Jr. of the Justice Department's Criminal Division. "This enforcement action demonstrates that the department will do everything in its power to protect the health care systems our communities rely on from people looking to defraud them for their own personal gain."

RELATED LINKS

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REIMBURSEMENT

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REIMBURSEMENT: DISCLAIMER

- I am not a billing expert.
- Check with the payer and/or your billing experts to confirm reimbursement issues….

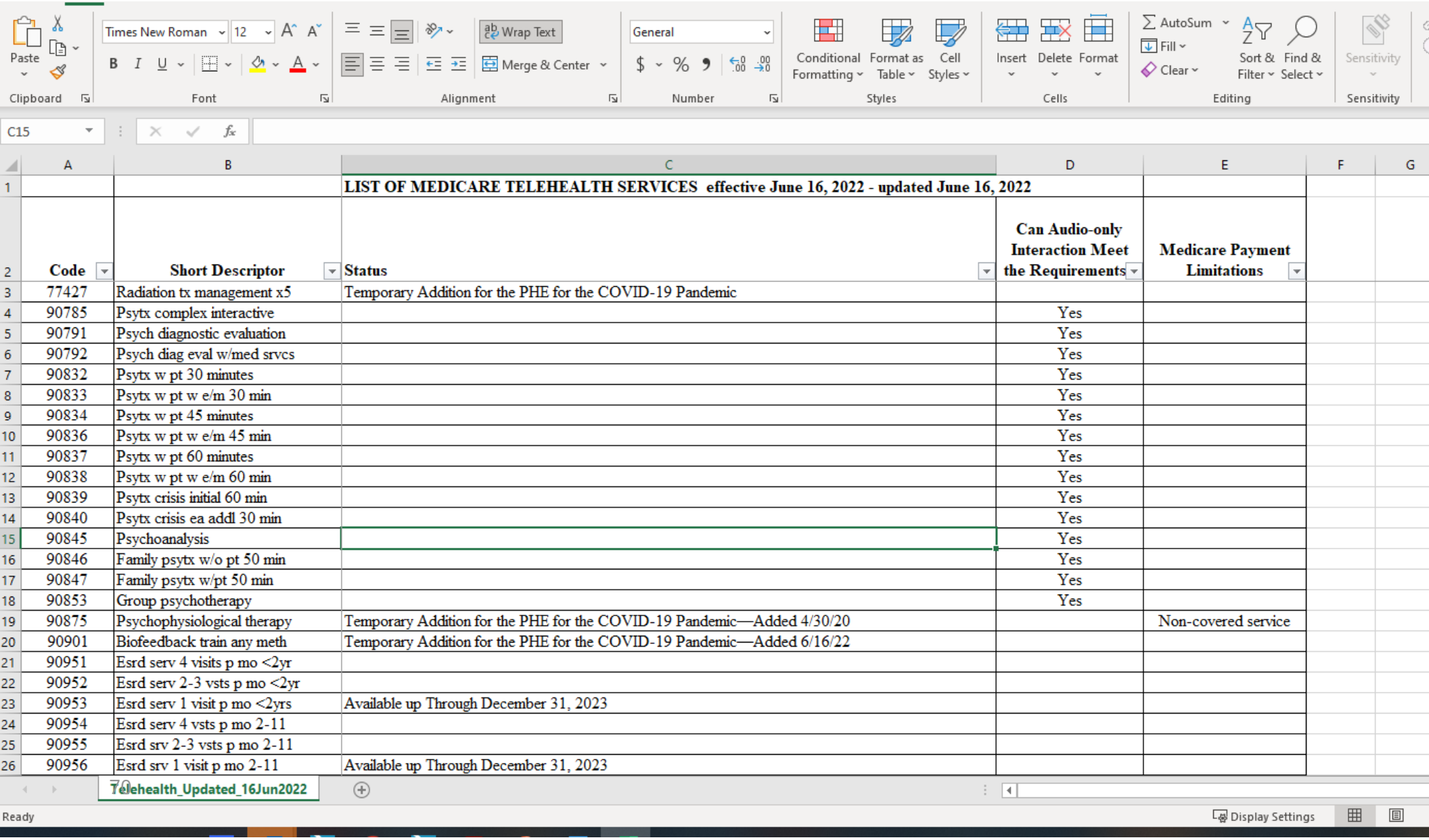
REIMBURSEMENT: MEDICARE

Excluding COVID-19 waivers:

- Part A: CMS pays for telehealth if satisfy conditions of payment.
- Part B: CMS pays for certain telehealth services if use interactive audio and video telecommunications permitting real-time communication between practitioner at distant site and patient at originating site.
  - NOT asynchronous, store-and-forward technology except in demonstration projects.

(45 USC 1395m(m); 42 CFR 410.78 and 414.65; Medicare Claims Processing Manual, Ch. 12, Sect. 190)

LIST OF CURRENTLY COVERED TELEHEALTH SERVICES: HTTPS://WWW.CMS.GOV/MEDICARE/MEDICARE-GENERAL-INFORMATION/TELEHEALTH/TELEHEALTH-CODES



	A	B	C	D	E	F	G
1			**LIST OF MEDICARE TELEHEALTH SERVICES effective June 16, 2022 - updated June 16, 2022**				
2	**Code**	**Short Descriptor**	**Status**	**Can Audio-only Interaction Meet the Requirements**	**Medicare Payment Limitations**		
3	77427	Radiation tx management x5	Temporary Addition for the PHE for the COVID-19 Pandemic				
4	90785	Psytx complex interactive		Yes			
5	90791	Psych diagnostic evaluation		Yes			
6	90792	Psych diag eval w/med srvcs		Yes			
7	90832	Psytx w pt 30 minutes		Yes			
8	90833	Psytx w pt w e/m 30 min		Yes			
9	90834	Psytx w pt 45 minutes		Yes			
10	90836	Psytx w pt w e/m 45 min		Yes			
11	90837	Psytx w pt 60 minutes		Yes			
12	90838	Psytx w pt w e/m 60 min		Yes			
13	90839	Psytx crisis initial 60 min		Yes			
14	90840	Psytx crisis ea addl 30 min		Yes			
15	90845	Psychoanalysis		Yes			
16	90846	Family psytx w/o pt 50 min		Yes			
17	90847	Family psytx w/pt 50 min		Yes			
18	90853	Group psychotherapy		Yes			
19	90875	Psychophysiological therapy	Temporary Addition for the PHE for the COVID-19 Pandemic—Added 4/30/20		Non-covered service		
20	90901	Biofeedback train any meth	Temporary Addition for the PHE for the COVID-19 Pandemic—Added 6/16/22				
21	90951	Esrd serv 4 visits p mo <2yr					
22	90952	Esrd serv 2-3 vsts p mo <2yr					
23	90953	Esrd serv 1 visit p mo <2yrs	Available up Through December 31, 2023				
24	90954	Esrd serv 4 vsts p mo 2-11					
25	90955	Esrd srv 2-3 vsts p mo 2-11					
26	90956	Esrd srv 1 visit p mo 2-11	Available up Through December 31, 2023				

REIMBURSEMENT: MEDICARE

Excluding COVID-19 waivers:

- Originating site must be:
  - In rural HPSA or county outside a MSA county, and
  - Proper type of facility
    - Physician or practitioner office
    - Hospital
    - Critical Access Hospital (CAH)
    - Rural Health Clinic (RHC)
    - Federally Qualified Health Center (FQHC)
    - Skilled Nursing Facility (SNF)
    - Hospital- or CAH-based Renal Dialysis Center
    - Renal Dialysis Facility
    - Community Mental Health Center
    - Participating in demonstration project
    - Patients with ESRD getting home dialysis
    - Mobile stroke units

(42 USC 1395m(m); 42 CFR 410.78)

REIMBURSEMENT: MEDICARE

Excluding COVID-19 waivers:

- Distant site practitioner must be—
  - Licensed under state law to provide the telehealth service (i.e., within scope of practice), and
  - One of following:
    - Physician
    - Nurse practitioner (NP)
    - Physician assistant (PA)
    - Certified nurse midwife (CNM)
    - Clinical nurse specialist (CNS)
    - Certified registered nurse anesthetist (CRNA)
    - Clinical psychologist and clinical social worker, but may not bill for certain codes
    - Registered dietician or nutrition professional

(MLN901705 (6/21))

REIMBURSEMENT: MEDICARE

During COVID-19 emergency:

- Any health care provider who is eligible to bill Medicare can bill for telehealth services regardless of where the patient or provider is located. (https://telehealth.hhs.gov/providers/billing-and-reimbursement/)
  - Originating/distant site limits waived.
  - Practitioner limits waived.
  - Expanded covered services.
- Patients must verbally consent.
- Certain services may be provided via audio-only telephones.
- FQHCs and RHCs may be distant sites.

HTTPS://WWW.CMS.GOV/OUTREACH-AND-EDUCATION/MEDICARE-LEARNING-NETWORK-MLN/MLNPRODUCTS/DOWNLOADS/TELEHEALTHSRVCSFCTSHT.PDF

REIMBURSEMENT: MEDICARE

- Consolidated Appropriations Act of 2022 gives 151-day extension after COVID-19 emergency ends for:
  - Originating site is anywhere the patient is located, including the patient's home.
  - Expanded list of telehealth practitioners.
  - Coverage for audio-only telehealth.
  - In-person visit for telemental health extended to 152nd day after emergency ends.
  - FQHCs and RHCs may serve as distant site.
- After 151 days, return to pre-COVID rules.
- Proposed Telehealth Extension and Evaluation Act would extend waivers for 2 years.

➢Stay tuned....

REIMBURSEMENT: MEDICAID

- States have flexibility in covering telehealth so long as it furthers "efficiency, economy and quality of care."
- Most states provide coverage for some telehealth services.
  - Usually cover live-video conferencing, not "store and forward" technology.
  - Often cover professional fee + facility fee; a few pay for transmission fee.
  - May limit based on type of provider, facility, service or geographic location.

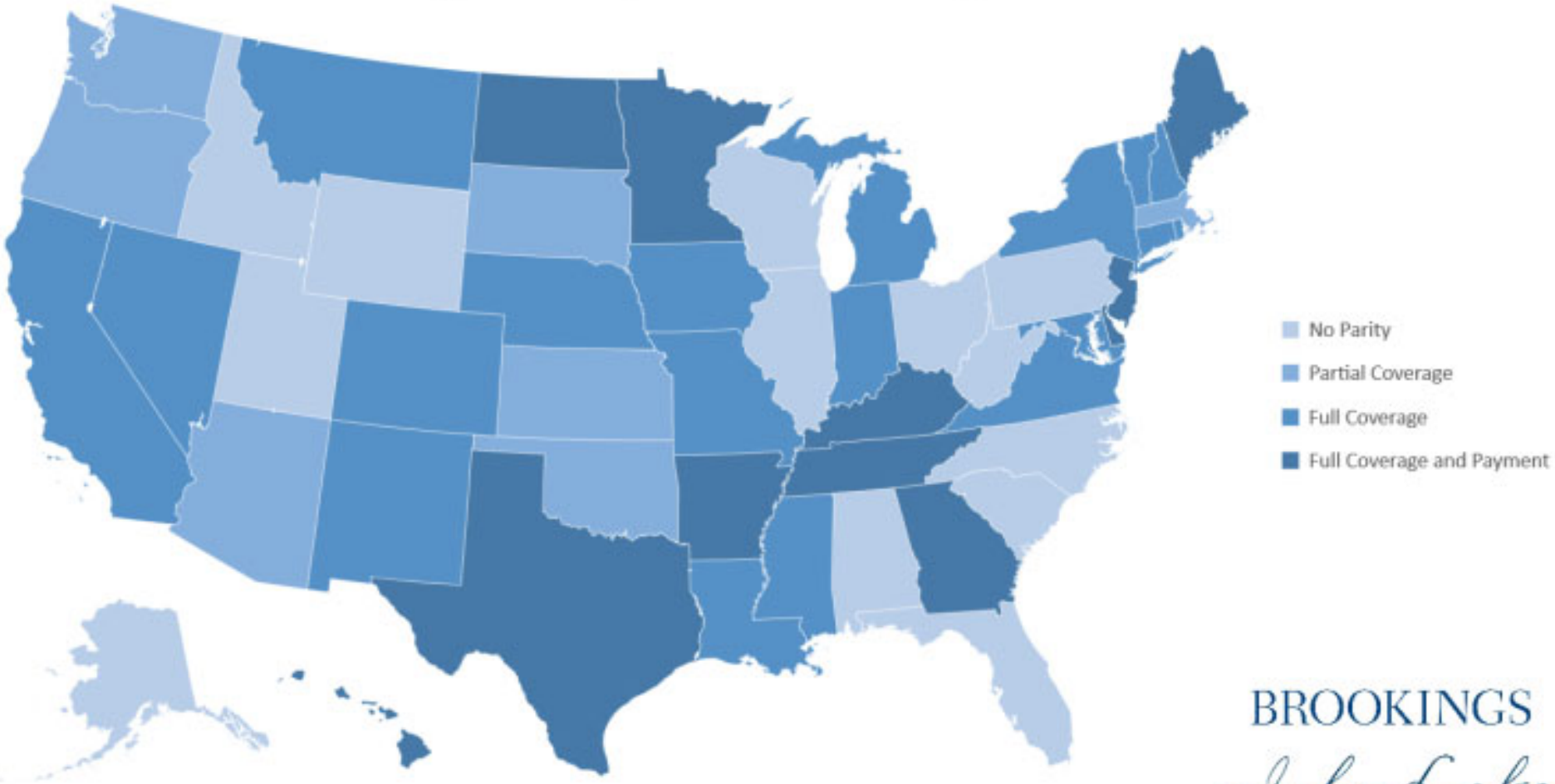
➢ Check relevant state laws and Medicaid regulations and policies.

REIMBURSEMENT: PRIVATE PAYERS

- Most states have some kind of parity law.
  - Often require private insurers to cover telehealth service to the same extent as face-to-face consultations so long as it meets same standard of care.
  - May place limits on parity.
  - May not require same level of reimbursement as in-person care.
- Absent law to the contrary, payers are generally able to establish the conditions on which they will cover telehealth.

TELEHEALTH PARITY LAWS

Figure 1. Map of U.S. State Parity Laws



Source: *"State Telehealth Laws & Reimbursement Policies." Center for Connected Health Policy, Spring 2019. https://www.cchpca.org/sites/default/files/2019-05/cchp_report_MASTER_spring_2019_FINAL.pdf.*

BROOKINGS

John Locke FOUNDATION

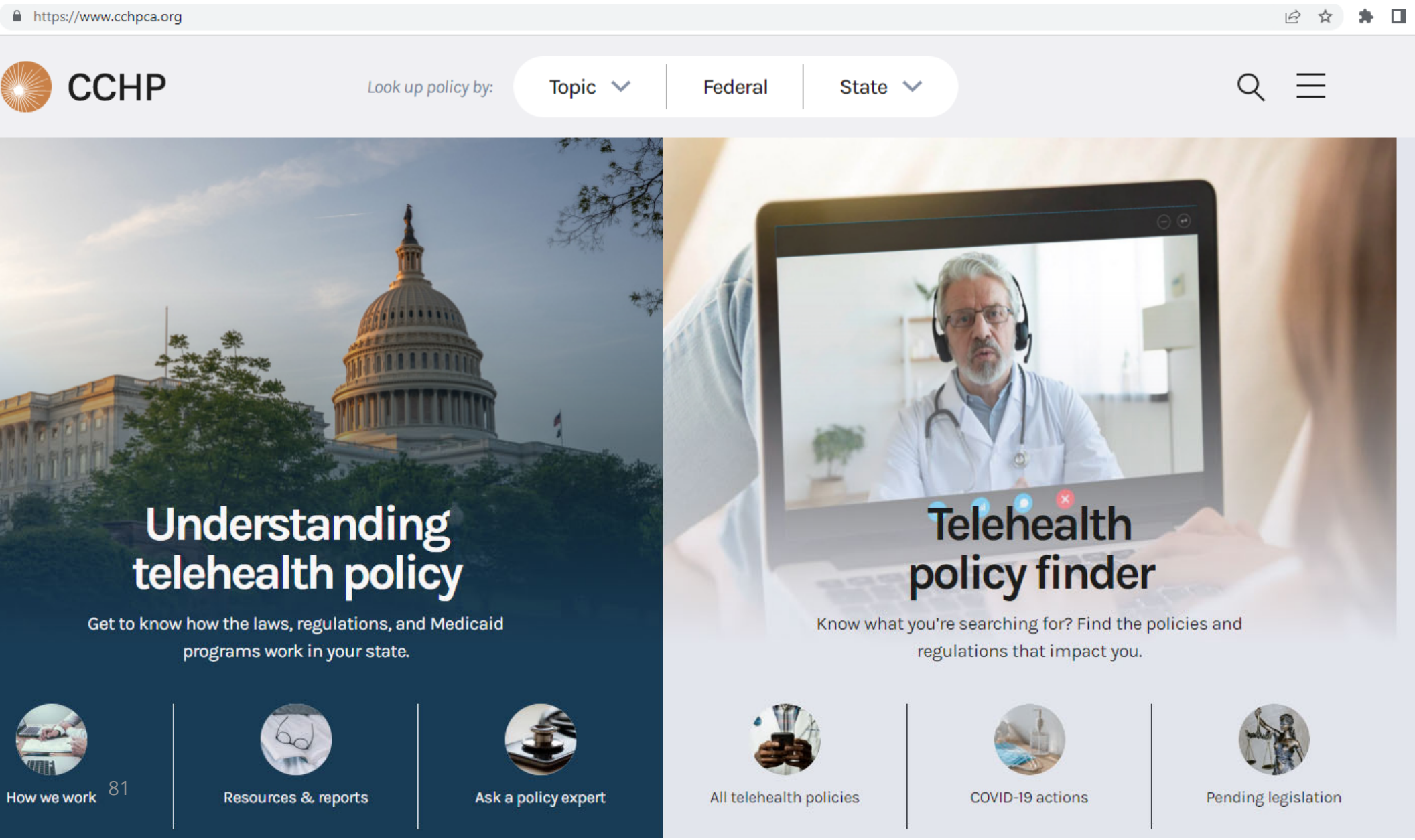
HOLLAND&HART LLP

REIMBURSEMENT

- Private payers
  - Check your state laws for parity requirements.
  - Check payer contracts.
  - Ensure you use correct “site of service” or other modifiers.

ADDITIONAL RESOURCES

CENTER FOR CONNECTED HEALTH POLICY, HTTPS://WWW.CCHPCA.ORG/



HHS, HTTPS://TELEHEALTH.HHS.GOV

https://telehealth.hhs.gov/providers/

An official website of the United States government Here's how you know

Español

TELEHEALTH.HHS.GOV

For patients | For providers | For researchers | Funding opportunities | Events | About

For providers

Telehealth resources for health care providers, including doctors, practitioners, and hospital staff.

Getting started with telehealth

How to evaluate telehealth vendors and begin offering care through telemedicine.

Planning your telehealth workflow

How to set up and manage a workflow for virtual visits.

Health equity in telehealth

How health care providers can improve access to telehealth for all populations.

Preparing patients for telehealth

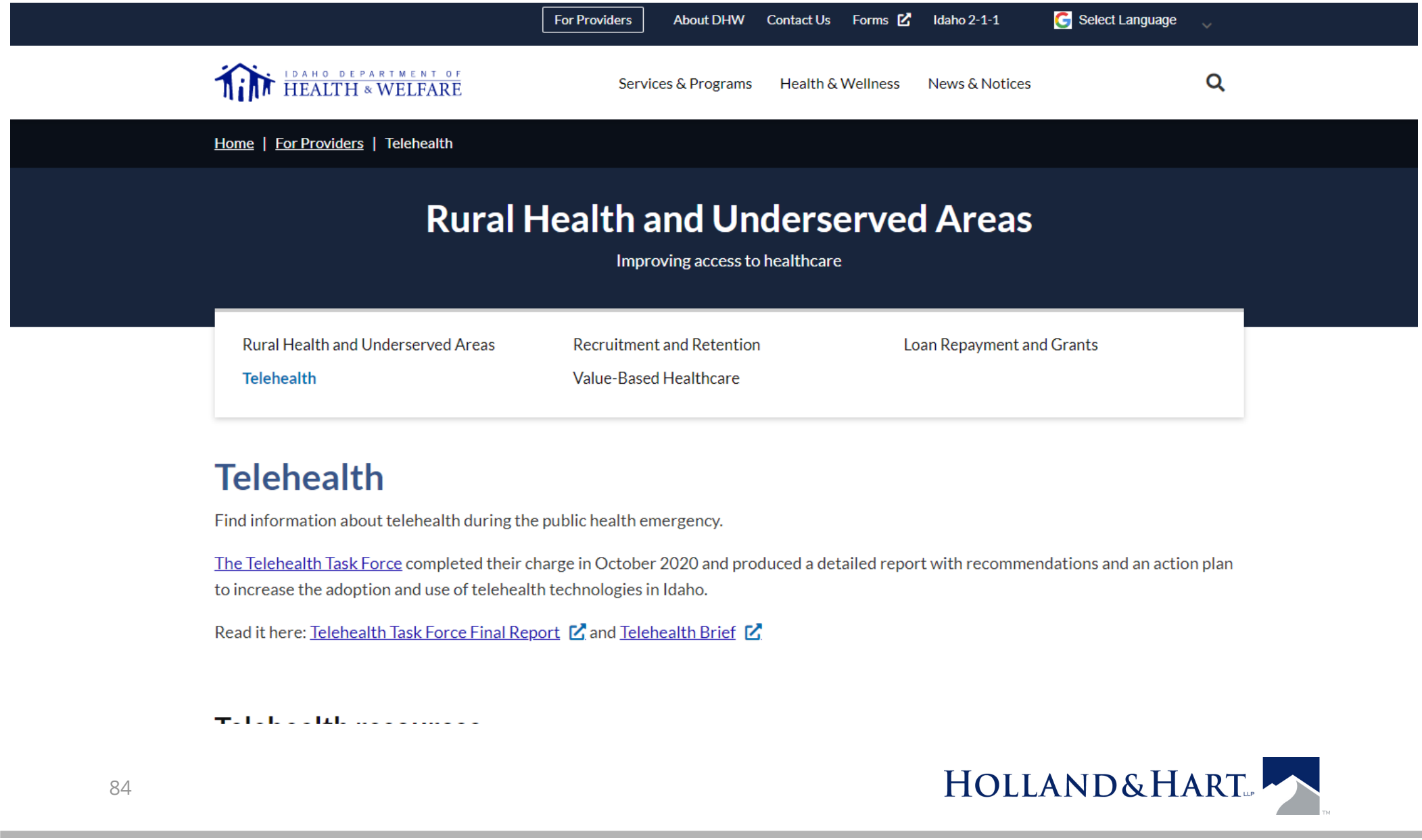
HTTPS://TELEHEALTH.HHS.GOV/PROVIDERS/BILLING-AND-REIMBURSEMENT/BILLING-AND-CODING-MEDICARE-FEE-FOR-SERVICE-CLAIMS/

Billing and coding Medicare Fee-for-Service claims

More Medicare Fee-for-Service (FFS) services are billable as telehealth during the COVID-19 public health emergency. Read the latest guidance on billing and coding FFS telehealth claims.

On this page:

DHW, TELEHEALTH HTTPS://HEALTHANDWELFARE.IDAHO.GOV/PROVIDERS/RURAL-HEALTH-AND-UNDERSERVED-AREAS/TELEHEALTH



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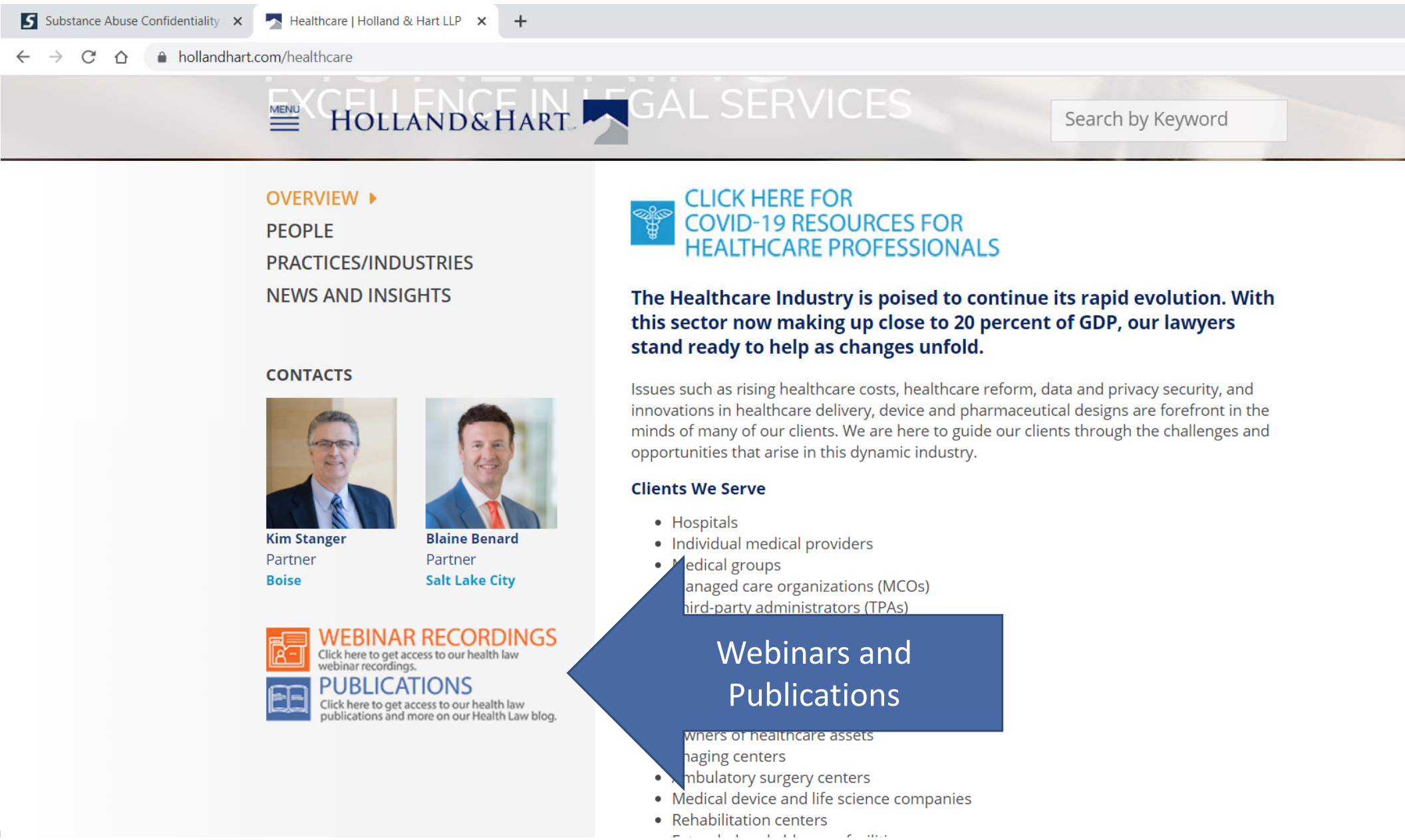
ADDITIONAL RESOURCES

- Federation of State Medical Boards, http://www.fsmb.org/grpol_telemedicine.html.
  - Summaries of state laws governing telemedicine.
  - Legislative update.
- Center for Telehealth & e-Health Law ("CTel"), http://www.fsmb.org/grpol_telemedicine.html.
  - Publications and guides.
  - News and information.
- American Telemedicine Ass'n, http://www.americantelemed.org/
  - Practice standards and guides.
  - News and information.

WWW.HOLLANDHART.COM/HEALTHCARE



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