



# Opioid update: New federal law and physician subpoenas for records and depositions

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On Oct. 24, 2018, President Trump signed into law the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, also known as the SUPPORT for Patients and Communities Act (H.R. 6).<sup>1</sup> According to the White House, this Act “addresses the opioid crisis by reducing access to and the supply of opioids and by expanding access to prevention, treatment and recovery services.”<sup>2</sup>

The Act itself is long (250 pages) and contains many provisions. This article will highlight some of the provisions that may be of the most interest to you.

## Telehealth

- By Oct. 24, 2019, Centers for Medicare and Medicaid Services (CMS) shall issue guidance to states regarding options for telehealth services to address substance use disorders under Medicaid.

- Beginning July 1, 2019, the Act eliminates certain originating site requirements for telehealth services provided to Medicare beneficiaries for the treatment of substance use disorders and co-occurring mental health disorders. It will allow payments for telehealth services at originating sites, regardless of geography.

## Coverage for pregnant women and children

- Effective immediately, the Act provides that pregnant and postpartum women receiving care for substance use disorders in an institution for mental disease can continue to receive other Medicaid-covered services outside of the IMD, such as prenatal services.

- Beginning Oct. 24, 2019, the Act requires state Children’s Health Insurance Programs (CHIP) to cover mental health benefits, including substance use disorder services, for eligible pregnant women and children. It also prevents states from imposing financial or utilization limits on mental health treatment that are lower than limits placed on physical health treatment.

## Screening for opioid use disorder

- For visits after Jan. 1, 2020, the Act provides for increased screening for opioid use disorder and other substance use disorder among Medicare beneficiaries during Medicare wellness and preventative care visits. It requires that the “Welcome to Medicare” visit and annual wellness visits include a review of current opioid prescriptions and screening for potential substance use disorders. The Act also allows for separate payments for structured

assessment and intervention for substance abuse furnished to an individual on the same day as an initial preventative physical examination or an annual wellness visit.

## Delivery of Medication-Assisted Treatment (MAT)

- The Act expands Medicare coverage to include Opioid Treatment Programs for the purposes of delivering MAT to beneficiaries.

- The Act authorizes clinical nurse specialists, certified nurse midwives and certified registered nurse anesthetists to prescribe MAT for five years. It also provides prescribing authority for physician assistance and nurse practitioners, and allows waived practitioners to immediately treat 100 patients at a time if the practitioner is board-certified in addiction medicine or addiction psychiatry, or if the practitioner provides MAT in a qualified practice setting.

## Illegal kickbacks

- The Act makes it illegal to knowingly and willfully pay or receive kickbacks in return for referring a patient to a recovery home, clinical treatment facility or laboratory. Each occurrence is punishable by a fine of up to \$200,000, imprisonment of up to 10 years, or both. This does not apply to:

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1) Discounts/price reductions if the reduction in price is properly disclosed and appropriately reflected in the costs claimed by the provider/entity;

2) Payment made by an employer to employee or independent contractor (with bona fide employer or contractual relationship with employer) for employment if that payment is not determined by or does not vary by:

A) number of referrals to a particular recovery home, clinical treatment facility or laboratory;

B) number of tests or procedures performed; or

C) the amounts billed to or received from (in whole or in part) the health care benefit program from the individuals referred to a particular recovery home, clinical treatment facility or laboratory.

3) Drug discounts under the Medicare coverage gap discount program;

4) A payment made by a principal to an agent as compensation for the services of the agent under a personal services and management contract that meets the requirements 42 C.F.R. §1001.952(d);

5) A waiver or discount of any coinsurance or copayment by a health care benefit program if:

A) the waiver or discount is not routinely provided; and

B) the waiver or discount is provided in good faith.

6) Any remuneration between a health center entity and any individual or entity providing goods, items, services, donations, loans, or a combination thereof, to such health center entity pursuant to a contract, lease,

grant, loan, or other agreement, if such agreement contributes to the ability of the health center entity to maintain or increase the availability, or enhance the quality, of services provided to a medically underserved population served by the health center entity;

7) A remuneration made pursuant to an alternative payment model or a payment arrangement used by a State health insurance issuer, or group health plan if the Secretary of Health and Human Services has determined that such arrangement is necessary for care coordination or value-based care; or

8) Any other payment, remuneration, discount, or reduction as determined by the Attorney General, in consultation with the Secretary of Health and Human Services, by regulation.

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## Prescriber outliers

The Act requires the secretary of HHS, no later than Oct. 24, 2020, to annually notify prescribers that they have been identified as an outlier prescriber of opioids compared to other prescribers in their specialty and geographic area. The secretary may exclude from the analysis individuals that receive hospice services or have a cancer diagnosis. The secretary also may exclude prescribers who are being investigated by the inspector general.

## Loan repayment

The Act requires the establishment of six-year loan repayment agreements with substance use disorder treatment professionals in mental health professional shortage areas or counties that have been hardest hit by drug overdoses.

## Physicians subpoenaed in the opioid litigation

While the Pennsylvania attorney general has not yet sued any of the pharmaceutical companies for their role in the opioid epidemic, our neighbors in West Virginia have done just that. The West Virginia attorney general, the West Virginia Department of Health and Human Resources and West Virginia Department of Military Affairs and Public Safety sued McKesson Corp. (the largest pharmaceutical distributor in North America) for its role in the opioid epidemic, which has hit West Virginia particularly hard. Similar

lawsuits are cropping up all over the country.

All physicians, particularly those who practice in pain management and/or prescribe opioids, should be on the lookout for subpoenas directed to them or their office from these lawsuits. Pharmaceutical companies (such as McKesson in the West Virginia litigation) have started to subpoena physicians and/or their practices. These subpoenas seek the production of information that may help the pharmaceutical companies turn the blame for the opioid epidemic back to the prescribing physicians. These subpoenas request detailed information about the amount and kinds of opioids prescribed, disciplinary action against the physicians, and other such intrusive requests.

If you receive a subpoena like this, you should take it very seriously and consult with a health law attorney prior to responding. Your answers to these questions could have grave repercussions on your license and potentially have criminal implications. Further, disclosing such information could be a violation of your obligations under HIPAA.

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### References

1. <https://www.congress.gov/bill/115th-congress/house-bill/6>
2. <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-signed-h-r-6-law/>

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