



The Reality of Florida’s New Telehealth Law

HB 23 reflects the Florida House’s attempt to weaken licensure requirements under the guise of promoting telemedicine — but it could have been even worse.

By Jeff Scott, Esq.
FMA General Counsel

Telemedicine is being practiced in Florida every day pursuant to the standards of practice for telemedicine adopted by the Board of Medicine and the Board of Osteopathic Medicine. These standards require a Florida license and provide that the standards of care shall remain the same regardless of whether healthcare services are provided in person or by telemedicine. There is no shortage of licensed physicians willing to provide telemedicine in Florida. There is however, an unwillingness among health insurance companies to pay for this service.

Recognizing this impediment to the increased utilization of telemedicine, Sen. Gayle Harrell filed SB 1526 during the 2019

Florida Legislative Session. SB 1526 would have put the current telemedicine practice standards into the statute books and would have required health insurance companies to reimburse telemedicine providers on the same basis as they would for an in-person encounter.

Unfortunately, the state House of Representatives, led by Speaker José Oliva in a bid to “revolutionize” medicine, completely missed the mark. Instead of providing for payment parity, the House focused on creating the means for out-of-state providers to practice in Florida without having to obtain a license.

Despite intense lobbying by the FMA, various specialty societies and other professional associations, SB 1526 was stripped of its favorable provisions and the language of HB 23, filed by Rep. Clay Yarborough, was used as a substitution. HB 23 as filed would have allowed out-of-state physicians to practice telemedicine in Florida without a Florida license and with absolutely no accountability to the state medical boards.

Though Sen. Harrell insisted on a number of changes to improve this legislation, the end product is still less than ideal. The FMA lobbied vigorously to have the bill vetoed, but Gov. Ron DeSantis ultimately signed it into law on Tuesday, June 25, 2019.

Accordingly, the FMA will work diligently with the Department of Health to ensure that HB 23 is implemented with the best interests of Florida's patients and in-person healthcare providers in mind. A full summary of HB 23 follows.

I. Telehealth Defined

HB 23 uses the term “telehealth” rather than “telemedicine” in order to include professions other than allopathic and osteopathic physicians. Telehealth is defined as the “use of synchronous or asynchronous telecommunications technology by a telehealth provider to provide healthcare services, including, but not limited to, assessment, diagnosis, consultation, treatment, and monitoring of a patient; transfer of medical data; patient and professional health-related education; public health services and health administration.”

HB 23 excluded audio-only telephone calls, e-mail messages and facsimile transmissions from the definition of telehealth but notably — despite the FMA's repeated requests — did not exclude prescribing based solely on an electronic medical questionnaire. FMA will work with the Board of Medicine to ensure that this current standard of practice (64B8-9.0141(5)) remains in effect.

Under HB 23, the following licensed or certified professionals are considered “telehealth providers:”

- *Behavior analysts*
- *Emergency medical technicians*
- *Paramedics*
- *Acupuncturists*
- *Allopathic physicians*
- *Osteopathic physicians*
- *Allopathic and osteopathic physician assistants*
- *Chiropractors*
- *Podiatrists*
- *Optometrists*
- *Nurses (any type)*
- *Pharmacists*
- *Dentists*
- *Midwives*
- *Speech-language pathologists*
- *Audiologists*
- *Occupational therapists*
- *Basic X-ray machine operators; general radiographers; nuclear medicine technologists; radiologist assistants; specialty technologists*
- *Respiratory therapists*
- *Dietetics and nutrition practitioners; nutrition counselors*
- *Athletic trainers*
- *Orthotists; pedorthists; prosthetist; prosthetist-orthotists*

- *Electrologists*
- *Massage therapists*
- *Clinical laboratory personnel*
- *Medical physicists*
- *Opticians*
- *Physical therapists*
- *Psychologists*
- *Clinical social workers*
- *Marriage and family therapists*
- *Mental health counselors*

Any assistant, resident or trainee licensed or certified pursuant to the same chapter as any of the above professionals would also presumably be considered a telehealth provider.

It is important to note that a “telehealth provider” refers to individuals licensed or certified in Florida in a profession listed above, to individuals licensed in Florida pursuant to a multi-state licensure compact (for example the nursing compact, s. 464.0095), and to individuals not licensed in Florida but who register with their applicable Florida board or the Department of Health.

It is the “registration” provision that allows individuals to practice telehealth in Florida without a Florida license. This is the most controversial, fought-over piece of this legislation and will be fully explained in section IV.

II. Practice Standards

HB 23 ignores the Board of Medicine's standards of practice and instead crafts its own, badly.

A. Scope of Practice?

The bill provides that a telehealth provider “has the duty to practice in a manner consistent with his or her scope of practice and the prevailing professional standard of practice for a healthcare professional who provides in-person healthcare services to patients in this state.”

There is some confusion over what this standard requires. Do telehealth providers have to practice in a manner consistent with the scope of practice where they are licensed, or the scope of practice as provided by Florida law? It appears clear that telehealth providers have to comply with the “prevailing professional standard of practice” required of Florida-licensed providers, but does the “who provides in-person healthcare services to patients in this state” language apply to both standards of practice and scope of practice, or just the former?

For reasons to be explained in section IV, it is the FMA's position that telehealth providers will have to practice in a manner consistent with **both** the scope of practice and the prevailing professional standards of practice required in Florida.



B. Patient Evaluations

HB 23 provides that “a telehealth provider may use telehealth to perform a patient evaluation.” The FMA does not have a problem with this provision. The legislation then, however, goes on to state that “if a telehealth provider conducts a patient evaluation sufficient to diagnose and treat the patient, the telehealth provider is not required to research a patient’s medical history or conduct a physical examination of the patient before using telehealth to provide healthcare services to the patient.” This provision is unnecessarily complicated. It could indicate that as long as a diagnosis is made and a treatment plan is developed, an in-person examination is not required, regardless of whether the current standard of care requires an in-person examination.

The FMA proposed language that would allow for telehealth evaluations when appropriate but require an in-person examination when required by the standard of care. The FMA language was as follows:

“A patient evaluation, including a history and physical examination, may be performed using telehealth unless the applicable standard of care requires an in-person examination.”

Despite the clarity this amendment would have provided, the House stubbornly clung to its language and refused to accept any language that deviated from the initial draft. The FMA hopes to work with the Department of Health to clarify this provision during rulemaking.

C. Controlled Substances

HB 23 prohibits the prescribing of controlled substances via telehealth unless the controlled substance is prescribed for (1) treatment of a psychiatric disorder; (2) inpatient hospital treatment; (3) treatment of a hospice patient; or (4) treatment of a nursing home resident.

D. Miscellaneous

In order to clarify the obvious, HB 23 provides that a telehealth provider and a patient may be in separate locations when telehealth services are provided.

HB 23 also provides that a “nonphysician telehealth provider using telehealth and acting within his or her scope of practice, as established by Florida law or rule, is not in violation of the statutes prohibiting the practice of medicine without a license.

This supports the FMA’s position that nonphysician telehealth providers must practice within the scope of their professions as established by Florida law, regardless as to whether the scope of practice in their home state is more expansive than in Florida.

III. Medical Records

HB 23 provides that a telehealth provider must document the services provided under the same standards applicable to in-person services, and that medical records generated by telehealth providers are confidential under Florida law.

This brief section doesn’t specifically state whether the other provisions of Florida law that govern medical records (provided primarily in s. 456.057) apply to telehealth providers or not. For example, s. 456.057(12) provides that medical records owners who terminate practice and are no longer available to patients must notify the appropriate board and specify who the new records owner is and where the medical records can be found.

Do registered telehealth providers who choose to no longer provide telehealth services to their patients in Florida have to comply with this provision? The FMA will work to persuade the Boards that yes, registered telehealth providers have to comply with all of the Florida laws, rules and regulations applicable to licensed healthcare providers. The basis for this position will be explained in section IV.

IV. Registration of Out-of-State Telehealth Providers

Despite intense opposition from a broad range of healthcare providers, Speaker Oliva and the House of Representatives prevailed in achieving their long-sought goal of allowing out-of-state practitioners to provide telehealth services in Florida without having to obtain a Florida license.

A. Who Can Register?

HB 23 requires the boards of the professions listed in section I above, or the Department of Health (if there is no board for the profession) to “register” out-of-state health professionals if they:

1. Complete an application;
2. Have an unencumbered license in another U.S. state, district, possession or territory that is substantially similar to a license issued to a Florida-licensed provider;
3. Have not been the subject of disciplinary action during the last five years;
4. Are not subject to a pending disciplinary investigation or action;
5. Have not had their license to provide healthcare services revoked in any state or jurisdiction;
6. Designate a duly appointed registered agent for service of process;
7. Demonstrate that they maintain the same financial responsibility requirements required of in-state providers, which includes coverage for services provided to patients not located in the provider’s home state; and
8. Pay an initial registration fee of \$150 and a biennial renewal fee of \$150 (required by HB 7076).

Note the “substantially similar” requirement. No one adequately explained during the Legislative Session what this meant or who would/would not qualify under this requirement. The FMA lobbied to have this phrase deleted and to require out-of-state telehealth providers to have the same qualifications as Florida-licensed providers. Alas, requiring substantial similarity was as far as the House was willing to go. This is another issue the FMA will work on with DOH in the hope of ensuring that “substantially similar” will not be interpreted loosely so as to allow otherwise unqualified individuals to practice medicine electronically in Florida.

B. Scope of Practice Revisited

HB 23 provides that “a health care professional not licensed in this state may provide health care services to a patient located in this state using telehealth if the health care professional registers with the applicable board, or the department if there is no board, **and provides health care services within the applicable scope of practice established by Florida law or rule.**”

This section firmly supports the FMA’s position that a registered telehealth provider must practice within the scope set by the applicable Florida practice act, and if this scope conflicts with the scope of practice set by the provider’s state of licensure, Florida law prevails. This position is further bolstered by the legislative intent expressed during session, most notably Sen. Harrell’s unequivocal statement delivered on the Senate floor:

“A practitioner who provides telehealth service has the duty to practice in the manner consistent with her scope of practice, but also with the scope of practice as defined in the state of Florida. **There will be no expansion of scope under this bill.**”

C. Telehealth Registrant Requirements

Registered telehealth providers must:

9. Prominently display a hyperlink to the Department’s website listing all registrants.
10. Notify the applicable board or DOH within five days of having any restriction or disciplinary action initiated or taken against their out-of-state license.
11. Maintain professional liability coverage or financial responsibility in an amount equal or greater than that required for a “substantially similar” licensed practitioner.
12. Not open an office in this state and may not provide in-person healthcare services in Florida.
13. For a registered “telepharmacist,” only use a state-licensed pharmacy, a registered nonresident pharmacy, or a permitted outsourcing facility to dispense medicinal drugs.

D. DOH Website

The Department of Health is required to publish on its website of list of all registrants and detailed information on the registrant, including name, health care occupation, out-of-state license number, five-year disciplinary history, etc.

E. Disciplinary Action

Under the original House bill, neither the boards nor DOH had the authority to discipline a registered telehealth provider for violations of Florida rules, regulations or the provider’s applicable practice act. Thanks to Sen. Harrell’s dogged insistence, the final bill gives the boards or DOH the authority to take disciplinary action against a registered telehealth provider if the registrant:

1. Fails to notify the appropriate authority of any adverse actions taken against his or her license.
2. Has restrictions placed on or disciplinary action taken against his or her license in any state or jurisdiction.

3. Violates any provision of the telehealth statute.
4. Commits any act that constitutes grounds for discipline under s. 456.072 or the applicable practice act for Florida-licensed providers.

One of the key grounds for discipline under the Medical Practice Act is violating any provision of the Medical Practice Act (chapter 458) or the chapter that regulates all healthcare providers (chapter 456). Additionally, it is grounds for discipline to fail to perform any statutory or legal obligation placed upon a licensed physician (s. 456.331(1)(g)).

This ability to discipline registrants should, in effect, serve as a requirement for all registered telehealth providers to comply with all of the laws and obligations applicable to Florida-licensed providers. It appears conclusive then, that a registrant who ceased practice and was no longer available to patients, as discussed above, would be required to notify the board of who currently owns the records where the records can be found. He or she would also have to comply with the Board of Medicine's rules regarding medical records retention/disposition/reproduction, advertising, financial responsibility and standards of practice.

If a physician telehealth registrant fails to comply with these rules, or with any provision of chapter 456 or 458, the board may suspend, revoke or take other disciplinary action against the registrant, which may include the issuance of a reprimand or letter of concern.

V. Venue

To address the trial bar's concerns, a specific section was added to ensure that for telehealth providers, any act that constitutes the delivery of healthcare services is deemed to occur at the place where the patient is located at the time the act is performed, or at the patient's county of residence. If a patient wishes to sue an out-of-state telehealth provider, he or she will be able to do so in either the patient's county of residence, or in Leon County.

VI. Exemptions

An out-of-state healthcare provider does not have to register in Florida to provide telehealth services if the telehealth services are provided:

1. In response to an emergency medical condition; or
2. In consultation with a healthcare professional licensed in this state who has ultimate authority over the diagnosis and care of the patient.

VII. Reimbursement

As stated above, SB 1526 contained an excellent payment parity provision. HB 23 initially contained no payment parity provisions and instead provided a \$30 million tax credit for health insurance companies that provide some undefined type of coverage for telehealth services. An insurance company that covered only a few telehealth procedures and paid less for such services than for in-person services presumably would have been eligible for the credit.

When SB 1526 was initially replaced with HB 23, the payment parity provision was removed, and language was added that required contracts between health insurance companies and telehealth providers to be voluntary, establish mutually acceptable payment rates, and give telehealth providers the option to accept reimbursement in an amount less than the insurer would pay for in-person services.

Apparently, this useless provision was too strong for the insurance companies, as HB 23 was later amended to provide only that a contract distinguishing between payment rates for services provided through telehealth and those provided in person must be initialed by the telehealth provider.

This section will accomplish nothing other than to give insurance companies a reason to deny payment to telehealth providers who forget to initial contracts that pay them less than the in-person rate. It is window dressing that does not provide any degree of payment parity or serve to expand telemedicine in Florida.

VIII. Department Review of Fees

HB 7067 (the companion bill to HB 23) requires out-of-state providers who wish to register to provide telehealth services in Florida to pay a \$150 registration fee. The FMA strongly objected to this amount, which is far below the fees paid by licensed physicians. To add insult to injury, HB 23 will siphon more than \$200,000 from the Medical Quality Assurance trust fund annually to pay the administrative costs of registering telehealth providers.

In an attempt to meet FMA objections, language was added to HB 23 requiring DOH to annually review the fees collected from out-of-state telehealth provider registrations to determine whether the fees are sufficient to enable the boards to fully implement the provisions of HB 23. If they are not, DOH will be required to ask the Legislature for an appropriate adjustment.

IX. Effective Date

This act takes effect on Monday, July 1, 2019.

[Click here to see the enrolled version of HB 23.](#)