



KROKIDAS & BLUESTEIN LLP

**CLIENT ALERT**

**HEALTH LAW CLIENT ALERT**

**OCR's APRIL 24<sup>TH</sup> CLARIFICATION OF ORIGINAL NOTICE OF HIPAA ENFORCEMENT DISCRETION RE: TELEHEALTH AND COVID -19**

At the outset of the COVID-19 Public Health Emergency (PHE), the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) announced that it will exercise its enforcement discretion and not impose penalties against covered entities for noncompliance with HIPAA regulations in connection with the good faith provision of telehealth services during the PHE. (See the [Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency](#); and the original FAQs may be found [here](#)).

In a national telephone call on April 24<sup>th</sup>, OCR provided additional detail and clarity regarding its telehealth-related enforcement discretion, which we have summarized below.

- What OCR's HIPAA Enforcement Discretion Means during the PHE:
  - OCR has not suspended the application of HIPAA Privacy and Security Rule regulations to the provision of telehealth services; OCR is only suspending the imposition of penalties for certain violations related to telehealth.
  - OCR's enforcement discretion applies to telehealth services provided for any reason and not just for services related to COVID-19.
  - In addition to real-time audio and visual telecommunication, OCR's enforcement discretion applies to telephone calls, non-public facing texting applications, and document scanning applications used to upload patient records onto electronic health records (EHR) systems.
  - OCR's enforcement discretion does not apply to the regulatory rules for protecting the confidentiality of substance use disorder patient records at 42 C.F.R. Part 2.
- Permitted Technology: Providers are permitted to utilize non-public facing communication applications such as Skype and FaceTime. Providers cannot use public facing applications such as Facebook Live, Twitch, or TikTok.

- Business Associate Agreements (BAAs): Providers are permitted to utilize non-public facing communication applications without a BAA and will not be penalized for the absence of a BAA.

OCR clarified that the current HIPAA enforcement discretion in relation to the good faith provision of telehealth services is not permanent. OCR plans to announce the end of such enforcement discretion at the conclusion of the PHE. Please note that the federal definition of the PHE may not align with the state public health emergency.

We will continue to monitor legal developments regarding COVID-19.

For additional information or guidance, please contact Attorneys Jennifer Gallop ([jgallop@kb-law.com](mailto:jgallop@kb-law.com)), Emily Kretchmer ([ekretchmer@kb-law.com](mailto:ekretchmer@kb-law.com)), or Andrew Maglione ([amaglione@kb-law.com](mailto:amaglione@kb-law.com)).