THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

JAMES GELFAND
President

September 21, 2022

Ms. Amanda Quintana
New Mexico Medical Board
Public Information Office
2055 South Pacheco Street, Bldg. 400
Santa Fe, NM 87505
Submitted Electronically

RE: Large Employer Written Comments in Opposition to Proposed Rules – NEW PART to Title 16, Chapter 10 Regarding Telemedicine – As the Rules Will Adversely Affect Health Care for New Mexicans

Dear Ms. Quintana:

The ERISA Industry Committee ("ERIC") appreciates the opportunity to provide comments on the proposed addition to Title 16, Chapter 10 ("Proposed Rules") regarding telemedicine issued by the New Mexico Medical Board ("Board") on August 9, 2022.

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation policies at the federal, state, and local levels. New Mexicans likely engage with an ERIC member company when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

With member companies that are leaders in every sector of the economy, ERIC advocates for legislative and regulatory policies that expand access to effective and efficient telemedicine services, improving the care that patients can receive and allowing employers to continue providing high quality benefit programs to workers across the state of New Mexico. Toward these ends, ERIC is pleased that New Mexico lawmakers adopted legislation that we supported for the state to join the Interstate Medical Licensure Commission Compact (IMLCC) and Psychology Interjurisdictional Compact (PSYPACT) to better facilitate telemedicine access for New Mexicans.

ERIC has long recognized the significant opportunity telemedicine services have to modernize health care delivery and improve access to quality medical care for workers and their dependents across the country. As ERIC member companies strive to provide the best health care coverage possible to their nationwide workforces, it is critical that state policies do not unnecessarily limit the flexibility or availability of invaluable telemedicine services that New Mexicans are ultimately able to enjoy.

ERIC is appreciative of past efforts by New Mexico lawmakers to establish broad telemedicine standards that allow patients and providers to connect more easily and expand safe use of telemedicine technologies in diagnosis and treatment. **However, there are several provisions included in the Proposed Rules that, if adopted, would restrict the ability of patients to access remote care, unnecessarily limit the proven technologies used by telemedicine providers, and generally reduce the quality of medical services available in New Mexico.** Furthermore, these problematic provisions stand in direct conflict with updated telemedicine guidelines recently issued by the Federation of State Medical Boards ("FSMB") and ignore the requirements of underlying state telemedicine laws established by the New Mexico Legislature. In addition, we are concerned that the New Mexico Medical Board lacks the regulatory authority required to adopt or even develop these rules in the first place.

On behalf of our member companies, ERIC offers the following comments regarding the Proposed Rules, which urge the Board to reconsider these unwarranted changes to telemedicine rules in the state and avert tremendous negative impacts on statewide medical capabilities in New Mexico.

Comments

The Proposed Requirements for Establishing a "Physician-Patient Relationship" Create Unnecessary and Ambiguous Standards of Care that Prevent Patients from Accessing Invaluable Telemedicine Services

While ERIC recognizes the importance of establishing safe medical practices to ensure patients' well-being, we are opposed to policies that attempt to place arbitrary or unclear requirements on the use of telemedicine services. When barriers to patient care are created without clinical justification, the result is often a reduction in access to care for vulnerable patients most in need of these remote services.

Section 16.10.18.8(B) of the Proposed Rules plainly states that "*telemedicine shall not be utilized by a physician with respect to any patient in the absence of a physician-patient relationship*". A definition of physician-patient relationship is provided by Section 16.10.18.7(A) of the Proposed Rules, which states that *"[a]t a minimum, this relationship is established by an interactive encounter between patient and physician involving an appropriate history and physical and/or mental status examination sufficient to make a diagnosis and to provide, prescribe or recommend treatment*". Finally, Section 16.10.18.8(B) further establishes that "*the use of asynchronous, store and forward technologies, such as the use of text, mobile apps or static online questionnaires, emails, imaging alone do not create a patient physician relationship*".

These criteria attempt to erroneously apply a blanket standard of care that must be followed to establish a physician-patient relationship, regardless of the clinical telemedicine considerations that ought to be made by providers on a case-by-case basis. First, the rules require a physician-patient relationship to feature an "*interactive encounter*", which is not truly defined beyond involvement of a "*history and physical and/or mental status examination*". Does this by

definition mean that a patient's first encounter with a provider cannot be via telemedicine? If so, that would place arbitrary limits to access of care for New Mexicans who don't plan in advance to seek medical care.

Second, asynchronous technologies are explicitly prohibited from qualifying as the kind of interactive encounter needed to establish a physician-patient relationship, whether or not such an asynchronous exchange would actually provide information "*sufficient to make a diagnosis and to provide, prescribe or recommend treatment*". There are a wide range of medical circumstances in which telemedicine is perfectly suited to diagnose and provide treatment for conditions using asynchronous technologies. For example, a dermatologist does not necessarily need to be engaged consistently via a video *and* audio connection with a patient to identify a skin condition and would need this synchronous connectivity even less to simply check for signs of improvement at different points in the treatment process. The real aim should be for applicable standards of care to be met under varying medical circumstances by the technology in question.

While ERIC recognizes that some forms of asynchronous technology exchange may not meet the standards needed to establish a physician-patient relationship in all cases, such as the static questionnaires noted, the blanket exclusion contained in the Proposed Rules does not discriminate between those kinds of information exchange and the range of asynchronous technologies that do meet this standard and should be permitted to establish a physician-patient relationship, at the discretion of medical providers. Similarly, there is no clinical justification for requiring particular examinations to be conducted prior to establishing a physician-patient relationship, and creating such a requirement would defeat the advantages of access and utility that telemedicine services are meant to offer in the first place.

This position is reinforced by recently updated FSMB state telemedicine guidelines, which propose policies for lawmakers and state medical boards that enable the broad use of telemedicine technologies while prioritizing patient safety. These guidelines plainly state that a "*physician-patient relationship may be established via either synchronous or asynchronous telemedicine technologies without any requirement of a prior in-person meeting, so long as the standard of care is met*." Importantly, these guidelines highlight both that specified examinations need not be required as a matter of course to establish a physician-patient relationship, and that asynchronous technologies can be a sufficient source of information exchange to establish the same, so long as standards of care are met. As a best practice, regulators should not attempt to create narrow standards to be applied to every circumstance of potential medical service to be provided, but instead leave discretion to medical providers to identify and meet the applicable standard of care.

ERIC therefore strongly encourages the Board to amend the Proposed Rules to allow the establishment of a physician-patient relationship using asynchronous technologies that meet the applicable standard of care, as well as remove unnecessary requirements for a specified examination or in-person meeting to be performed before establishing this relationship.

The Proposed Rules Restrict the Use of All Asynchronous Technologies for Telemedicine Diagnosis and Treatment and Limit the Tools Available to Providers Without Apparent Clinical Justification

The core advantage offered by telemedicine services is the range of effective and efficient technologies that providers can use to gather relevant medical data, make informed diagnoses, implement treatment, and ultimately improve the quality of care available to patients. This advantage, and the benefit patients can receive, are severely reduced when blanket restrictions are placed on useable telemedicine technologies based on broad modality categorizations instead of whether they are able to provide the information and interaction needed to meet the applicable standard of care. It is for this reason that ERIC advocates for the adoption of **technology neutral** telemedicine standards that grant providers the discretion to use both synchronous and asynchronous technologies that they believe are appropriate to meet the standard of care at hand.

Such a harmful blanket restriction is applied by Section 16.10.18.8(B) of the Proposed Rules, which states that "*the use of asynchronous, store and forward technologies, such as the use of text, mobile apps or static online questionnaires, emails, imaging alone do not create a patient-physician relationship and cannot be used for diagnosis or treatment*", ignoring applicable standards of care and removing provider discretion to make use of proven asynchronous technologies altogether. While Section 16.10.18.8(C) of the Proposed Rules provides a limited carve out for radiology, pathology, dermatology, or ophthalmology, this excepted list is oddly limited and again does not provide justification as to why all other medical applications are prohibited.

Importantly, this proposed standard again stands in direct conflict with FSMB state telemedicine guidelines, which do not discriminate against the use of asynchronous technologies by providers in the diagnosis or treatment of a patient. Furthermore, this exclusion of otherwise permissible modes of medical information exchange conflicts with underlying New Mexico state telemedicine laws.

In fact, New Mexico law (NMSA Sections 13-7-14(L)(6) and 59A-23-7.12(L)(6)) provides an explicitly inclusive definition of telemedicine as a service that "*allows health care professionals to evaluate, diagnose and treat patients in remote locations using telecommunications and information technology in real time or asynchronously, including the use of interactive simultaneous audio and video or store-and-forward technology, or remote patient monitoring and telecommunications in order to deliver health care services to a site where the patient is located, along with the use of electronic media and health information*." Without regulatory context to reference, it remains unclear why the Board is now attempting to so severely limit the use of clinically proven, generally accepted, asynchronous technology modalities in the practice of telemedicine – especially when doing so is in conflict with both interstate convention and existing state law.

ERIC therefore strongly urges the Board to remove unnecessary limitations on the use of asynchronous technologies within the practice of telemedicine from the Proposed Rules and

instead maintain the ability of medical providers to use their discretion in determining the most appropriate available telemedicine modes to use based on the applicable standard of medical care. Alternatively, we recommend that the Board develop an all-encompassing list of the specific asynchronous telemedicine technologies that cannot be used alone to diagnose or treat patients as well as the clinical justifications for their exclusion, leaving otherwise unidentified technological modes as permissible within the practice of telemedicine.

The Proposed Rules Place Additional Requirements on Telemedicine Prescription Practice that are Arbitrarily Restrictive and Unreasonably Alter Commonly Accepted Standards of Care

ERIC is appreciative of general prescription safety considerations and advocates for policies that adopt reasonable standards of care for prescription practice within telemedicine. Despite this, we oppose legislative or regulatory policies that attempt to limit the ability of patients to access critical prescription services via telemedicine by applying expansive and arbitrary standards of care that are not medically necessary for patient safety and severely limit the ability of telemedicine providers to issue quality prescriptive care.

The Proposed Rules follow this form of arbitrary standard expansion in Section 16.10.18.8(E), which requires that "*Treatment and consultation recommendations made in a telemedicine setting, including issuing a prescription via electronic means, will be held to the same standards of care as those in in-person settings. Issuing prescriptions must include a face-to-face telemedicine encounter, or occur in the context of an established patient-physician relationship.*" Not only does this rule seem to contradict itself – by claiming to apply the same standard of care as in-person settings while creating additional requirements for telemedicine prescriptions – but also appears to remove the critical discretion of providers to utilize available telemedicine modes that they believe would meet applicable standards of care for prescription.

Once again, the impact of this policy stands in contrast with FSMB state telemedicine guidelines which more clearly state that "*prescribing medications via telemedicine, as is the case during in-person care, is at the professional discretion of the physician. The indication, appropriateness, and safety considerations for each prescription issued during a telemedicine encounter must be evaluated by the physician in accordance with state and federal laws, as well as current standards of practice, and consequently carry the same professional accountability as prescriptions delivered during an encounter in person.*" Notably, this FSMB standard does not try to formulate specific practice requirements for any and all potential prescription services provided via telemedicine, but instead protects the ability of physicians to "*exercise their judgment and prescribe medications as part of telemedicine encounters*" so long as the "*appropriate clinical consideration is carried out and documented*."

By placing additional face-to-face encounter requirements on telemedicine prescription, the Proposed Rules would effectively hold telemedicine practice to a significantly different standard of care than in-person prescription without explaining an adequate patient safety goal served by this discrimination. At the same time, the separation of invaluable prescription practice from general telemedicine services via differing requirements creates an unnecessary barrier to

medical treatment for New Mexico residents, many of whom are already facing the very technological connectivity and provider access issues that telemedicine services are best equipped to combat and resolve.

ERIC therefore strongly encourages the Board to remove the additional telemedicine prescription practice requirements currently included in the Proposed Rules and avoid establishing arbitrary standards of care that would unjustifiably bar patients from seeking critical prescription services via telemedicine. Alternatively, we urge the Board to clarify the patient safety purpose of requiring face-to-face interaction in these instances, and to consider whether information necessary for safe prescription practice can be adequately captured by the range of synchronous and asynchronous telemedicine technologies widely available today.

The Board May Lack Statutory Authority to Develop the Proposed Rules or Alter State Telemedicine Practice Standards

Finally, ERIC would like to echo concerns that have been raised regarding the statutory authority that the Board cites as the basis for the Proposed Rules and the substantial regulatory changes that they contain. While NMSA Section 61-6-21 provides the Board with narrow authority to "*establish mandatory continuing educational requirements for licensees*" and "*suspend the license of a licensee who fails to comply with continuing medical education or continuing education requirements*", it does not appear to provide any authority or responsibility to establish or alter telemedicine standards of practice at large, especially when alterations represent such a notable departure from state telemedicine standards already established by the state's direct legislation.

Similarly, while the related NMSA Section 61-6-11.1 does provide the Board with less defined authority to promulgate telemedicine rules, that authority is narrowly limited to rules establishing a "*telemedicine license to allow the practice of medicine across state lines*." As the Proposed Rules stand to broadly reshape the requirements and standards of telemedicine practice throughout the state regardless of provider location or interstate licensure, they appear to exceed the scope of authority granted to the Board in this area.

ERIC therefore strongly encourages the Board to update the statutory authority cited to in the Proposed Rules and provide clear justification as to how the Proposed Rules fit within the limited regulatory scope established by NMSA Sections 61-6-21 and 61-6-11.1. Alternatively, ERIC suggests the Board seek intervention or proper authority from the New Mexico Legislature in order to pursue the regulatory changes contained in the Proposed Rules.

Conclusion

ERIC appreciates the opportunity to provide regulatory comments to the Board on these Proposed Rules and help shape critical telemedicine standards that secure quality medical care for more New Mexicans.

ERIC strongly recommends that the Board make the regulatory revisions outlined above and reorient development of the Proposed Rules to improve the quality and accessibility of invaluable telemedicine services throughout New Mexico.

If you have any questions concerning our regulatory comments or would like to discuss ways in which telemedicine can improve statewide medical practice, please contact us at (202) 789-1400 or jgelfand@eric.org.

Sincerely,

James Gelfand
President