

WV CODE UPDATE: LIMITATIONS ON PRESCRIBING CONTROLLED SUBSTANCES TO NEW and ESTABLISHED PATIENTS VIA IN-PERSON and TELEHEALTH VISITS DURING Public Health Emergency AND AFTER

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WV CODE 30-3-26 ‘Established patient’ means a patient who has received professional services, face-to-face, from the physician, qualified health care professional, or another physician or qualified health care professional of the exact same specialty and subspecialty who belongs to the same group practice, within the past three years **OR by WV CODE 30-3-13a Telemedicine** to establish patient:(A) Through the use of telemedicine technologies which incorporate interactive audio using store and forward technology, real-time videoconferencing, or similar secure video services during the initial physician-patient encounter;(B) For the practice of pathology and radiology, a physician-patient relationship may be established through store and forward telemedicine or other similar technologies; or(C) Through the use of audio-only calls or conversations that occur in real time. patient communication through audio-visual communication is preferable, if available or possible. Audio-only calls or conversations that occur in real time may be used to establish the physician-patient relationship.

ONCE Patient is ESTABLISHED, PROVIDER MUST: 1. Document H and P relevant to diagnosis. 2. Document controlled substance history. 3. Develop treatment plan. 4. Access and evaluate the PDMP before prescribing.

PATIENT TYPE	WV Prescribing Limits (number of pills or refills)	RX of Schedule II substance Physical Exam Requirement	Telehealth Visit Requires 12 month In-Person Requirement WV CODE 30-1-26b(4)
Chronic Non-malignant Pain	Prescribing limits apply see Chronic Non-Malignant Pain in Previous Table.	DURING PHE: In-person exam requirement waived if Audio-Visual synchronous used. POST PHE: 90 day In-Person Visit/Exam will likely be reinstated.	DURING AND AFTER PHE: previous 12mth IN-PERSON REQUIRED for WV telehealth eligibility. (POST PHE: must be in-person visit every 3 months if prescribing Schedule II)
Acute Pain	Prescribing limits apply see Acute Pain in Previous Table	N/A	N/A
Substance Use Disorder, Opioid Use Disorder By <u>DATA-Waived Practitioners.</u>	Schedule II: M: 90d? Schedule III: M: 90d R:1?	RX of Schedule II and III via telehealth allowed: DURING PHE: Allowed RX of Schedule II and III for New and Established patients with Audio-Visual OR Audio only. POST PHE: Via Synchronous Audio-Visual for New and Established patients.	12 month in person for telehealth apt not required for SUD/OD.
Cancer patient in active treatment, Palliative Care patient, Hospice patient	Schedule II: M: 90d R: 1 Schedule III: M: 90d R:1	DURING PHE: In person waived if Audio-Visual synchronous used. POST PHE: 90 day In-Person Visit/Exam will likely be reinstated.	12 month in person NOT Required for palliative/hospice care telehealth apt.
Long term care resident	Schedule II: M: 90d? Schedule III: M: 90d R:1?	DURING PHE: In person waived if Audio-Visual synchronous used. POST PHE: 90 day In-Person Visit/Exam will likely be reinstated.	DURING AND POST PHE: 12 month in person required for telehealth eligibility
EXCEPTION for Disorders in WV CODE 30-3-13a (see notation) in minors or those >18 enrolled in Primary or Secondary school with established relationship with provider: Note inclusions listed above under TELEHEALTH EXCEPTION	Schedule II non opioids: 90d R: 0? Schedule III: M: 90d R: 1?	DURING and POST PHE: Schedule II prescribing for Diagnosis Exceptions allowed via Telehealth using synchronous audio-visual	DURING and POST PHE: 12 month in person required for telehealth eligibility unless DX is considered “Behavioral Health” and excepted.

References:

PRESCRIBING OF SCHEDULE II OPIOIDS: WV CODE 16-54-4: g) Notwithstanding any provision of this code or legislative rule to the contrary, no medication listed as a Schedule II opioid drug as set forth in §60A-2-206 of this code, may be prescribed by a practitioner for greater than a 30-day supply: Provided, That two additional prescriptions, each for a 30-day period for a total of a 90-day supply, may be prescribed if the practitioner accesses the West Virginia controlled substances Monitoring Program Database as set forth in §60A-9-1 et seq. of this code: Provided, however, That the limitations in this section do not apply to cancer patients, patients receiving hospice care from a licensed hospice provider, patients receiving palliative care, a patient who is a resident of a long-term care facility, or a patient receiving medications that are being prescribed for use in the treatment of substance abuse or opioid dependence. (h) A practitioner is required to conduct and document the results of a physical examination every 90 days for any patient for whom he or she continues to treat with any Schedule II opioid drug as set forth in §60A-2-206 of this code. The physical examination should be relevant to the specific diagnosis and course of treatment, and should assess whether continuing the course of treatment would be safe and effective for the patient.

PRESCRIPTIONS CONTROLLED SUBSTANCES: WV CODE 60A-3-308: (c) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a controlled substance included in Schedule III or IV, which is a prescription drug as determined under appropriate state or federal statute, shall not be dispensed without a lawful prescription of a practitioner. The prescription shall not be filled or refilled more than six months after the date thereof or be refilled more than five times unless renewed by the practitioner.

(d) (1) A controlled substance included in Schedule V shall not be distributed or dispensed other than for a medicinal purpose: Provided, That buprenorphine shall be dispensed only by prescription pursuant to subsections (a), (b) and (c) of this section: Provided, however, That the controlled substances included in subsection (e), section two hundred twelve, article two of this chapter shall be dispensed, sold or distributed only by a physician, in a pharmacy by a pharmacist or pharmacy technician, or health care professional.

PRESCRIBING FOR SUD and OUD: DEA has already announced that practitioners may prescribe controlled substances to patients using telemedicine without first conducting an in-person evaluation during this public health emergency under 21 U.S.C. 802(54)(D).¹ Today, DEA notes that practitioners have further flexibility during the nationwide public health emergency to prescribe buprenorphine to new and existing patients with OUD via telephone by otherwise authorized practitioners without requiring such practitioners to first conduct an examination of the patient in person or via telemedicine. ² This additional flexibility under which authorized practitioners may prescribe buprenorphine to new patients on the basis of a telephone evaluation is in effect from March 31, 2020, until the public health emergency declared by the Secretary ends, unless DEA specifies an earlier date.

The Controlled Substances Act (CSA) allows practitioners to dispense narcotic drugs, including buprenorphine, to individuals with OUD for maintenance or detoxification treatment if the practitioners separately register with DEA as an opioid treatment program (OTP). See 21 U.S.C. 823(g)(1). The CSA also permits practitioners to dispense narcotic drugs for OUD by providing for a waiver of this separate registration requirement for practitioners dispensing schedule III, IV, or V narcotic controlled substances approved by the Food and Drug Administration specifically for the use in maintenance or detoxification treatment. *Id.* at 21 U.S.C. 823(g)(2); 21 CFR 1301.28. Currently, the only controlled substance meeting these criteria is buprenorphine. To qualify for the waiver to dispense buprenorphine for maintenance or detoxification treatment, the practitioner must meet the qualifications set by SAMHSA. Practitioners who have met these SAMHSA qualifications and obtained authorization from DEA to dispense buprenorphine for maintenance or detoxification treatment are often referred to as “DATA-waived practitioners” (in reference to the Drug Addiction Treatment Act of 2000, which added 21 U.S.C. 823(g)(2) to the CSA). Under the CSA, all prescriptions for controlled substances, including those issued for maintenance or detoxification treatment, must be issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice. See 21 CFR 1306.04(a). As noted above, despite the CSA’s limitations on issuing prescriptions for controlled substances by means of the Internet, **for the duration of the public health emergency, a practitioner may prescribe a controlled substance to a new patient via telemedicine—using a real-time, two-way, interactive audio-visual communication—without first conducting an in-person examination.** ³ See 21 U.S.C. 802(54)(D).

TELEHEALTH VISITS with ESTABLISHED PATIENTS: WV CODE 30-1-26b (4) The standard of care for the provision of telehealth services. The standard of care shall require that with respect to the established patient, the patient shall visit an in-person health care practitioner within 12 months of using the initial telemedicine service or the telemedicine service shall no longer be available to the patient until an in-person visit is obtained. This requirement may be suspended, in the discretion of the health care practitioner, on a case-by-case basis, and it does not to the following services: acute inpatient care, post-operative follow-up checks, behavioral medicine, addiction medicine, or palliative care.

TELEHEALTH: WV CODE 30-1-26b (5) A prohibition of prescribing any controlled substance listed in Schedule II of the Uniform Controlled Substance Act, unless authorized by another section: *Provided,* That the prescribing limitations contained in this section do not apply to a physician or a member of the same group practice with an established patient.

TELEHEALTH EXCEPTION WV CODE 3-3-13A The prescribing limitations in this subsection (controlled schedule II RX) do not apply when a physician is providing treatment to patients who are minors, or if 18 years of age or older, who are enrolled in a primary or secondary education program and are **diagnosed with intellectual or developmental disabilities, neurological disease, Attention Deficit Disorder, Autism, or a traumatic brain injury** in accordance with guidelines as set forth by organizations such as the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, or the American Academy of Pediatrics. The physician must maintain records supporting the diagnosis and the continued need of treatment

PRESCRIBING TO PATIENTS LOCATED OUT OF STATE DURING THE PHE: For several of these categories, the CSA (Controlled Substance Act) specifically requires a practitioner to have a DEA registration in the state in which the patient is located. See, e.g., *id.* 802(54)(A), (B). But the practice of telemedicine during a public health emergency pursuant to 21 U.S.C. 802(54)(D) does not include this requirement. On March 16, 2020, the Secretary of HHS, with concurrence of the Acting DEA Administrator, designated that the telemedicine allowance under section 802(54)(D) applies to all schedule II-V controlled substances in all areas of the United States. Thus, in light of this designation and subject the conditions of this letter’s temporary exception, DEA-registered practitioners may prescribe controlled substances to patients in states in which they are not registered with DEA via telemedicine.