

# DEA: In-Person Visit Not Required For Controlled Substances Prescription During Public Health Emergency

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The US Drug Enforcement Administration (DEA) stated in an FAQ on its website that prescribers may issue prescriptions for controlled substances based on a telemedicine encounter in the absence of an in-person medical evaluation for the duration of the COVID-19 public health emergency. This alert reviews the FAQ and the state level barriers that remain for the exception.

## IN DEPTH

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The US Drug Enforcement Administration (DEA) stated in an FAQ on its [website](#) that for the duration of the public health emergency [declared](#) by US Department of Health and Human Services (HHS) Secretary Alex M. Azar with regard to COVID-19, prescribers may issue prescriptions for controlled substances based on a telemedicine encounter in the absence of an in-person medical evaluation. This development could remove a significant barrier to the use of telemedicine in the treatment of patients affected by the COVID-19 outbreak and other vulnerable populations. State barriers to such practice may still exist, however, and the full effect of the exception may require certain state governments to follow suit.

## Background

The Ryan Haight Online Pharmacy Consumer Protection Act of 2008 requires a telemedicine provider to perform an in-person medical evaluation of a patient prior to prescribing a controlled substance to that patient, unless an exception applies. As noted in the DEA FAQ, one such exception occurs when the secretary of HHS has declared a public health emergency (Public Health Emergency Exception), such as the declaration by Secretary Azar with regard to COVID-19 on January 31, 2020, with retroactive effect to January 27, 2020.

The DEA FAQ states that as a result of the declaration, DEA-registered practitioners may issue prescriptions for controlled substances to patients for whom they have not conducted an in-person medical evaluation, provided:

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- The prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of her professional practice.
  - The telemedicine communication is conducted using an audio-visual, real-time, two-way interactive communication system.
  - The practitioner is acting in accordance with applicable federal and state law.

The DEA FAQ generally aligns with the requirements of the Ryan Haight Act. However, the text of the Public Health Emergency Exception includes a second prong that limits the application of the exception to “patients located in such areas, and such controlled substances, as the Secretary, with the concurrence of the Attorney General, designates.” This prong implies that some sort of designation by Secretary Azar with the concurrence of the attorney general would be required for the exception to have effect. While the exception likely will not be limited in geographic scope, given that a public health emergency has been declared nationwide, we have not seen any communications from HHS or the attorney general addressing the use of the exception or the scope of acceptable controlled substances.

## **Don’t Forget State Law**

While the Ryan Haight Act is often the focus of telemedicine remote prescribing compliance, in reality remote prescribing regulation is largely left to the states. Remote prescribing restrictions can be commonly found in telemedicine-specific statutes or regulations, pharmacy practice acts, medical practice acts, and in controlled substances acts themselves. Some states still require a face-to-face encounter prior to prescribing controlled substances to treat a patient. As a result, the scope of the exception could be limited within a particular state by the application of state laws that are more stringent than the exception with respect to the prescription of controlled substances based on a telemedicine encounter.

While some states have relaxed prohibitions against prescribing controlled substances based on a telemedicine encounter, others have limited the practice to patients in certain treatment facilities or with certain conditions, such as substance abuse disorders. States may also continue to enforce additional restrictions on prescribers, particularly with respect to cross-border practices, including limitations with respect to the licensure or registration of prescribers qualified to prescribe controlled substances.

Certain recent COVID-19 state emergency declarations may loosen state remote prescribing requirements. For example, the [Mississippi State Board of Medical Licensure issued a proclamation on March 14, 2020](#), stating that the board will not enforce any statute, rule or regulation that requires physicians to personally examine patients before issuing a prescription, including controlled substances.

Before changing current telemedicine prescribing practices based on the DEA FAQ, prescribers should review any state law restrictions on prescribing controlled substances to patients seen via telemedicine without a prior physical examination.

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