

**WSR 22-19-064**  
**PROPOSED RULES**  
**OFFICE OF THE**  
**INSURANCE COMMISSIONER**

[Insurance Commissioner Matter R 2022-03—Filed September 16, 2022, 2:35 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-13-063.

Title of Rule and Other Identifying Information: Accessing and receiving health care services and benefits.

Hearing Location(s): On October 25, 2022, at 10:30 a.m., Zoom meeting: Detailed information for attending the Zoom meeting is posted on the office of the insurance commissioner's (OIC) website <https://www.insurance.wa.gov/accessing-and-receiving-health-care-services-and-benefits-r-2022-03>.

Date of Intended Adoption: October 27, 2022.

Submit Written Comments to: Shari Maier, P.O. Box 40255, Olympia, WA 98504-0255, email [rulescoordinator@oic.wa.gov](mailto:rulescoordinator@oic.wa.gov), fax 360-586-3109, by October 26, 2022.

Assistance for Persons with Disabilities: Contact Katie Bennett, phone 360-725-7013, fax 360-586-2023, TTY 360-586-0241, email [Katie.Bennett@oic.wa.gov](mailto:Katie.Bennett@oic.wa.gov), by October 26, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To amend existing rules as needed to be consistent with chapter 213, Laws of 2022, regarding audio-only telehealth.

Reasons Supporting Proposal: In 2022, the legislature enacted ESHB 1821 (chapter 213, Laws of 2022), which relates to accessing and receiving audio-only telehealth. OIC needs to make applicable updates to the existing rules for them to align with the legislation's requirements.

Statutory Authority for Adoption: RCW 48.02.060, 48.43.735.

Statute Being Implemented: ESHB 1821 (chapter 213, Laws of 2022).

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Mike Kreidler, Insurance Commissioner, governmental.

Name of Agency Personnel Responsible for Drafting: Shari Maier, P.O. Box 40255, Olympia, WA 98504-0255, 360-725-7173; Implementation: Molly Nollette, P.O. Box 40255, Olympia, WA 98504-0255, 360-725-7000; and Enforcement: Charles Malone, P.O. Box 40255, Olympia, WA 98504-0255, 360-725-7000.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Simon Casson, P.O. Box 40255, Olympia, WA 98504-0255, phone 360-725-7138, fax 360-586-3109, email [Simon.Casson@oic.wa.gov](mailto:Simon.Casson@oic.wa.gov).

Scope of exemption for rule proposal:

Is not exempt.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. Chapter 19.85 RCW states that "... an agency shall prepare a small business economic impact statement: (i) If the proposed rule will impose more than minor costs on businesses in an industry<sup>1</sup> ..." The small business economic impact statement (SBEIS) must include "... a brief description of the reporting, recordkeeping, and

other compliance requirements of the proposed rule, and the kinds of professional services that a small business is likely to need in order to comply with such requirements ... to determine whether the proposed rule will have a disproportionate cost impact on small businesses.<sup>2</sup>"

<sup>1</sup> RCW 19.85.030: <http://app.leg.wa.gov/RCW/default.aspx?cite=19.85.030>.

<sup>2</sup> RCW 19.85.040: <http://app.leg.wa.gov/RCW/default.aspx?cite=19.85.040>.

This rule proposal is exempt from requirements of the Regulatory Fairness Act. Based on findings in the cost-benefit analysis, the costs of compliance estimated by OIC are minor costs on businesses as defined by RCW 19.85.020(2).

The proposed rule also amends the definition of "Established relationship" in WAC 284-170-130(13), which broadens the scope to include at least one in-person appointment within the past three years, or at least one real-time interactive appointment using both audio and video technology for health care services included in the essential health benefits category of mental health and substance use disorder services.

The analysis of the impacts of this rule determined that there are no substantive costs for the parties involved. OIC has applied a default cost of compliance (\$100) to determine whether the rule would have a disproportionate effect on small businesses, as defined in RCW 19.85.020(3).

Below are calculations for minor cost thresholds across stakeholders that classify as a small business based on the best analogous NAICS types. Although it is unlikely these rules would result in even the full default cost of compliance, the minor cost does not exceed any of the thresholds for any of the small business stakeholders.

OIC had determined that the proposed rule could potentially offer increased benefit to the small businesses as this proposed rule provides them the potential for increased patient revenue and some reduced overhead costs by virtue of being able to provide care via audio-only telemedicine.

For these reasons, the proposed rules do not impose more-than-minor costs on businesses as defined by RCW 19.85.020(2).

<i>2019 Industry NAICS Code</i>	<i>Estimated Cost of Compliance</i>	<i>Industry Description</i>	<i>NAICS Code Title</i>	<i>Average number of employees / business</i>	<i>Minor Cost Estimate - 1% of Avg Annual Payroll (0.01*AvgPa y)</i>
621111	\$100.00	Offices of physicians, except mental health	Health care and social assistance	29	\$968.28
621112	\$100.00	Offices of mental health physicians	Health care and social assistance	5	\$482.23
621210	\$100.00	Offices of dentists	Health care and social assistance	9	\$454.52
621320	\$100.00	Offices of optometrists	Health care and social assistance	7	\$375.00
621330	\$100.00	Offices of mental health practitioners	Health care and social assistance	9	\$379.98
621340	\$100.00	Offices of specialty therapists	Health care and social assistance	15	\$472.87
621399	\$100.00	Offices of miscellaneous health practitioners	Health care and social assistance	5	\$329.79

<i>2019 Industry NAICS Code</i>	<i>Estimated Cost of Compliance</i>	<i>Industry Description</i>	<i>NAICS Code Title</i>	<i>Average number of employees / business</i>	<i>Minor Cost Estimate - 1% of Avg Annual Payroll (0.01*AvgPa y)</i>
621410	\$100.00	Family planning centers	Health care and social assistance	37	\$549.48
621420	\$100.00	Outpatient mental health centers	Health care and social assistance	47	\$523.24

OIC has determined that the proposed rule does not impose more-than-minor costs (as defined by RCW 19.85.020(2)) on small businesses.

September 16, 2022  
Mike Kreidler  
Insurance Commissioner

## OTS-4074.2

AMENDATORY SECTION (Amending WSR 21-24-029, filed 11/22/21, effective 12/23/21)

**WAC 284-170-130 Definitions.** Except as defined in other sub-chapters and unless the context requires otherwise, the following definitions shall apply throughout this chapter.

- (1) "Adverse determination" has the same meaning as the definition of adverse benefit determination in RCW 48.43.005, and includes:
- (a) The determination includes any decision by a health carrier's designee utilization review organization that a request for a benefit under the health carrier's health benefit plan does not meet the health carrier's requirements for medical necessity, appropriateness, health care setting, level of care, or effectiveness or is determined to be experimental or investigational and the requested benefit is therefore denied, reduced, or terminated or payment is not provided or made, in whole or in part for the benefit;
- (b) The denial, reduction, termination, or failure to provide or make payment, in whole or in part, for a benefit based on a determination by a health carrier or its designee utilization review organization of a covered person's eligibility to participate in the health carrier's health benefit plan;
- (c) Any prospective review or retrospective review determination that denies, reduces, or terminates or fails to provide or make payment in whole or in part for a benefit;
- (d) A rescission of coverage determination; or
- (e) A carrier's denial of an application for coverage.
- (2) "Allowed amount" has the meaning set forth in RCW 48.43.005.
- (3) (a) "Audio-only telemedicine" means the delivery of health care services through the use of audio-only technology, permitting real-time communication between the patient at the originating site and the provider, for the purpose of diagnosis, consultation, or treatment.

(b) "Audio-only telemedicine" does not include:

(i) The use of facsimile, email, or text messages, unless the use of text-like messaging is necessary to ensure effective communication with individuals who have a hearing, speech, or other disability; or

(ii) The delivery of health care services that are customarily delivered by audio-only technology and customarily not billed as separate services by the provider, such as the sharing of laboratory results.

(4) "Authorization" or "certification" means a determination by the carrier that an admission, extension of stay, or other health care service has been reviewed and, based on the information provided, meets the clinical requirements for medical necessity, appropriateness, level of care, or effectiveness in relation to the applicable health plan.

(5) "Clinical review criteria" means the written screens, or screening procedures, decision rules, medical protocols, or clinical practice guidelines used by the carrier as an element in the evaluation of medical necessity and appropriateness of requested admissions, procedures, and services, including prescription drug benefits, under the auspices of the applicable health plan. Clinical approval criteria has the same meaning as clinical review criteria.

(6) "Covered health condition" means any disease, illness, injury or condition of health risk covered according to the terms of any health plan.

(7) "Covered person" or "enrollee" means an individual covered by a health plan including a subscriber, policyholder, or beneficiary of a group plan.

(8) "Disciplining authority" has the meaning set forth in RCW 18.130.020.

(9) "Distant site" has the meaning set forth in RCW 48.43.735.

(10) "Emergency medical condition" means the emergent and acute onset of a symptom or symptoms, including severe pain or emotional distress, that would lead a prudent layperson acting reasonably to believe that a health condition exists that requires immediate medical, mental health, or substance use disorder treatment attention, if failure to provide medical, mental health, or substance use disorder treatment attention would result in serious impairment to bodily functions or serious dysfunction of a bodily organ or part, or would place the person's health in serious jeopardy.

(11) "Emergency services" has the meaning set forth in RCW 48.43.005.

(12) "Enrollee point-of-service cost-sharing" or "cost-sharing" has the meaning set forth in RCW 48.43.005.

(13) "Established relationship" means the provider providing audio-only telemedicine has access to sufficient health records to ensure safe, effective, and appropriate care services and:

(a) For health care services included in the essential health benefits category of mental health and substance use disorder services, including behavioral health treatment:

(i) The covered person has had, within the past three years, at least one in-person appointment ((within the past year)), or at least one real-time interactive appointment using both audio and video technology, with:

(A) The provider providing audio-only telemedicine((,with));

(B) A provider employed at the same medical group, at the same clinic, or by the same integrated delivery system operated by a carri-

er licensed under chapter 48.44 or 48.46 RCW as the provider providing audio-only telemedicine~~((7))~~; or ~~((with))~~

(C) A locum tenens or other provider who is the designated back up or substitute provider for the provider providing audio-only telemedicine who is on leave and is not associated with an established medical group, clinic, or integrated delivery system operated by a carrier licensed under chapter 48.44 or 48.46 RCW; or

~~((b))~~ (ii) The covered person was referred to the provider providing audio-only telemedicine by another provider who has:

(A) Had, within the past three years, at least one in-person appointment, or at least one real-time interactive appointment using both audio and video technology, with the covered person ~~((within the past year and has))~~; and

(B) Provided relevant medical information to the provider providing audio-only telemedicine.

(C) A referral includes circumstances in which the provider who has had at least one in-person appointment, or at least one real-time interactive appointment using both audio and video technology, with the covered person participates in the audio-only telemedicine encounter with the provider to whom the covered person has been referred.

(b) For any other health care service:

(i) The covered person has had, within the past two years, at least one in-person appointment, or, until January 1, 2024, at least one real-time interactive appointment using both audio and video technology, with:

(A) The provider providing audio-only telemedicine; or

(B) A provider employed at the same medical group, at the same clinic, or by the same integrated delivery system operated by a carrier licensed under chapter 48.44 or 48.46 RCW as the provider providing audio-only telemedicine; or

(C) A locum tenens or other provider who is the designated back up or substitute provider for the provider providing audio-only telemedicine who is on leave and is not associated with an established medical group, clinic, or integrated delivery system operated by a carrier licensed under chapter 48.44 or 48.46 RCW; or

(ii) The covered person was referred to the provider providing audio-only telemedicine by another provider who has:

(A) Had, within the past two years, at least one in-person appointment or, until January 1, 2024, at least one real-time interactive appointment using both audio and video technology, with the covered person; and

(B) Provided relevant medical information to the provider providing audio-only telemedicine.

(C) A referral includes circumstances in which the provider who has had at least one in-person appointment, or, until January 1, 2024, at least one real-time interactive appointment using both audio and video technology, with the covered person participating in the audio-only telemedicine encounter with the provider to whom the covered person has been referred.

(14) "Facility" means an institution providing health care services including, but not limited to, hospitals and other licensed inpatient centers, ambulatory surgical or treatment centers, skilled nursing centers, residential treatment centers, diagnostic, laboratory, and imaging centers, and rehabilitation and other therapeutic settings, and as defined in RCW 48.43.005.

(15) "Formulary" means a listing of drugs used within a health plan.

(16) "Grievance" has the meaning set forth in RCW 48.43.005.

(17) "Health care provider" or "provider" means:

(a) A person regulated under Title 18 RCW or chapter 70.127 RCW, to practice health or health-related services or otherwise practicing health care services in this state consistent with state law; or

(b) An employee or agent of a person described in (a) of this subsection, acting in the course and scope of his or her employment.

(18) "Health care service" or "health service" means that service offered or provided by health care facilities and health care providers relating to the prevention, cure, or treatment of illness, injury, or disease.

(19) "Health carrier" or "carrier" means a disability insurance company regulated under chapter 48.20 or 48.21 RCW, a health care service contractor as defined in RCW 48.44.010, and a health maintenance organization as defined in RCW 48.46.020, and includes "issuers" as that term is used in The Patient Protection and Affordable Care Act (P.L. 111-148, as amended (2010)).

(20) "Health plan" or "plan" means any individual or group policy, contract, or agreement offered by a health carrier to provide, arrange, reimburse, or pay for health care service except the following:

(a) Long-term care insurance governed by chapter 48.84 RCW;

(b) Medicare supplemental health insurance governed by chapter 48.66 RCW;

(c) Limited health care service offered by limited health care service contractors in accordance with RCW 48.44.035;

(d) Disability income;

(e) Coverage incidental to a property/casualty liability insurance policy such as automobile personal injury protection coverage and homeowner guest medical;

(f) Workers' compensation coverage;

(g) Accident only coverage;

(h) Specified disease and hospital confinement indemnity when marketed solely as a supplement to a health plan;

(i) Employer-sponsored self-funded health plans;

(j) Dental only and vision only coverage; and

(k) Plans deemed by the insurance commissioner to have a short-term limited purpose or duration, or to be a student-only plan that is guaranteed renewable while the covered person is enrolled as a regular full-time undergraduate or graduate student at an accredited higher education institution, after a written request for such classification by the carrier and subsequent written approval by the insurance commissioner.

(21) "Hospital" has the meaning set forth in RCW 48.43.735.

(22) "Indian health care provider" means:

(a) The Indian Health Service, an agency operated by the U.S. Department of Health and Human Services established by the Indian Health Care Improvement Act, Section 601, 25 U.S.C. Sec. 1661;

(b) An Indian tribe, as defined in the Indian Health Care Improvement Act, Section 4(14), 25 U.S.C. Sec. 1603(14), that operates a health program under a contract or compact to carry out programs of the Indian Health Service pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. Sec. 450 et seq.;

(c) A tribal organization, as defined in the Indian Health Care Improvement Act, Section 4(26), 25 U.S.C. Sec. 1603(26), that operates a health program under a contract or compact to carry out programs of the Indian Health Service pursuant to the ISDEAA, 25 U.S.C. Sec. 450 et seq.;

(d) An Indian tribe, as defined in the Indian Health Care Improvement Act, Section 4(14), 25 U.S.C. Sec. 1603(14), or tribal organization, as defined in the Indian Health Care Improvement Act, Section 4(26), 25 U.S.C. Sec. 1603(26), that operates a health program with funding provided in whole or part pursuant to 25 U.S.C. Sec. 47 (commonly known as the Buy Indian Act); or

(e) An urban Indian organization that operates a health program with funds in whole or part provided by Indian Health Service under a grant or contract awarded pursuant to Title V of the Indian Health Care Improvement Act, Section 4(29), 25 U.S.C. Sec. 1603(29).

(23) "Managed care plan" means a health plan that coordinates the provision of covered health care services to a covered person through the use of a primary care provider and a network.

(24) "Medically necessary" or "medical necessity" in regard to mental health services and pharmacy services is a carrier determination as to whether a health service is a covered benefit because the service is consistent with generally recognized standards within a relevant health profession.

(25) "Mental health provider" means a health care provider or a health care facility authorized by state law to provide mental health services.

(26) "Mental health services" means in-patient or out-patient treatment including, but not limited to, partial hospitalization, residential treatment, out-patient facility-based treatment, intensive outpatient treatment, emergency services, or prescription drugs to manage, stabilize, or ameliorate the effects of a mental disorder listed in the most current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association, including diagnoses and treatment for substance use disorder.

(27) "Network" means the group of participating providers and facilities providing health care services to a particular health plan or line of business (individual, small, or large group). A health plan network for issuers offering more than one health plan may be smaller in number than the total number of participating providers and facilities for all plans offered by the carrier.

(28) "Originating site" means the physical location of a patient receiving health care services through telemedicine, and includes those sites described in WAC 284-170-433.

(29) "Out-patient therapeutic visit" or "out-patient visit" means a clinical treatment session with a mental health provider of a duration consistent with relevant professional standards used by the carrier to determine medical necessity for the particular service being rendered, as defined in Physicians Current Procedural Terminology, published by the American Medical Association.

(30) "Participating provider" and "participating facility" mean a facility or provider who, under a contract with the health carrier or with the carrier's contractor or subcontractor, has agreed to provide health care services to covered persons with an expectation of receiving payment, other than coinsurance, copayments, or deductibles, from the health carrier rather than from the covered person.

(31) "Patient consent" means a voluntary and informed decision by a patient, following an explanation by the provider or auxiliary personnel under the general supervision of the provider presented in a manner understandable to the patient that is free of undue influence, fraud or duress, to consent to a provider billing the patient or the

patient's health plan for an audio-only telemedicine service under RCW 48.43.735 or WAC 284-170-433.

(32) "Person" means an individual, a corporation, a partnership, an association, a joint venture, a joint stock company, a trust, an unincorporated organization, any similar entity, or any combination of the foregoing.

(33) "Pharmacy services" means the practice of pharmacy as defined in chapter 18.64 RCW and includes any drugs or devices as defined in chapter 18.64 RCW.

(34) "Primary care provider" means a participating provider who supervises, coordinates, or provides initial care or continuing care to a covered person, and who may be required by the health carrier to initiate a referral for specialty care and maintain supervision of health care services rendered to the covered person.

(35) "Preexisting condition" means any medical condition, illness, or injury that existed any time prior to the effective date of coverage.

(36) "Premium" means all sums charged, received, or deposited by a health carrier as consideration for a health plan or the continuance of a health plan. Any assessment or any "membership," "policy," "contract," "service," or similar fee or charge made by a health carrier in consideration for a health plan is deemed part of the premium. "Premium" shall not include amounts paid as enrollee point-of-service cost-sharing.

(37) "Real time communication" means synchronous and live communication between a provider and a patient. It does not include delayed or recorded messages, such as email, facsimile or voicemail.

(38) "Same amount of compensation" means providers are reimbursed by a carrier using the same allowed amount for telemedicine services as they would if the service had been provided in-person unless negotiation has been undertaken under RCW 48.43.735 or WAC 284-170-433(2). Where consumer cost-sharing applies to telemedicine services, the consumer's payment combined with the carrier's payment must be the same amount of compensation, or allowed amount, as the carrier would pay the provider if the telemedicine service had been provided in person. Where an alternative payment methodology other than fee-for-service payment would apply to an in-person service, "same amount of compensation" means providers are reimbursed by a carrier using the same alternative payment methodology that would be used for the same service if provided in-person, unless negotiation has been undertaken under RCW 48.43.735 or WAC 284-170-433(2).

(39) "Service area" means the geographic area or areas where a specific product is issued, accepts members or enrollees, and covers provided services. A service area must be defined by the county or counties included unless, for good cause, the commissioner permits limitation of a service area by zip code. Good cause includes geographic barriers within a service area, or other conditions that make offering coverage throughout an entire county unreasonable.

(40) "Small group plan" means a health plan issued to a small employer as defined under RCW 48.43.005(34) comprising from one to 50 eligible employees.

(41) "Store and forward technology" has the meaning set forth in RCW 48.43.735.

(42) "Substance use disorder services" means in-patient or out-patient treatment including, but not limited to, partial hospitalization, residential treatment, or out-patient facility-based treatment, intensive outpatient treatment, emergency services, or prescription



drugs to manage, stabilize, or ameliorate the effects of a substance use disorder listed in the most current version of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) published by the American Psychiatric Association, including diagnoses and treatment for substance use disorder.

(43) "Substitute drug" means a prescription medication, drug or therapy that a carrier covers based on an exception request. When the exception request is based on therapeutic equivalence, a substitute drug means a therapeutically equivalent substance as defined in chapter 69.41 RCW.

(44) "Supplementary pharmacy services" or "other pharmacy services" means pharmacy services involving the provision of drug therapy management and other services not required under state and federal law but that may be rendered in connection with dispensing, or that may be used in disease prevention or disease management.

(45) "Telemedicine" means the delivery of health care services through the use of interactive audio and video technology or audio-only technology, permitting real-time communication between the patient at the originating site and the provider, for the purpose of diagnosis, consultation, or treatment. For purposes of this chapter, "telemedicine" does not include facsimile, email, or text messaging, unless the use of text-like messaging is necessary to ensure effective communication with individuals who have a hearing, speech, or other disability.

[Statutory Authority: RCW 48.43.735(9). WSR 21-24-029, § 284-170-130, filed 11/22/21, effective 12/23/21. Statutory Authority: RCW 48.02.060 and 48.43.765. WSR 21-01-094 (Matter No. R 2019-05), § 284-170-130, filed 12/11/20, effective 1/11/21. Statutory Authority: RCW 48.02.060. WSR 16-07-144 (Matter No. R 2016-01), § 284-170-130, filed 3/23/16, effective 4/23/16.]