The doctor will see you now: FMLA and telehealth visits

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As you already know, COVID-19 changed almost everything, and some of those things are likely here to stay (or at least linger for a while longer).

One widespread change is the increased use of videoconferencing. In early 2020, a videoconference was a rarity, but now we Zoom in and out of classrooms, work meetings, and court appearances. Not surprisingly, the virtual world has reached the doctor’s office.

In an effort to respond to the COVID-19 pandemic and the changing practice of medicine, the U.S. Department of Labor extended its guidance considering telemedicine as in-person treatment under the Family and Medical Leave Act indefinitely.

While videoconferencing for medical treatment (aka telemedicine or telehealth) has been on the rise since the late 1990s, the COVID-19 pandemic spurred the medical community to promote the use of telehealth to treat patients without increased exposure to COVID-19.

In an effort to respond to the COVID-19 pandemic and the changing practice of medicine, the U.S. Department of Labor (DOL) extended its guidance considering telemedicine as in-person treatment under the Family and Medical Leave Act (FMLA) indefinitely (or at least until the DOL issues further guidance).

Although the Biden administration has rolled back many of its predecessor’s guidance, this one seems likely to stay put.

BACKGROUND INFORMATION ON TELEHEALTH SERVICES

Telehealth services offer a safe and convenient option for medical and psychiatric treatment that reduces potential exposure to COVID-19 and the strain on healthcare systems.

While telehealth may not always be the best practice for treatment, the Center for Disease Control and Prevention (CDC) reports that telehealth services can be used to, among other things, screen patients, provide low-risk urgent care, access primary care providers and specialists, provide coaching and support, participate in physical and occupational therapy, monitor certain chronic medical conditions, engage patients who have difficulty accessing care, and provide follow up after hospitalization.

What qualifies as telehealth?

There are three categories of telehealth modalities:

1. Synchronous (our focus here);
2. Asynchronous; and
3. Remote patient monitoring. Id.

Synchronous telehealth is the real-time telephone or live audio-video interaction between a patient and health care provider. Id.

Asynchronous telehealth involves the collection of data at one point and time and involves a later interpretation. Id.

Finally, remote patient monitoring is the direct transmission of a patient’s clinical measurements to a health care provider. Id.

The DOL’s guidance regarding the FMLA and telehealth addresses when a telehealth visit counts as an in-person doctor’s visit to diagnose or treat a serious health condition.

In this sphere, the DOL counts only those video conferences involving face-to-face examination or treatment as in-person doctor’s visits. See id.

We will discuss more below, but mere real-time telephone interaction without more does not qualify as an in-person visit, or qualifying treatment, under the FMLA.

Thus, of the three types of telehealth modalities, synchronous videoconferencing is the only type that currently can provide the necessary basis for FMLA leave.

A CHECKLIST ON FMLA QUALIFICATIONS

As a refresher, the FMLA protects an eligible employee’s right to take an unpaid leave of absence (usually up to 12 weeks during a 12-month period).
Of the three types of telehealth modalities, synchronous videoconferencing is the only type that currently can provide the necessary basis for FMLA leave.

If an employee raises a condition that you do not think qualifies, get guidance from your employment counsel.

Caring for family members or one’s own serious health condition includes seeking “continuing treatment by a health care provider.”

Under FMLA regulations and historically, treatment has been defined as an “in-person visit to a health care provider” and has not included phone calls, letters, emails, or text messages.

In July 2020, in response to the COVID-19 pandemic, the DOL’s Wage and Hour Division issued a Frequently Asked Question and Answer addressing when telemedicine would be acceptable for FMLA purposes.

Specifically, the guidance stated that the DOL would consider telemedicine visits as “in-person visits” under the FMLA, but only visits that involve face-to-face examinations or treatment by remote video conference. Id. Note the key term is “face-to-face.”

The DOL optimistically put an end date of December 31, 2020, on this change, assuming like the rest of the world that the pandemic couldn’t possibly last forever.

Sadly, we are not out of the COVID woods yet and on December 29, 2020, the DOL issued guidance extending that approach in what could be an indefinite inclusion under the FMLA.
HOW DO EMPLOYERS COMPLY WITH THE CHANGE?
Assuming the employee’s request meets all of the boxes on the above checklist, decide whether you, as the employer, should request the employee to provide certification from the employee’s health care provider.

Remember that you may require medical certification for FMLA leave based on a serious health condition. That should be a regular part of your leave approval process.

When evaluating FMLA certification documents, employers must now keep in mind that a telemedicine visit may qualify as a healthcare provider visit to support FMLA leave.

Once you have approved the leave, however, you should not request recertification within a 30-day period unless:
(1) The employee requests an extension of leave;
(2) Circumstances described by the previous certification have changed significantly (e.g., the duration of frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee’s absence for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absence also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or
(3) The employer receives information that casts doubt upon the employee’s stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee’s knee surgery, including recuperation, and the employee plays in company softball league games during the employee’s third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days. If an employer requests certification (or recertification), you must do so in writing (29 C.F.R. § 825.305(a)), and you must advise the employee of the consequences if he or she fails to provide adequate certification. The best practice for employers is to request the certification at the time the employee gives notice of the need for leave, or within five business days.

If it is unforeseeable leave, employers should request that certification be provided within “five business days after the leave commences.” Employees should provide the certification or recertification within 15 days of the request for leave absent exigent circumstances. Id.

Cautious employers will communicate clearly with employees and work with them if they are having trouble obtaining the certification.

Certifications and recertifications, when proper, may require the employee to obtain a medical certification from a health care provider that contains the following information:
• Contact information for the health care provider and his or her type of practice;
• The approximate commencement date of the serious health condition and likely duration;
• A description of medical facts regarding the patient’s serious health condition that supports the need for leave;
• If the employee is the patient (as opposed to an employee’s covered family member), information establishing that the employee cannot perform the essential functions of his or her job, work restrictions, and likely duration of the inability;
• If the covered family member is the patient, information establishing that the family member is in need of care and the estimated frequency and duration of leave required;
• If for intermittent leave, rather than continuous, information regarding an estimate of dates and duration of the treatment and recovery;
• Statement of why such leave is necessary.

If an employee provides an insufficient or incomplete certification or recertification, you should inform the employee in writing what is lacking and how to remedy the insufficient certification. Insufficient certifications are those with incomplete entries or vague, ambiguous, or non-responsive answers. Id. After receiving written notice, the employee should have seven calendar days to cure any deficiencies. Id.

Although an employer can contact the healthcare provider under some limited circumstances, be careful before you do so.

When evaluating FMLA certification documents, employers must now keep in mind that a telemedicine visit may qualify as a healthcare provider visit to support FMLA leave.
Further, with the recent guidance, just because the employee requests FMLA leave for a telemedicine visit, that is not a sufficient basis to request recertification (absent other circumstances that suggest the employee’s reason for the absence is untrue).

Keep in mind, videoconferences now qualify as an in-person visit so long as the videoconference:

1. Includes an examination, evaluation, or treatment by a healthcare provider;

2. Is permitted by state licensing authorities; and

3. Is performed by videoconference (phone calls, letters, emails, or text messages alone won’t cut it).

Accordingly, an eligible employee who tells you that the doctor’s visit was via videoconference should be granted FMLA leave (so long as the above-mentioned criteria is met).

But, telephone calls without video, letters, emails, and text messages alone are not considered treatment under the FMLA.

When evaluating FMLA coverage for an employee or certification documents, keep this change in mind and, as always, contact your employment counsel with any questions.

Notes


5. See 29 C.F.R. § 825.104.


8. For additional information related to the qualifications under the FMLA, see the DOL’s FMLA Frequently Asked Questions, located at https://bit.ly/2Nir5At.

9. 29 C.F.R. §§ 825.113(a), 825.114.


11. 29 C.F.R. § 825.113(d)


13. 29 C.F.R. § 825.308(c)

14. 29 C.F.R. § 825.305(d)

15. 29 C.F.R. § 825.305(b)

16. 29 C.F.R. § 825.306(a). For more information on the content of certification, see the DOL’s Form WH-380E and Form WH-380F, located on the DOL’s website at https://bit.ly/2ZyDOiW.

17. 29 C.F.R. § 825.305(c)

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