

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-19.¹

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).²

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.³

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.⁴

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).

Below is a checklist of key qualifiers for FMLA:

THE EMPLOYEE MUST WORK FOR AN EMPLOYER COVERED BY THE FMLA. WHAT EMPLOYERS ARE COVERED?

Private employers engaged in any industry or activity affecting commerce who employs 50 or more employees for each working day during the previous 20 calendar workweeks.

This count includes full-time, part-time, and suspended employees working in any of the 50 United States, the District of Columbia, and any United States territory.

Generally, you must count any employee who is paid compensation. You do not count contractors. The FMLA also covers public agencies and private and public elementary and secondary schools without regard to employee count.⁵

THE EMPLOYEE MUST BE ELIGIBLE. WHO IS AN ELIGIBLE EMPLOYEE?

Any employee who has been employed for at least 12 months (not necessarily consecutively) *and* has worked at least 1,250 hours during the previous 12-month period. There are special rules for airline flight crew employees that are beyond the scope of this article.⁶

THE REASON FOR LEAVE MUST BE COVERED UNDER FMLA. WHAT ARE THOSE REASONS?

- Leave related to pregnancy, birth, adoption, or foster care placement of a child;
- To care for a spouse, child, or parent of the employee who has a serious health condition;
- The employee's serious health condition that makes the employee unable to perform the functions of his or her job
- A qualifying exigency arising out of the fact that a spouse, child, or parent of the employee is on covered active duty
- To care for a service member who was injured (This is a whole different animal and does not have a lot to do with telemedicine but be mindful that this leave allows eligible employees to take up to 26 weeks of leave during a 12-month period.)⁷

Note that the covered reasons do not include staying home to take care of a child whose regular school or daycare is closed. While that reason was covered under the Emergency FMLA leave in the Families First Coronavirus Act, it no longer applies (although your employees may think it should).⁸

OKAY, GOT IT ... WHAT ABOUT TELEMEDICINE?

The new telemedicine guidance comes into play under the FMLA's serious health condition qualification. As noted

above, eligible employees who work for covered employers are entitled to leave to, among other things, care for family members with serious health conditions or for their own serious health conditions.

A serious health condition is "an illness, injury, impairment, or physical or mental condition that involves inpatient care [in a hospital, hospice, or residential medical care facility] or continuing treatment by a health care provider."⁹

Examples of serious health conditions include, among others, heart attacks, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, heart conditions requiring heart bypass or valve operations, severe respiratory conditions, severe nervous disorders, injuries caused by a serious accident, pregnancy, miscarriage, and recovery from childbirth.¹⁰

Absent complications, the common cold, flu, stomach bugs, non-migraine headaches, and routine dental problems are not considered serious health conditions under the FMLA.¹¹

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.¹²

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.¹³

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.¹⁴

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."¹⁵

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.¹⁶

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.¹⁷

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

¹ CENTER FOR DISEASE CONTROL AND PREVENTION, *Using Telehealth to Expand Access to Essential Health Services during the COVID-19 Pandemic* (June 10, 2020), <http://bit.ly/3s6tBcA>. [hereinafter Using Telehealth]

² UNITED STATES DEPARTMENT OF LABOR, *Field Assistance Bulletin No. 2020-8*, (Dec. 28, 2020), <https://bit.ly/3ufRq3C>. [hereinafter DOL Guidance]

³ *Using Telehealth*, <https://bit.ly/3s5B4Zt>

⁴ *DOL Guidance*, <https://bit.ly/2ZwoKfK>.

⁵ See 29 C.F.R. § 825.104.

⁶ See 29 C.F.R. § 825.110.

⁷ See 29 C.F.R. §§ 825.112, 825.127.

⁸ For additional information related to the qualifications under the FMLA, see the DOL's FMLA Frequently Asked Questions, located at <https://bit.ly/2Nlr5At>.

⁹ 29 C.F.R. §§ 825.113(a), 825.114.

¹⁰ S. Rep. No. 103-3, at 29 (1993)

¹¹ 29 C.F.R. § 825.113(d)

¹² UNITED STATES DEPARTMENT OF LABOR, *COVID-19 and the Family and Medical Leave Act Questions and Answers*, at No. 12, <https://bit.ly/3bp1Th6> (last visited Feb. 17, 2021).

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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ayuengert@bradley.com. **Cortlin Bond** (R) is an associate in the firm's Litigation Practice Group in Birmingham. She can be reached at cbond@bradley.com. This article reflects the situation at the time it was written based on the rapidly changing nature of the COVID-19 pandemic.

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