

Telemedicine Gains Acceptance Under FMLA

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On December 29, 2020, the U.S. Department of Labor (“DOL”) [released guidance](#) recognizing the increasingly important role of telemedicine in establishing a serious health condition under the Family and Medical Leave Act (“FMLA”). The FMLA provides eligible employees of covered employers up to 12 weeks of unpaid leave in a 12-month period for a serious health condition or to care for an immediate family member. Serious health conditions include those requiring “continuing treatment by a health care provider.” In the past, this meant in-person patient visits.

Since the emergence of the COVID-19 pandemic, the DOL has adopted a more lenient policy. This began on July 20, 2020, when the DOL explained in an answer to a frequently asked question that it would temporarily consider telemedicine visits “in-person” for establishing a serious health condition under the FMLA. The DOL’s guidance released December 29 extends that policy indefinitely.

According to the DOL, telemedicine allows providers to “facilitate the availability of healthcare while increasing social distancing” and “deliver examinations, evaluations, and other healthcare services that would previously have been provided only in an office setting.” The DOL therefore considers a telemedicine visit in-person, provided specified criteria are met. To be considered an “in-person” visit, the telemedicine visit must include:

- an examination, evaluation, or treatment by a health care provider;
- be permitted and accepted by state licensing authorities; and,
- generally, should be performed by video conference.

Other methods, such as a mere telephone call, letter, email, or text message are insufficient.

Employers should be aware of this policy change when considering FMLA leave requests to avoid inadvertently denying leave to which an employee may be entitled. Employers are allowed to ask for sufficient information to determine if an employee has an FMLA-qualifying serious health condition, and the receipt of telemedicine services that meets the foregoing criteria may entitle an employee to FMLA leave. Remember that a violation of an employee’s FMLA rights not only subjects the employer to liability—without regard for motive—but individual managers and supervisors may also be subject to personal liability under the FMLA. It is therefore critical to train and educate managers and supervisors regarding FMLA rights and responsibilities.

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