



# A Primer On Telemedicine And The Workplace

Insights

2.01.18

Most people probably do not enjoy sitting in a doctor's reception area with other coughing and sneezing people while waiting for an appointment, or devoting hours to getting a prescription refilled. The concept of telemedicine represents a possible alternative to these scenarios. It's a model that is quickly growing in popularity, largely because it can make many aspects of medical care easier to access and less expensive. Although telemedicine can be a great solution, many employers are unaware of the legal risks associated with introducing it in the workplace. And healthcare employers who offer such services must of course be acutely aware of issues that this service model presents.

## What Exactly Is Telemedicine?

Telemedicine generally refers to the provision of some sort of medical service by health care professionals remotely, through technology, rather than in person. These services may be provided via either real-time communications—think phone calls or video conferencing—or “store-and-forward” technology, such as transmitting medical images or biosignal data. Services that are commonly offered through telemedicine range from patient consultations and primary care diagnoses, to prescription drug refills and behavioral health counseling.

The appeal of telemedicine services for an employer is that they generally reduce benefit costs while increasing convenience and access to care for group health plan participants. Plan costs are reduced because medical services offered through telemedicine are often less expensive than an office visit. Telemedicine can also potentially help identify and address smaller health issues before they become more serious.

Telemedicine can also reduce the amount of time off needed for employees to visit the doctor. It may be especially attractive to employers with operations in rural settings where advanced or specialty health care options are inaccessible or inconvenient, and to employers whose employees have irregular schedules or travel frequently (because a physician consultation can be accessed remotely).

Telemedicine can be offered in a variety of forms, but it is most easily classified into two types: provider-sponsored and employer-sponsored group health plans. Provider-sponsored telemedicine is simply an electronic “visit” with a medical professional, typically through provider-authorized software or apps. Under a group health plan there is a charge for the visit, paid in the same way as an in-person visit. This type poses little risk for employers.

and in-person visit. The type of service may differ for employees.

Group health plan-centered telemedicine involves an arrangement wherein a telemedicine company provides the conduit to on-call physicians allowing plan members to speak with a doctor who is affiliated with the telemedicine provider. Many of these arrangements charge a monthly maintenance fee for access to free or reduced-cost “visits.”

### **Legal Risks For All Employers**

Offering telemedicine services to employees can raise a number of legal issues, the most common being compliance with federal laws such as ERISA, COBRA, and HIPAA, as well as state laws concerning medical licensure and practice and informed consent.

Employers offering a telemedicine program to all employees regardless of their group health plan enrollment status could inadvertently create a separate ERISA group health plan. If the program provides primary care or prescription drug services, it would qualify as a separate group health plan under ERISA, COBRA, HIPAA and other federal laws, and would therefore be subject to those requirements under law. Further, all telemedicine programs are subject to HIPAA's privacy, security, and breach notification requirements.

Additionally, each state has medical licensing laws that may preclude or restrict a provider who isn't licensed in the state from delivering telemedicine services to that state's residents. Some state laws may also restrict the scope of benefits that providers can deliver over the telephone or internet. Further, some local rules may require “informed consent” from patients before a provider is permitted to give telemedicine services. The consent must provide an explanation of telemedicine, laying out the expected benefits and possible risks associated with using the service.

Employers must also be careful to not disqualify employees from using their health savings accounts (HSA). An HSA allows individuals covered under a high-deductible health plan (HDHP) to defer compensation on a pre-tax basis for the purpose of paying eligible medical expenses. To maintain eligibility, the HSA participant must not be covered under any disqualifying coverage, which generally includes any health coverage that provides a benefit prior to meeting the HDHP deductible (unless one of the IRS's limited exceptions applies). Thus, a telemedicine benefit could be considered disqualifying coverage where, for example, the employer pays a portion of the telemedicine consultation, or the participant pays less than fair market value for the consultation before meeting the HDHP deductible. A provider-sponsored program or a telemedicine program requiring a separate charge for each “visit” would avoid this HSA issue.

### **Best Practices For All Employers**

Any employer that considers offering a telemedicine program should take compliance requirements into consideration when designing and implementing the program. The best way to minimize the risk of creating a separate group health plan—and thus triggering additional compliance obligations under various federal laws—is by permitting only those employees who are enrolled in a group health plan to use the telemedicine benefits. This way, the telemedicine program can be integrated with the group health plan to meet federal requirements. As such, it must also be available to qualified beneficiaries through COBRA.

qualified beneficiaries through COBRA.

### **Additional Considerations For Healthcare Providers**

Employers of healthcare workers who actually administer such services to patients must consider myriad other issues in addition to all of those mentioned above. The fact that telemedicine may be more convenient or cost-effective to patients does not materially reduce the serious compliance issues that must be fulfilled by the healthcare provider. Besides licensure and other state law rules, HIPAA compliance and general confidentiality requirements are critical considerations for healthcare providers engaged in this aspect of care.

Another key aspect of providing these services is ensuring that patients understand and consent to the very limited scope of available diagnoses and treatments. Obviously, a telephonic or online encounter is far different than one in person. The provider has the burden of making the scope of its services clear.

Further employment issues vary according to the nature and setting of the service. For example, employees who provide telemedicine services from home or other remote locations are still protected by the Occupational Safety and Health Act (OSHA) and the Fair Labor Standards Act (FLSA), which encompass detailed time-recording requirements and minimum wage and overtime rules. Other employment laws, including but not limited to those which prohibit workplace discrimination and harassment, also apply. Employers must ensure that key employees receive documented training regarding these and other workplace rights and protections. In short, while telemedicine services may present some new circumstances, employers remain responsible for respecting and enforcing employees' rights to a workplace that is safe and free from discrimination.

*For more information, contact the authors at [JSmith@fisherphillips.com](mailto:JSmith@fisherphillips.com) or 440.838.8800 or [ktroutman@fisherphillips.com](mailto:ktroutman@fisherphillips.com) or 713.292.5602. A version of this article was originally published in Crain's Cleveland Business.*

### ***Related People***

---



**Jeffrey D. Smith**  
Partner

440.838.8800

Email



**A. Kevin Troutman**

Senior Counsel

713.292.5602

Email

## ***Service Focus***

Employee Benefits and Tax

## ***Industry Focus***

Healthcare