Telemedicine Visits Count Towards FMLA Time Under New Labor Department Guidance

Insights
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The U.S. Department of Labor just confirmed that employees who seek medical treatment via telemedicine visits could qualify for leave under the Family and Medical Leave Act (FMLA) into the new year – and perhaps beyond. While there may have previously been confusion or uncertainty about whether remote visits to a healthcare provider should be considered as valid "treatment" that would render an employee eligible for protected time off under federal law, the agency's December 29 guidance offers the first definitive word from federal authorities in the wake of the COVID-19 pandemic that this temporary policy will be extended for the foreseeable future. The agency also released an update on how employers can satisfy federal posting requirements via electronic communication methods. What do employers need to know about these latest developments?

Background: Why Is This Issue Significant?

As most employers know, the FMLA offers eligible employees the opportunity to take up to 12 weeks of protected unpaid leave from work (and perhaps more) in certain scenarios. Two of the most common ways that these workers can receive FMLA leave is for their own "serious health condition" or caring for certain family members with "serious health conditions" of their own.

Two of the ways an eligible individual can demonstrate they have a "serious health condition" under the statute and its regulations are by showing (a) they have received "subsequent treatment" after a stint of inpatient care, or (b) they are receiving "continuing treatment" from a healthcare provider. Up until the pandemic struck, however, the agency maintained a narrow interpretation of the term "treatment."

In 2008, the Labor Department revised its regulations to state that "treatment" was limited to "in-person visits" to a healthcare provider. It noted that "treatment" did not include phone calls, letters, emails, or text messages – not even considering the possibility of video conferencing (which apparently seemed too fanciful a premise for the agency to even address as recently as 12 years ago).

Labor Department Extends Temporary Reprieve For Foreseeable Future

In July 2020, however, after the pandemic altered many aspects of daily life, the agency relented and temporarily loosened its standards. On July 20, it issued guidance noting that it would consider

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temporarily loosened its standards. On July 20, it issued guidance noting that it would consider telemedicine visits to be "in-person" visits for purposes of establishing a serious health condition under the FMLA under certain circumstances. This temporary interpretation was slated to expire on December 30, 2020, as the agency was hopeful that the COVID-19 crisis would be quelled by year's end.

Given the state of affairs as we close out 2020, however, the Labor Department recognized that employees needed the continued flexibility that telemedicine offered. The December 29 guidance memo notes that telemedicine reduces exposure to potential infections for vulnerable patients, and reduces the need for healthcare staff to exhaust personal protective equipment and patient care supplies. It also aligns with the stated recommendations and, in some cases, local government orders relating to social distancing to reduce community spread of COVID-19.

Therefore, the agency extended the interpretation that telemedicine visits with healthcare providers would be considered "in-person" visits provided three specific criteria are met:

- the remote examination, evaluation, or treatment must be conducted by a **healthcare provider**;
- it must be permitted and accepted by **state licensing authorities**; and
- it should "generally" be performed by **video conference**.

The guidance memo notes that simple telephone calls, letters, emails, or text messages are insufficient "by themselves" to satisfy the new standard. However, given the phrasing offered by the Labor Department, it would appear that these non-video communication methods may be considered "treatment" in certain isolated circumstances (perhaps as follow-up communications, or otherwise maintained in conjunction with video visits).

Agency Also Approves Virtual Communication To Satisfy Posting Obligations

In a tandem guidance memo issued alongside the telemedicine release, the agency also confirmed that employers are permitted to electronically "post" required notices of employees' statutory rights under a variety of federal labor laws by email, internet, or intranet to satisfy posting requirements. The agency said that employers can typically satisfy their obligations following digital communications if all workers exclusively do their job remotely, customarily receive electronic information from their employer; and have readily available access to the electronic posting at all times. For employers with workers who divide their time between on-site and remote work, the agency encourages using both electronic notices and a hard-copy posting at the workplace.

What's Next – And What Should Employers Do?

The key question on most employers' minds following these revisions: how long will they last? As for the telemedicine revision, the agency noted that the practice has grown increasingly widespread over the last 20 years, skyrocketing from 7,000 such visits for rural Medicare recipients in 2004 to nearly 108,000 in 2013, an increase of almost 1500%. And these figures pre-date the COVID-19

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pandemic, which has accelerated the use of telemedicine and introduced it to countless individuals who may want to consider the practice even after the crisis is over. The agency noted that another benefit of telemedicine is the decrease in travel time and expense for rural patients. Factoring in all of these issues, the agency may therefore consider loosening the telemedicine requirement on a permanent basis in 2021, especially given that the Biden administration will be taking a fresh look at these matters when the president-elect soon takes office.

In light of these revisions, you should review your internal policies and practices with respect to FMLA leave. Train your managers on this new change if they were previously unaware. Check whether any state family leave laws in your state may have followed the lead of the Department of Labor and instituted their own telemedicine rules that may require you to adjust your policies and practices. And, of course, if you are unsure whether the state licensing authorities where you operate permit telemedicine, check with your lawyer or contact the state directly. With respect to the electronic notice revisions, work with your counsel to ensure you are in compliance with the new requirements and ensure your practices are adjusted to match the new standards in place.

Conclusion

We will monitor the developments related to these new interpretations and provide updates as warranted, so you should ensure that you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Employee Leaves Practice Group.

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