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# Telemedicine Appointments are Sufficient to Establish a Serious Health Condition for FMLA Leave

On December 29, 2020, the U.S. Department of Labor Wage and Hour Division (WHD) issued [Field Assistance Bulletin 2020-8](#) regarding the use of telemedicine in establishing a “serious health condition” under the Family and Medical Leave Act (FMLA).

The FMLA provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 workweeks of leave in a 12-month period for, among other things, a serious health condition that makes the employee unable to perform the essential functions of his or her job, or to care for the employee’s spouse, son, daughter, or parent with a serious health condition. See 29 U.S.C. § 2612(a)(1)(C)-(D); 29 CFR § 825.112(a)(3)-(4). 

Under the FMLA, a “serious health condition” is an “illness, injury, impairment, or physical or mental condition that involves” either: (1) “inpatient care,” such as an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care; or (2) “continuing treatment by a health care provider.” The FMLA regulations define the term “treatment” to include “examinations to determine if a serious health condition exists and evaluations of the condition.” The regulations also provide that “[t]reatment by a health care provider means an **in-person visit** to a health care provider.” The “in-person visit” requirement was placed in the regulation to clarify that treatment means an “examination, evaluation, or specific treatment, and does not include, for example, a phone call, letter, email, or text message.” 73 FR 67948 (Nov. 17, 2008).

Earlier this year, on July 20, 2020, the Wage and Hour Division softened the requirements of the FMLA regulations due to the COVID-19 pandemic in a [Frequently Asked Question](#) listed on its COVID-19 and The Family and Medical Leave Act website – stating, in part:

***Until December 31, 2020, the WHD will consider telemedicine visits to be in-person visits . . . , for purposes of establishing a serious health condition under the FMLA. To be considered an in-person visit, the telemedicine visit must include an examination, evaluation, or treatment by a health care provider; be performed by video conference; and be permitted and accepted by state licensing authorities.***

Just days before the New Year, the Wage and Hour Division issued the Field Assistance Bulletin clarifying that it

will continue considering a telemedicine visit an “in-person” visit under the FMLA, provided that certain criteria are met. Specifically, 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, is performed by video conference.

The Wage and Hour Division cautioned that a simple telephone call or email is not a sufficient communication method to satisfy the regulatory requirement for an “in-person” visit. Furthermore, there is no specific sunset clause or any indication that this modification is only temporary until the COVID-19 pandemic ends.

Assuming that an employee’s request for FMLA leave meets the qualifying criteria, an employer may require medical certification for FMLA leave based on a serious health condition, which is generally a regular practice in an employer’s leave approval process. If an employer requests certification (or recertification), it must do so in writing (29 C.F.R. § 825.305(a)) and inform the employee of the consequences if he or she fails to provide proper certification.

Certifications, 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 it is for intermittent leave, rather than continuous leave, information regarding an estimate of dates and duration of the treatment and recovery;
- Statement of why such leave is necessary.

29 C.F.R. 825.306(a). In light of the new guidance, if an employee’s visit to a physician was done through telemedicine, employers should ensure that the telemedicine visit meets the criteria laid out in the Wage and Hour Division’s recent guidance. If further information is necessary to understand how the visit was conducted, further documentation and/or information may be required. However, aside from conducting some due diligence to confirm that an employee was evaluated by a physician through a telemedicine appointment (by video), the FMLA medical certification process is the same.

This minor change to the FMLA regulations certainly eases the burden on the general public to satisfy the FMLA requirements due to COVID-19, and employers should be prepared to see more and more telemedicine visits for purposes of requesting FMLA leave. While this change was driven by efforts to curb the COVID-19 pandemic, it is possible that this new guidance could be an indefinite inclusion under the FMLA – even after the pandemic ends.

