Telemedicine Appointments Can Be Used To Establish Serious Health Conditions Under the FMLA

Labor & Employment Law Update

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Recent guidance from the U.S. Department of Labor (DOL) reiterates that the DOL will allow telemedicine visits—generally speaking, health care appointments held via video conference—to qualify as in-person visits to a health care provider under certain circumstances.

As our readers know, the FMLA provides certain employees up to 12 workweeks of leave for, among other things, a "serious health condition." An employee can show the existence of a serious health condition by several methods that include establishing that the employee has an illness or injury that involves "continuing treatment by a health care provider." Under federal regulations, "treatment by a health care provider" means actually visiting a health care provider in-person. That regulation was added in 2008 to make clear that phone calls, letters, emails, and text messages exchanged with a doctor are **not** "treatment."

However, in response to the COVID-19 pandemic, the DOL issued guidance in July 2020 that was confirmed and extended by a more recent DOL Wage and Hour Division Field Assistance Bulletin, which states that telemedicine, which "typically involves face-to-face examinations or treatment of patients by remote video conference via computers or mobile devices" will be considered an "in-person" visit, provided the visit meets these three criteria:

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

That said, the Field Assistance Bulletin also made clear that "a simple telephone call, letter, email, or text message" remains "insufficient, by themselves" to satisfy the in-person requirement.

Bearing all of that in mind, employers evaluating the adequacy of FMLA certification documents must, at least for the duration of the ongoing pandemic, consider telemedicine appointments to be "treatment" for purposes of the FMLA provided the three criteria above are satisfied. And as always, questions

regarding the application of this and any other COVID-19-related employment law issues should be directed to experienced counsel.

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