The Telehealth "New Normal"—Employment & Compliance Considerations

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The dramatic increase in the use of telehealth—i.e., a patient using virtual communication technology to visit with a health care provider in lieu of an in-person visit—has permitted patients and health care providers to remain in safe contact during the COVID-19 pandemic. Particularly during the imposition of shelter-in-place or stay-at-home orders issued by state and local governments, the use of telehealth allowed patients to continue to obtain services from their health care providers without risking unnecessary exposure to COVID-19. Additionally, it has been an infection control strategy used by governments and employers to help prevent the spread of COVID-19.

Although telehealth will never be a substitute for every type of in-person visit, it is widely expected that the increased use of telehealth services in some form will be part of the "new normal" going forward.[1] However, the post-pandemic use of telehealth services will in many circumstances require government action. The emergency government orders promulgated in response to the COVID-19 pandemic, which permitted the rapid expansion of telehealth services outside of the niche areas to which it was previously largely relegated, will expire in the future when the pandemic abates. Further government action may be necessary to preserve and make permanent the changes that allowed the pervasive use of telehealth.

It is difficult to predict what future government action regarding the telehealth expansion will ultimately look like. Regardless of the future direction of telehealth, it is likely that the provision of telehealth services will continue for the foreseeable future and will continue to raise unique labor management and employment challenges, some of which are described below. Employers should carefully consider and develop strategies to address these challenges.

Remote Work as Reasonable Accommodation

Even during a global pandemic, employers are required to provide reasonable accommodations to qualified individuals with disabilities, which may include partial or full remote work.[2] One of the most common requests for accommodation related to the pandemic is to work from home, or to continue working remotely. To the extent such requests are made by individuals with disabilities or other considerations (such as age) that make them particularly susceptible to COVID-19, they should be handled in the same manner as other requests for accommodation—on a case-by-case basis and through the interactive process. In addition to the assessment of whether the employee has a "disability" as defined by the Americans with Disabilities Act (ADA) (which is likely "yes" due to the broad definition of "disability"), employers must assess whether physical presence at the worksite is an essential function of the employee's position. Moreover, employers should closely monitor state and local guidance. Many jurisdictions have promulgated guidance strongly encouraging employers to allow remote work to the extent possible, as well as prohibiting employers from taking adverse action as to employees whose work abilities are limited due to COVID-19-related reasons.

A recent decision by a federal judge in Massachusetts underscores the importance of engaging in the interactive process unique to the particular employee's circumstances during the COVID-19 pandemic. On Sept. 16, 2020, the plaintiff employee secured a preliminary injunction allowing managers to work from home as an accommodation under the ADA for 60 days or pending further order from the court.[3] By way of background, the employee, a manager, suffers from asthma, resulting in a potentially increased vulnerability to COVID-19. Managers had been permitted to work from home for a period of time due to COVID-19. When the employer, which operates a clinic program, required all managers to report to work in-person, the plaintiff made a formal request to work from home due to a physician recommendation to stay home to avoid contracting COVID-19 and the complications that could result given the plaintiff's asthma. However, the employer declined to make an exception and required the plaintiff report to work.

This federal ruling has several important components. First, the court held that the employee's asthma qualified as a disability, but qualified that holding by adding "at least during the COVID-19 pandemic," demonstrating that conditions that did not previously warrant an accommodation may now require one. Second, the court found that the employer's attempt to impose its blanket rule on managers returning to the office was not an adequate substitute for the interactive process considering the employee's circumstances. And third, the employee was able to demonstrate a likelihood of success on their discrimination claim to justify issuance of the injunction because their supervisor had written an email noting that the employee was performing all essential functions while working remotely.

The decision in this case may have been different had the plaintiff's job description contained physical attendance as an essential function, with evidence that physical presence is, indeed, essential. Importantly, on this point, the Equal Employment Opportunity Commission's (EEOC's) Enforcement Guidance provides that "[a]n employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, *but only if this accommodation would be effective and would not cause an undue hardship*."[4] Job descriptions can be a valuable resource in the accommodation analysis, but the practicalities of the position must also be analyzed to determine whether physical attendance is an "essential" function. To be proactive, an employer may elect to review all job descriptions and expressly add the requirement of physical presence, where appropriate for the position, to provide more justification if denying a remote work accommodation request.

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The EEOC recently issued helpful guidance to employers regarding remote work during the pandemic and the employer's obligations post-pandemic, clarifying that by allowing an employee to work remotely during this state of emergency, the employer is not opening the floodgate to accommodation requests. Specifically, the EEOC provided:

> To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.[5]

That said, employers should be mindful that remote work during the pandemic is being leveraged to demonstrate the reasonableness of prior accommodations requests. For example, the EEOC recently filed suit against a health care employer alleging that the employee's successful telework experience from March 2020 through present demonstrated that the *prior* telehealth request the employee made in 2019 was a reasonable accommodation.[6]

In preparation for the eventuality that operations will increasingly return to in-person, employers should be clear in job descriptions of the extent to which "in person" is an essential job function of the role to help set the expectation and lay the groundwork that in-person attendance will be required when the crisis abates. Additionally, as employees return to in-person work and employers engage in the interactive process as to reasonable accommodations, an employee's requested accommodation (e.g., telework) is not the accommodation that must be provided; rather, employers may work with the employee and the employee's provider to determine how effective telework would be, as opposed to other accommodations that might be provided. Critically, and again, employers should be extremely thorough and precise in engaging in the interactive process to review accommodations requested to enable a disabled employee to perform the essential functions

of his role. Employers should also be aware that local guidance may be more restrictive about return to the physical workplace concepts; for example, instructing employers to continue telework for individuals who have cancer, chronic obstructive pulmonary disease, or Sickle cell disease, or are otherwise immunocompromised.[7]

Remote Wage and Leave Considerations

With providers working remotely, employers must be cognizant of continuing to properly pay exempt (generally salaried) and nonexempt (generally hourly) employees correctly under federal and state wage and hour laws.

Employers carry the burden to demonstrate an exemption applies to a particular employee, based on the employee's actual duties and method of pay, for the employer to be exempt from complying with the federal Fair Labor Standards Act (FLSA)[8] minimum wage and overtime requirements. To this end, even while working remotely, the employee's duties and salary payment must continue to comport with the FLSA and applicable state wage exemption law requirements. The U.S. Department of Labor (DOL) has promulgated guidance that during COVID-19, a temporary increase in nonexempt duties will not negate the exemption. Specifically, "during the period of a public health emergency declared by a Federal, State, or local authority with respect to COVID-19, otherwise-exempt employees may temporarily perform nonexempt duties that are required by the emergency without losing the exemption."[9] Although the DOL's guidance only references the Section 213(a)(1) exemptions (executive, administrative, professional), presumably the rationale may apply to other exemptions. Note, however, the DOL's position is not binding on states whose wage laws may have more protective positions.

For nonexempt employees, who are generally paid on an hourly basis, it is critical that employers capture and pay for all hours worked, including wellness screens and certain travel activities, as well as to provide uninterrupted meal and rest periods as provided by the laws of the jurisdiction the employee is residing in.[10] Employers should require employees to track and record all working time and prohibit off-the-clock work to proactively mitigate risk of costly wage class and collective actions alleging violations of the overtime, meal, and rest period requirements. As to tracking hours, the DOL recently issued a Field Assistance Bulletin (FAB) providing that employers are obliged to track the number of hours of compensable work by employees teleworking or otherwise working away from the employer's premises.[11] The FAB reiterates that employers must pay for work even if it is not requested or allowed.

Finally, employers should be mindful that leave (both paid and unpaid) must be provided to employees, even those working remotely, under the federal Families First Coronavirus Response Act (FFCRA)[12] and related state laws. The FFCRA implementing regulations were amended on September 16, 2020, and now cover more health care employers.[13] Specifically, "healthcare provider" was re-defined to mean employees who meet the definition of that term under the Family and Medical Leave Act (FMLA) regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care. Thus, the FFCRA does not per se exempt health care employers from coverage; rather, certain positions within health care institutions are eligible for the paid leave and extended FMLA available under the FFCRA.

Temporary Relocation of Health Care Providers to a Different State

Unique issues surrounding health care provider requests to work remotely from another state on a temporary basis have also come to the forefront during the COVID-19 pandemic. For example, a provider may request that they be able to provide telehealth services to patients while temporarily relocated in a different state to ensure patient continuity of care. The temporary relocation may be due to the need to care for an ill family member or may simply be a desire for a change of scenery.

Whatever the reason, a provider working temporarily from a different state raises a host of issues that should be evaluated on a case-by-case basis, including considerations regarding the provider's professional licensure. During a telehealth patient encounter, the place of service is typically the location of the patient, and in general a provider must be either licensed or otherwise authorized to provide services in the state where the patient is located. However, depending on the laws of the state in which the provider plans to temporarily reside, the provider may need to become licensed in the state of temporary residence, even to provide services to patients outside of that state. For example, the State of Florida Board of Psychology has issued an opinion that a psychologist who, while living part-time in Florida, provides telehealth services to patients located in another state in which the psychologist is licensed,

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would also be required to become licensed in Florida.[14] Thus, practicing while physically located in a state in which the provider is not licensed could potentially subject the provider to disciplinary action.

Aside from professional licensure, other issues may arise associated with temporary work in another state, ranging from tax implications—discussed in the next section—to professional liability insurance coverage. Employers should thoroughly vet these issues and put in place policies addressing temporary relocation to, and remotely working from, other states.

Tax Implications When Work Is Performed in Different States

The spike in remote work triggered by the pandemic has also resulted in many individuals temporarily or permanently moving their residences to less populated or more desirable locations when physical proximity to the workplace is not as important as it once was. Employers are encouraged to consult with tax advisors regarding the impact of their employees' new residences on withholding taxes, as well as the employer's license to do business in certain jurisdictions. Some states are issuing temporary guidance to address these scenarios, but there is not clear guidance in all jurisdictions, necessitating an analysis of the employee's home and work locations to ensure proper withholdings.

Use and Return of Property

The pandemic rapidly escalated without advance warning. Many employees hastily grabbed the office equipment they thought would be helpful in building their home offices. Some employees may have continued borrowing office supplies when occasionally visiting the workplace. This activity, though not surprising and not inherently wrong, raises a variety of issues for the health care employer.

First, employees' use of electronic devices such as computers, tablets, and phones outside of the workplace could jeopardize the security of confidential information and protected health information (addressed in more detail below). Employees should be explicitly reminded that proprietary information such as software, standard operating procedures, and personnel information continues to be secret and entitled to protection when accessed and/or stored outside of the workplace. For example, employees should be required to safeguard all devices and information in their home office through password protections, secure storage of devices, and limiting printing of confidential information. To the extent applicable security and confidential information policies already address these issues, such policies should be re-issued and emphasized. And if existing policies do not require heightened employee attention to such security measures when working remotely, then such policies should be implemented immediately.

Second, employees should be aware that all technology security and monitoring policies apply with equal force when systems and devices are accessed outside of the workplace. Policies should be put in place (if not already) that emphasize the employer's ownership of electronic devices and systems (including document storage, email, voicemail, and instant messaging systems), and that employees have no expectation of privacy when working on such devices and networks—including outside of the physical workplace.

Third, in the rush to establish functioning home offices in the wake of the pandemic, employers likely did not thoroughly track and document the property and equipment borrowed by employees. We generally recommend a robust policy and procedure for employees to "check out" employer-owned property, which includes a description, serial number, condition of the item, value, and the employee's liability for damage, destruction, or loss. Depending on the jurisdiction, such a document can also establish the employer's right to deduct the value of property not promptly returned in good condition from an employee's wages and final paycheck. Some states have strict requirements for allowing such deductions,[15] and counsel should be consulted when drafting and acting on such provisions. But, if drafted carefully and in compliance with applicable law, deductions can be a useful tool for employers to recover amounts lost due to an employee's failure to return property.

Compliance with Privacy Obligations

Health care providers subject to the Health Insurance Portability and Accountability Act (HIPAA) must take care to consider the HIPAA implications of telehealth services. As with other facets of telehealth, the HIPAA and privacy considerations have changed dramatically, and temporarily, during the COVID-19 pandemic.

Prior to the pandemic, telehealth could be furnished only through HIPAA-compliant telecommunications systems. However, in March 2020, the U.S. Department of Health and Human Services (HHS) Office

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for Civil Rights (OCR) announced that during the nationwide public health emergency, it would exercise its enforcement discretion and not impose penalties for noncompliance with HIPAA against providers in connection with the good faith provision of telehealth services. Specifically, OCR stated that it would waive penalties for HIPAA violations occasioned by health care providers serving patients in good faith using popular, non-public-facing remote communications technologies, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype. This exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19 or to a wholly unrelated condition, such as a sprained ankle or psychological evaluation.[16]

OCR's announcement of enforcement discretion also encouraged providers to notify patients that communication technologies potentially introduce privacy risks. OCR further noted that many communications technology vendors hold themselves out as HIPAA-compliant and will enter business associate agreements in connection with the provision of their products.[17]

Given that it is explicitly tied to the public health emergency, OCR's enforcement discretion will likely end when the official public health emergency ends. However, additional HIPAA guidance on telehealth may be promulgated in the meantime. In particular, Section 3224 of the Coronavirus Aid, Relief, and Economic Security Act, commonly known as the CARES Act, required that the HHS Secretary issue guidance on the "sharing of patients' protected health information" and compliance with HIPAA during the public health emergency.[18] It is possible that the HHS Secretary will issue additional guidance on HIPAA compliance as it relates to telehealth during the public health emergency.

Finally, aside from HIPAA, providers should always consider whether any state data privacy laws apply to telehealth services and take appropriate measures in the telehealth environment.

Return to the Physical Workplace Considerations

Presuming telehealth will not be a permanent fixture for all providers and employees, employers should be thinking ahead about return-to-work concepts to the extent telehealth is rolled back or reduced. That said, telehealth is a significant portion of the "new normal" for the foreseeable future and health care employers would be well advised to consider bolstered training and agreements for both employees working remotely, as well as their leaders, to ensure continued compliance with the complex interplay of employment law compliance considerations.

Endnotes

1 *See* Seema Verma, *The telemedicine genie is out of the bottle*, The Hill, July 17, 2020, https://thehill.com/blogs/congress-blog/healthcare/507874-the-telemedicine-genie-is-out-of-the-bottle.

2 *See, e.g., Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* EEOC Notice No. 915.002, 2002 WL 31994335, at *24 (Oct. 17, 2002); *Equal Employment Opportunity Commission v. Advanced Home Care, Inc.*, 305 F.Supp.3d 672, 676 (M.D.N.C. 2018) (holding the EEOC's complaint sufficiently alleged a failure to accommodate claim under the ADA by claiming plaintiff could perform the essential functions of her position, including answering telephone calls, while working from home).

3 *Peeples v. Clinical Support Options, Inc.,* No. 3:20-cv-30144-KAR (D. Mass. Sept. 16, 2020).

4 *Enforcement Guidance, supra* note 2, at *24 (emphasis added).

5 U.S. Equal Employment Opportunity Comm'n, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Sept. 24, 2020).

6 *EEOC v. Gentiva Health Servs. Inc. dba Kindred at Home*, No. 1:20-cv-03936 (N.D. Ga.).

7 *See, e.g.*, Colo. Exec. Order D 2020 154 ("vulnerable individuals" as defined by the state must be accommodated).

8 29 U.S.C. §§ 201, *et seq.*

9 U.S. Dep't of Labor Wage and Hour Div., COVID-19 and the FLSA Questions and Answers, https://www.dol.gov/agencies/whd/flsa/pandemic#q2 (last visited Sept. 24, 2020).

10 *See, e.g.,* Colo. COMPS Order #36 (2020).

11 U.S. Dep't of Labor, FAB 2020-5 (eff. Aug. 24, 2020).

12 Pub. L. No. 116–127.

13 85 Fed. Reg. 57677 (eff. Sept. 16, 2020).

14 State of Florida Board of Psychology, *In re: The Petition for Declaratory Statement of Marc B. Dielman, Ph.D.*, Final Order No. DOH-06-0976-D5-MQA (June 5, 2006).

15 For example, employers may not deduct from a California employee's pay for breakage or loss of equipment that is not a result of the employee's dishonesty or gross negligence. *See* Cal. Lab. Code §§ 221-224 (authorizing very limited deductions from wages); DLSE Enforcement Manual § 11.2.4, http://www.dir.ca.gov/dlse/dlsemanual/dlse_enfcmanual.pdf (last viewed Sept. 24, 2020).

16 Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency, https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html.

17 *Id.*

18 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3224.

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