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Remote Working, Vaccines and Employment Obligations Under the Americans with Disabilities Act

The last eighteen months have brought tumultuous change for employers due to the COVID-19 pandemic. The pandemic has been a great disruptor, and has brought rules, regulations and related agency guidance that have served to overwhelm even the most conscientious and attentive employer. The welcomed arrival of COVID-19 vaccines has, in many respects, caused many employers even more confusion on how to deal with employee requests for accommodations, such as a request to telework.

With the rollout of vaccines nationwide and improving conditions which allowed for return to work policies, one area for employers to be aware of is the intersection of an employer's obligations under the Americans with Disabilities Act (as Amended) ("ADA") to address a request for a reasonable accommodation, and a request by an employee to telework. This alert is intended to address recent guidance and case law on this issue.

In years past, requiring full-time, in-office attendance was seen as an "essential function" of many jobs. There was often resistance to accommodations which departed from this norm and employers often took the position that accommodating a disability with remote work was unreasonable. With millions of workers having participated in a large, forced experiment to see if remote working would be productive on a full-time basis, many employees are of the view that it does, and are resisting a return to the office by asking for an accommodation to work at home.

For those employees who raise a disability as an impediment to returning to the office, and who seek an accommodation in the form of teleworking, an employer must be sure to engage in an interactive process to avoid potential liability. The ADA obligates an employer to make a "reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business." 29 CFR § 1630.9. The Equal Employment Opportunity Commission ("EEOC"), which enforces the ADA, looks to whether the employer engaged with the employee in an interactive process with respect to their request for an accommodation.

The interactive process begins with a request. Requests may not always need to be formal or in writing, but it is advisable for employers to maintain policies and procedures regarding the form and process for accommodation requests to ensure that employee requests are handled in a neutral and consistent manner. While failure to request a reasonable accommodation may complicate an employee's failure to accommodate claim, if an employer is aware of or put on notice that a medical condition interferes with the employee's ability to perform the essential functions of their job, they must engage in the interactive process with that employee.

Employers are in many ways in uncharted waters at present. In the past, there have been some cases which turned on whether it was a violation of the ADA to refuse to allow teleworking, and it has been held that such an accommodation cannot be conditioned on improved performance. See Goonan v. FRB of N.Y., 916 F. Supp. 2d 470, 484 (S.D.N.Y. 2013). As an example of a case that has arisen during the COVID-19 Pandemic, the Court in Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 65 (D. Mass. 2020) granted a preliminary injunction requiring the employer to permit plaintiff to continue to telework as a reasonable accommodation for asthma during the COVID-19 pandemic where the plaintiff demonstrated that they performed the same duties on-site that they performed at home.

As with any discussion of essential job functions, for remote work it is key to determine which job functions can be performed outside of the workplace and which must be performed in the workplace. This is where the lack of any written job descriptions can be an Achilles' heel. If a marginal function needs to be performed by an in-office employee and is the only obstacle to permitting an employee to work at home, such marginal functions may be reassigned and an employer may substitute another minor task to be performed remotely. See Work at Home/Telework as a Reasonable Accommodation, EEOC, February 3, 2003, available at <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>. While the EEOC has consistently provided for remote work as an accommodation, prior to the COVID-19 Pandemic, many employers took the position that in-person interaction was an "essential function" of the job. For example, for employers who did not already offer a remote work program, the EEOC's guidance stated that, with respect to remote work as an accommodation, "an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternative accommodations as long as they would be effective." Id.

In the EEOC's more recent COVID-19 guidance, however, remote work as an accommodation has been mentioned prominently. The EEOC has stated that while working remotely during the pandemic does not mean that employers must "automatically" grant remote work as a reasonable accommodation, it is relevant to the consideration of new or renewed requests for remote work. What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, EEOC, June 28, 2021, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> Further, the EEOC has stated that employers' temporary excusal of performance of one or more essential job functions when they close the office does not mean that the job's essential functions have changed. Id. However, this does not provide a license for employers to reject remote work as an accommodation. A determination still



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needs to be made that the employee can fulfill their essential job functions working remotely. The EEOC has also stated that, in determining whether remote work is a “reasonable accommodation,” remote work during the pandemic may be looked to as a “trial period” for how remote work might work for that employee. Id.

Additionally, and significantly, in Section K.2 of that same guidance, when discussing the implementation of vaccine programs, the EEOC noted that where an employee is unable to be vaccinated due to a disability covered by the ADA, the employer should consider whether to allow that employee to telework, provided it does not constitute an undue burden on the employer.

Accordingly, employers must use caution when considering employee accommodations on this basis, and are recommended to consult with qualified counsel knowledgeable in this area before rejecting any employee request to telework as an accommodation for a disability.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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