

Employment Law

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Tonight's Special: Telework

The U.S. Equal Employment Opportunity Commission ("EEOC") this month published a new "Fact Sheet" featuring telework as an important option for employers and employees with disabilities. The new fact sheet, entitled *Work At Home/Telework as a Reasonable Accommodation*, showcases telework as today's featured reasonable accommodation recipe but, in truth, introduces nothing new into the employer's cookbook.

Telework, also known as Telecommuting or Work-At-Home, allows employees to work from their own homes or other remote locations and connect to the employer's central workplace through computer or telephone connections. Telework has been available as a reasonable accommodation tool since the Americans with Disabilities Act ("ADA") was enacted, but until now hasn't received much direct attention from the EEOC. In its new fact sheet, the EEOC applies traditional ADA inquiries and procedures to highlight the ways in which telework arrangements can expand employment opportunities for the disabled.

Under the ADA, employers of 15 or more employees are required to provide reasonable accommodations for qualified employees with disabilities. A reasonable accommodation is a change in the work environment that allows an employee with a disability to apply for a job, perform the essential functions of a job, or take advantage of the privileges and benefits of employment. To those already familiar with ADA analysis, the EEOC's telework fact sheet offers nothing out of the ordinary. However, it does remind

employers and employees alike that an old favorite may be the best dish in the house.

Telework is an especially important reasonable accommodation option for employers who already have a telework program in place. At a minimum, the employer must allow employees with disabilities the same opportunity to participate in telework as it does other employees. The employer may even have to alter certain workplace policies, like eligibility requirements, to allow a disabled employee to participate (if participation would help the employee perform the essential functions of his/her job). However, an employer is not required to institute a telework program for all employees, and an employer is never required to institute an accommodation that would result in undue hardship for the employer. If an accommodation other than telework would be equally or more effective, the employer may offer that accommodation to the employee in lieu of a telework arrangement. The employee does not get his/her choice of preferable accommodations.

THE EEOC'S TELEWORK RECIPE:

As in all cases, the employee must first inform the employer of his/her disability and request an accommodation. The employee does not have to use any magic words, but can make the request in plain English.

This request should trigger an "interactive process" through which the employee and employer discuss the employee's disabilities and any limitations the

disability places on the employee's ability to perform the essential functions of his/her job. If the employee's disability is not obvious, the employer may request documentation from the employee's health care provider. Through this interactive process, the employer and employee should discuss accommodations that would allow the employee to perform the essential functions of his/her job. If other accommodations would be equally or more effective than telework, the employer should discuss those with the employee.

As part of its responsibilities under the ADA, the employer should identify the "essential functions" of all of its jobs. The essential functions are the central tasks required of the position, not those marginally related to the position. In accommodating a disabled employee, an employer may be required to reassign marginal tasks to other employees. If this is necessary, the EEOC notes that the employer may assign other employees' marginal tasks to the employee with a disability, so long as they are within his/her capabilities.

Once the employer has identified the essential functions of the job, the employer must determine whether those functions can be performed from home or another remote location. The employer should carefully consider several questions:

- Will the employer be able to adequately supervise the employee?
- Can equipment or tools necessary to perform the job be replicated in the home?
- Is face-to-face interaction and coordination of work with other employees necessary to performance of the job?
- Does the job require in-person interaction with customers or clients?
- Does the job require immediate access to hard documents or other information located only in the workplace?

If some, but not all, of the job functions can reasonably be performed from the employee's home, the employer and employee should work together to create a flexible schedule. It is not necessary that the

employee work exclusively from home. The EEOC cautions that "an employee may work at home only to the extent that his/her disability necessitates it." The employer and employee may be able to develop a schedule through which the employee works at home once a week, a few days per week, one week per month, or any amount of time that is acceptable to both employer and employee.

IT LOOKS SO EASY ON TV!

While the EEOC's fact sheet offers an introduction to telework and its use as a reasonable accommodation, it leaves out a few ingredients that may be vital to an employer attempting to institute a telework program. Most essential to employer and employees are clear, written guidelines for how the program will work. The employer should be alert to potential areas of liability and establish in advance how those situations will be addressed.

Employee Privacy: The employer will very likely require access to an employee's e-mail and computer files to ensure proper supervision and compliance with employer policies; however, this may implicate the employee's right to privacy. The employer is entitled to monitor employee activities for legitimate business purposes, but should be certain to alert employees that the employer will actually do so. Employers are strongly encouraged to adopt an electronic communications policy that covers monitoring, *inter alia*, of e-mails.

Personal Use of Employer Property: The employer should make its own determination of whether or not personal use of employer-provided equipment (such as computers, copiers, fax machines, etc.) is appropriate, how much use is acceptable, and who is responsible for maintenance or repairs of equipment. The employer should decide these issues before releasing any equipment to employees and should convey its expectations to employees in writing.

Information Security: If the employer permits an employee's spouse, children or friends to use the same computer on which the employee is working, it is essential that the employer alert employees to the need to protect sensitive information and institute

measures to protect the employer's information. For example, the employer may require a secure login to the Local Area Network or password protection of work-related documents. This security concern applies to hard documents as well – the employer should warn employees that sensitive files must be kept away from others in the employee's home. Even trash could pose a problem. Written guidelines for the maintenance and disposal of files are vital to protecting sensitive information.

Wage and Hour Concerns: Employees who telework are subject to the same wage and hour laws as employees in traditional work environments. If an employee is non-exempt under the Fair Labor Standards Act, the employer must maintain time records for the employee and compensate him/her according to overtime laws. Well before launching a telework program, the employer should develop a system by which employees record their hours by keeping time logs or logging on to a computer or telephone at the start and end of working hours. Employers should institute a policy whereby employees must gain pre-approval for working overtime hours.

Workplace Safety: Although the U.S. Labor Department has announced that an employer is not required to conduct inspections of home offices, the extent of an employer's obligation to provide home-based workers with a safe work environment is still under debate. At the very least, an employer may be subject to workers' compensation claims for repetitive stress injuries arising from computer use. The employer should provide a telework employee with as much information as possible regarding an ergonomic work environment. If the employer has provided the employee with office furniture or equipment, the employer should do its best to ensure that they comply with ergonomic and safety standards.

SEASON TO TASTE

Whether instituting a telework program as an accommodation for a disabled employee or as an option for all employees, the key ingredient is clear communication. The employer's ability to monitor and supervise employees at remote locations is necessarily hampered, which makes explicit policies and written guidelines vital to the ongoing work relationship. Telework employees are no different from traditional employees, and an employer should affirmatively address any issues that it knows are specific to the job position in question.

The EEOC's telework fact sheet and other information relating to the ADA are available at <http://www.eeoc.gov>.

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