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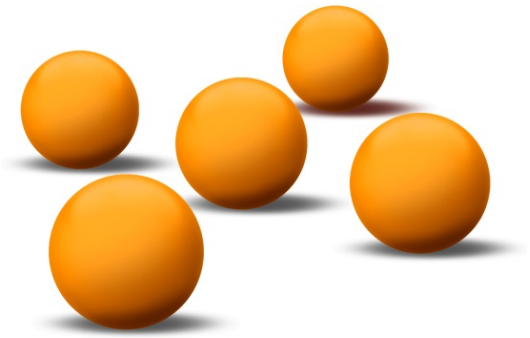

Issues Experienced With Telecommuting Employees in the Financial Industry

John J. Coleman III for BLOOMBERG BNA BANKING REPORT

Telecommuting has become a popular work option for many financial industry employers. Generally, such a program allows employees to perform some or all of their job duties at a location other than the employer's worksite.

The benefits of such programs are well documented and numerous: increased employer and employee flexibility, reduced overhead costs, improved employee productivity and retention, to name a few.

This telecommuting trend has not gone unnoticed by banks and other financial institutions, with many now offering flexible work programs to their employees.

For example, Bank of America has the "My Work" program, a flexible, work-from-home job arrangement, and several other large banks offer similar telecommuting programs.

While this changing work landscape provides employees and employers many benefits, it also poses new and unique challenges that typically are not encountered in the more traditional workplace.

This article discusses three common issues that arise when financial sector employers administer these policies. These include compliance with the Americans With Disabilities Act and similar laws, Family and Medical Leave Act concerns, and wage-hour issues. We conclude with a few suggestions to meet these challenges.

Compliance with the ADA

Any financial industry employer considering a telecommuting or other remote or work-from-home program should evaluate the impact on disability management. Occasional telecommuting allowed as a convenience under policy can be used as evidence that more regular telecommuting – or even performance of most or all job duties from home – is an effective accommodation for disabilities that make workplace attendance difficult or impossible.

Are there jobs for which such telecommuting will not work? Does your policy identify these and explain why? If not, accommodating disabilities through work-from-home programs can create nightmares.

An essential component of Title I of the Americans with Disabilities Act (ADA) and similar provisions is the obligation of covered employers to provide reasonable accommodation for employees with disabilities (many financial sector employers also face Rehabilitation Act §503 and 504 coverage as well as that of equivalent state laws, but the issues discussed usually are identical). A “reasonable accommodation” is one that works and does not impose an undue hardship.

In most instances, accommodation works if it enables an employee to perform those essential functions of his or her job that the disability's restrictions (including medical side effects) otherwise prevent – whether or not the accommodation is the employee’s first choice.

"Undue hardship" generally means that the effective accommodation costs too much in light of employee resources. If an employee proves an accommodation proposed is effective, then the employer either must prove it is too expensive, show that a preferred accommodation is just as effective, or provide the employee's accommodation choice.

Courts have regularly rejected telecommuting in the past because many employers have considered most jobs to include prompt, regular attendance onsite among the jobs' essential functions, and the law does not require employers to eliminate essential functions to accommodate disabilities.

However, times are changing.

As technology has progressed, courts have required a more rigorous showing that prompt, regular attendance is required for a *specific* job, and when required, that attendance always means "attendance onsite" when signing in at a desktop has little physical difference from signing in remotely.

Common objections to telecommuting have involved supervision issues, co-worker interaction issues and security issues. The courts no longer accept generalities respecting these topics, but call for specifics.

For instance, how is surveillance software inadequate for supervising the position? What is it about the job that makes personal co-worker interaction necessary? What security concerns does telecommuting across the city present that telecommuting across the building does not?

These questions will have different answers for different work places and jobs, and the financial industry is no different.

While the ADA does not require that an employer offer a telecommute program to all employees, allowing an employee to work remotely may be a reasonable accommodation if the employee's disability prevents successfully performing the job on-site, and the job can be performed at home effectively without causing significant difficulty or expense.

A recent case out of the Northern District of Illinois makes this point clear.

Bixby v. JP Morgan Chase Bank, N.A., 2012 U.S. Dist. LEXIS 32974 (N.D. Ill. Mar. 8, 2012), denied summary judgment against the claim of a JP Morgan Chase project manager, whose job involved performing nonspecified, "onboarding" duties relating to customers, and who sought unsuccessfully to work from home to accommodate his panic attacks.

Rejecting the bank's proposal to allow work from home only one or two days per week, the court rejected bank arguments based on his need for supervision and the job's need for face-to-face interaction. The court explained that developments in the Internet and technology in general made working from home feasible in this instance. Further, the Bank allowed other project managers to telecommute, and the employee's essential job duties could be performed at home since meetings were often conducted by teleconference anyway, and the plaintiff could direct activities and people through email.

Some financial industry jobs may not be suited for work from home accommodation, but that list is growing shorter by the day.

Consider retail banking: Can tellers work from home? In the past, the answer was "no," but with the advent of Skype-style telecommuting and automated branches, that is no longer necessarily the case.

Certainly many loan underwriting functions can be performed remotely, but what about loan officers? Why not? The protest of the need for a handshake and a personal meeting rings hollow when dealing with the "Twitter generation."

Retail securities dealers? Employers who try to limit these will hear that online brokerages and e-trading are decades old. Of course, proprietary software products actually used to place trades may not be secure if operated remotely in the current environment, whether executed for another or for the employer's own account; jobs requiring those duties cannot be done remotely now. Nevertheless, even if there remain such barriers to working remotely right now, they involve the current limits of security and supervision, and those limits change daily.

Industry trends make showing "undue hardship" unlikely as well, and proof is the employer's burden. Technological advances reduce the cost associated with remote work, and the trend toward concentration of players concentrates available resources as well. Simply put, larger entities have more resources.

Not only are the barriers to work-from-home accommodation falling, but also the types of disabilities whose restrictions call for it are increasing.

Medical literature is replete with examples of stress-related mental disorders that cause restrictions that telecommuting can alleviate, and the exposure to environmental toxins and the aging baby boomer population are producing more and more cancer-related illnesses and advanced, but debilitating, medical treatments that create such restrictions as well.

The only solution for the financial employer is to designate jobs that cannot be done remotely (the occasional temporary telecommute notwithstanding), and to document the reasons why, in terms of effectiveness (the issue on which the employee has the burden of proof), the job must be done on premises. Use available tools that may include the ban against essential function reassignment and what is required or necessitated to comply with other federal laws.

The ADA does not require employers to reassign or eliminate essential functions. However, what if the jobs' core functions makes it necessary for the employee to be present? For instance, must a branch security guard be onsite to guard the bank, or financial planners available for daily face-to-face meetings with customers? Is on-premises work essential when daily duties involve selling financial products that demonstrably sell materially better when dealing with prospects face-to-face in a professional setting? Must the bank's management team members (chief trust officer, chief lending officer and general counsel, among others) be physically available to each other and the chief executive officer most of the time? Does the security of trades, and the proprietary software used to execute them, require the trader's on-premises performance?

The ADA does not punish an employer for actions required or necessitated by other federal laws. Do laws and regulations governing security make it necessary (whether or not they actually say so) for some functions to be performed in person?

Make sure job function descriptions and telecommuting policies reflect these realities.

Compliance with the Family Medical Leave Act

The Family Medical Leave Act (FMLA) applies with equal force to telecommuters, and employers must be aware of the unique FMLA coverage and application issues that can arise with telecommuters.

Generally, the FMLA provides certain qualifying employees with up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons.

FMLA compliance is challenging enough to the financial sector without having to add telecommuting. Concepts such as: when we know someone is eligible when the onsite is medically unable to perform a job done by telecommute, when he or she is actually on leave, and when he or she can return to work are issues that represent only the tip of the iceberg.

Who is eligible? To be covered under the FMLA, employees, including telecommuting employees, must meet the FMLA's eligibility requirements; is, the employee must have worked at least 1,250 hours for the covered employer during the 12 months prior to the start of the FMLA leave, and worked at a location where at least 50 employees are employed or within 75 miles of the location.

With telecommuters, the difficult issue often is determining the employee's worksite and whether that employee has worked a sufficient amount of hours.

The telecommuting employee's "worksite," for determining whether he or she works "at a location where at least 50 employees are employed," is the office to which he or she reports and from which assignments are made. *29 C.F.R. § 825.111.* Thus, a telecommuting employee who reports to a worksite with over 50 employees meets the worksite criterion, regardless of the fact that he or she may physically work hundreds of miles from the worksite and any other employees.

A telecommuting employee must also work 1,250 hours during the 12 months prior to the start of the FMLA leave; employers who properly document employee hours worked can generally readily determine whether the telecommuting employee has met the hour threshold. Proper documentation is key. Telecommuting employees' hours are difficult to track and verify, and, without proper documentation, an employer must find a way to verify a telecommuting employee's claim (especially one by an exempt telecommuting employee) that he or she worked more than the required 1,250 hours.

Once it has been determined that a telecommuting employee is, in fact, FMLA eligible, employers must still be cognizant of other pitfalls that can arise from such a work arrangement.

One benefit of telecommuting programs is that employees are readily accessible at all times, with most, if not all, communications occurring by phone or email. Unfortunately, once the telecommuting employee's FMLA leave begins, many times, these work communications continue. An employer constantly contacting the individual on leave about work and work-related matters violates the FMLA by "interfering" with an employee's exercise of his or her FMLA rights. *See 29 C.F.R. § 825.220.*

While employers are allowed to make limited work-related contacts with an employee on FMLA leave, such as to pass on the employee's institutional knowledge to new staff or to provide closure on assignments, if the employee begins regularly returning work emails and calls, then such work would interfere with his or her FMLA leave (not to mention potentially create uncompensated working time that could compromise wage recordkeeping and expose an employer to FLSA overtime liability).

Managing FMLA compliance among telecommuters requires planning.

A well-drafted job description designed to fit telecommuters enables a health care provider to know – and be able to certify – when a telecommuting employee's serious health condition prevents him or her from working, and when he or she is able to return. Careful work monitoring software and a well-crafted rule against moonlighting while on leave helps ensure a telecommuter does not abuse leave, particularly when the leave granted involves a condition requiring time off on an intermittent or reduced schedule basis (no employer, for example, wants to be in the situation when a supervisor contacts a telecommuter at home only to be told by the spouse – and this is a true story, "Don't you realize he is on leave today?!").

Giving these issues thought ahead of time saves serious headaches later.

Compliance with the Fair Labor Standards Act

Finally, an often-litigated component of telecommuting arrangements are claims brought under the Fair Labor Standards Act (FLSA), which requires that employers pay non-exempt employees for all hours worked and also to keep accurate information of those hours worked. This requirement includes all work performed away from the worksite, including work performed at home. *29 C.F.R. § 785.12.*

An important challenge for any telecommuting program is establishing the process to properly track work time.

The only solution for the financial employer is to designate jobs that cannot be done remotely (the occasional temporary telecommute notwithstanding), and to document the reasons why, in terms of effectiveness (the issue on which the employee has the burden of proof), the job must be done on premises.

Accurately monitoring employees' work hours away from the worksite is critical to avoiding costly FLSA litigation. The failure to track a telecommuting employee's work time can leave an employer with the unenviable task of having to defend an "off-the-clock" claim (such as that the employee worked through breaks and meal periods at home, or spent time waiting for projects or for software or a computer to start) without supporting documentation.

Every work program should have clear guidelines for telecommuting employees regarding recording hours and confirming the hours reported.

A recent decision out of the Southern District of Texas, *Griffith v. Wells Fargo Bank, N.A.,* illustrates the importance of having such guidelines. 2012 U.S. Dist. LEXIS 129937 (S.D. Tex. Sept. 12, 2012).

In the case, Wells Fargo loan processors brought a collective action alleging that they were misclassified as exempt, and, therefore, were not paid for overtime work, including hours worked at home.

The court refused to certify the class in part because Wells Fargo properly required employees to record all hours worked, including those at home, and the bank's payroll and record-keeping system properly allowed employees to record hours worked from home. Without these proper payroll policies for telecommuting employees, Wells Fargo would have been susceptible to a potentially costly collective action.

One important tool employers can use to avoid such claims is to require telecommuting employees to enter into written employment agreements describing the employees' telecommuting obligations and expectations.

Such agreements should, among other things, designate the amount of hours to be worked each week, should prescribe that overtime without prior approval is not allowed, and should provide a specific and detailed procedure for recording all time worked. The Department of Labor regulations specifically provide for such agreements, allowing employers to enter into a "reasonable agreement" with employees working at home for the purpose of tracking hours. *29 C.F.R. § 785.23.*

Another important issue concerns protection against the collective action procedural device.

The FLSA collective action procedure permits the aggregation of many individual pay claims when, among other things, employees are subject to a common policy, plan or design and share sufficient commonality. An employer's policies are critical for determining whether telecommuting employees share a sufficient nexus with non-telecommunicating employees.

For example, in *Wigart v. Fifth Third Bank*, the Southern District of Ohio granted certification to a class of loan officers, finding commonality, even though some of the loan officers worked remotely. *288 F.R.D. 177 (S.D. Ohio 2012).*

The employer argued that the loan officers could not be classified together because some loan officers worked from home, while others worked in the office, and, thus, there was no commonality.

The court found this argument unavailing because the same job policies applied to all loan officers. For instance, they were ranked together for performance reviews, and the employer treated the employees the same for classification purposes.

This case illustrates that employer policies and practices – not the classification of telecommuting v. non-telecommuting – will control the analysis in collective actions, and employers should design their policies accordingly.

What Can You Do?

What can you do as a financial industry employer?

No list is complete, but here are a few suggestions:

- **Use medical screening opportunities.** Use your chance as the employer to conduct broad, post-offer, pre-hire medical evaluations so that information necessary for job placement decisions can help identify potential accommodation issues.

- **Audit job descriptions**. Courts evaluating accommodation alternatives, and health care providers considering fitness questions, will honor written job function descriptions that require on-premises work if security or other effectiveness concerns determine that the work must be performed on premises as part of the essential job functions.

- **Establish clear leave policies**. Make sure that telecommuting employees who must go on FMLA leave are not working – for your financial institution or anyone else.

- **Lock down work hours and policy compliance in writing**. Make sure the telecommuting employee is committed to following rules regarding the start and end times of the work day, and meal interruption. Ensure that the company has a reliable means to verify and track remote compliance.

- **Consider the forum**. Many financial industry employment disputes go to arbitration, while others will be resolved at bench trials based on jury waivers and juries will decide a few. A good policy should anticipate the lack of industry knowledge by a judge, jury or arbitrator, and should consider a jury's usually strong pro-employee stance.

Conclusion

The discussion above addresses a few key, legal risks that employers face when operating a telecommuting program. However, it is not a comprehensive list (e.g., tax issues and international legal restrictions offer two others), and each financial institution must carefully review and analyze its telecommuting programs in the context of its business needs in the applicable technological and legal environment.

Ultimately, an effective program will fit the company's needs and culture, while also protecting the company from unnecessary litigation.

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