

Telecommuting as a Reasonable Accommodation: A Remote Possibility?

In recent years, many employers have shied away from telecommuting programs and arrangements, believing employees cannot perform their jobs as effectively from home or be adequately supervised while working remotely. Disputes naturally arise when such employers receive requests from disabled employees seeking telecommuting as an accommodation. Employers who genuinely place an emphasis on employees working at the office or job site can expect to find support from the courts when they deny such requests. However, these employers must be prepared to explain legitimate business justifications for their position on telecommuting and ensure their policies and past practices are consistent with that position.

A "REASONABLE" ACCOMMODATION

With its passage in 1990, the Americans with Disabilities Act (ADA) put forth the now commonly understood requirement that employers must provide disabled employees with accommodations enabling them to perform the essential functions of their jobs or otherwise enjoy employment opportunities equal to non-disabled co-workers. The ADA did not originally discuss whether or when telecommuting is a "reasonable" accommodation or causes an "undue hardship." *Continued*



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Dean Rocco
Partner, Los Angeles
213.330.8922
dean.rocco@wilsonelser.com

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In 1999, the Equal Employment Opportunity Commission (EEOC) published a formal guidance document entitled *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, which states that:

An 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.

The EEOC focused its discussion on the question of whether the essential functions of the employee's position could be performed at home. To make such a determination, the EEOC said it would consider key factors such as the employer's ability to adequately supervise the employee working remotely and the employee's need to work with equipment or tools that cannot be replicated at home. The publication specifically noted that jobs such as food servers or cashiers cannot be performed remotely, but added telemarketing and proofreading jobs might be positions where telecommuting could be required as a reasonable accommodation.

Later, in October 2005, the EEOC published a fact sheet entitled *Work At Home/Telework as a Reasonable Accommodation*. In it, the EEOC observed that telecommuting programs were emerging in the wake of technological advances that seemingly allowed employees to work more effectively from home, and commented that employers were increasingly willing to offer such programs as fringe benefits to retain valuable employees and boost morale and productivity.

Noting the ADA does not require telecommuting programs, but reminding employers such arrangements may be considered reasonable accommodations, the EEOC's fact sheet provided an approach to determining whether a particular job can be performed at home. The EEOC advised that employers should first determine which functions of an employee's job are essential and then whether all or some of those functions can be performed at home. In addition to

previously noted considerations such as the employer's ability to adequately supervise the remote worker or the employee's need to access tools or equipment only available on-site, the EEOC noted the following:

Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.

The EEOC further noted that telecommuting arrangements are not an "all or nothing" proposition. The Commission observed that partial telecommuting arrangements might be reasonable accommodations where some job duties can be performed in the workplace and others from home (e.g., an employee who needs to meet face-to-face with clients in the workplace but can review documents or write reports from home). The Commission also noted telecommuting arrangements can be limited in time (e.g., working remotely one day per week or for a limited period of three months while an individual recovers from treatment). The EEOC even suggested an employee might be able to telecommute on an "as needed" basis where the effects of a disability become particularly severe on a periodic but irregular basis.

Notably, the EEOC said employers could make other accommodations in lieu of providing telecommuting arrangements provided they were effective in allowing the employee to perform their job (e.g., changing an employee's reporting time to accommodate paratransit schedules rather than having the employee work from home in the mornings). *Continued*

EMPLOYERS TURNING AWAY FROM TELECOMMUTING AND RELATED ACCOMMODATIONS

There are signs telecommuting works to promote productivity and employee morale in certain job categories, and some industries have embraced such programs. The *2013 Stanford and Beijing University Economic Study* found call center employees experienced a 13 percent performance increase when working from home. The study attributed the increase to employees working more minutes per shift (due to fewer breaks and sick days) and making more calls per shift (due to a quieter work environment). The study also found less turnover with at-home call center employees, who reported improved job satisfaction.

At the same time, however, telecommuting programs have fallen into disfavor among many employers. A May 2013 *Yahoo! Human Resources Memo* illustrates some of the key reasons behind this trend:

To become the absolute best place to work, communication and collaboration will be important, so we need to be working side-by-side. That is why it is critical that we are all present in our offices. Some of the best decisions and insights come from hallway and cafeteria discussions, meeting new people, and impromptu team meetings. Speed and quality are often sacrificed when we work from home. We need to be one Yahoo!, and that starts with physically being together. Beginning in June, we're asking all employees with work-from-home arrangements to work in Yahoo! offices.

COURTS SUPPORTING DENIALS OF TELECOMMUTING ACCOMMODATIONS

So far, courts have shown an inclination to side with employers who deny telecommuting arrangements based on some of the same business justifications outlined by Yahoo!'s HR Department. For example, in *Frontera v. SKF USA, Inc.* 2010 U.S. Dist. LEXIS 83460 (W.D.N.Y. 2010), a U.S. district court recently supported an employer's denial of a telecommuting arrangement given the importance placed on having the accountant

work closely with co-workers and meet face-to-face with clients. Even more recently, in *EEOC v. Ford Motor Company* 2012 U.S. Dist. LEXIS 128200 (E.D. Mich. 2012), a U.S. district court found an employee was not "qualified" for a resale buyer position because her disability – irritable bowel syndrome – prevented her from adhering to attendance standards. In upholding Ford's refusal to permit telecommuting based on the face-to-face nature of the buyer's position, the *Ford* court noted several cases upholding employers' denials of telecommuting accommodations based on the need for the employee to be at the job site and even commented "in general courts have found that working at home is rarely a reasonable accommodation."

Notwithstanding the strong language in the *Ford* decision, these recent holdings have not eliminated telecommuting as a potential accommodation. Federal and state disability laws routinely explain that accommodation requests should be considered on a case-by-case basis, and there certainly are published cases where an employer's denial of a telecommuting accommodation was questioned under the facts of the case. However, these recent holdings provide solid reasons for employers to remain confident that carefully considered denials of telecommuting accommodations can and will be upheld.

GUIDANCE FOR EMPLOYERS WISHING TO LIMIT TELECOMMUTING

As noted by the *Ford* decision, courts generally will not "second guess" an employer's reasonable business judgment about the essential functions of a job:

The ADA requires us to consider "the employer's judgment as to what functions of a job are essential" The employer describes the job and functions required to perform that job. We will not second guess the employer's judgment when its description is job-related, uniformly enforced, and consistent with business necessity. In short, the essential function "inquiry is not intended to second guess the employer or to require the employer to lower company standards." *Continued*

Given the foregoing, an employer wishing to limit telecommuting, as stated earlier, must be prepared to explain its business justifications for denying telecommuting accommodations when they arise. Beyond that, such an employer must understand that its policies and past practices will be examined by a court to determine whether it genuinely places an emphasis on employees working at the office. To that end, employers wishing to limit telecommuting should consider the following:

■ **Handbooks & Personnel Policies**

If an employer considers regular attendance to be an essential job requirement for employees, it should have attendance and personnel policies stating it.

■ **Job Descriptions**

If an employer believes all or some of the essential functions of a position must be performed at work or on a job site, the job description should identify those essential functions and note the importance of them being performed at the office or work site. The essential functions must reflect the actual responsibilities of the position in question.

■ **Telecommuting Programs & Past Practices**

Employers must realize that their decisions to implement telecommuting programs or allow

individualized telecommuting arrangements may impact later decisions about telecommuting arrangements for disabled employees. If, for example, an employer provides telecommuting arrangements to employees in some or all job categories, it may be hard-pressed to deny an at-home work arrangement to a disabled employee based on a claim that attendance at the office is critical. Similarly, if an employer allows a non-disabled employee to work from home, courts will heavily scrutinize a decision to later deny a telecommuting arrangement to a similarly situated disabled employee.

Managing employees with disabilities or the need for medical leave is often a complex proposition for employers, and missteps can lead to substantial liability. The experienced attorneys in Wilson Elser's Employment & Labor practice routinely guide clients on how to communicate with such employees and manage risks when responding to their needs in the workplace. To obtain more information about our capabilities on disability and leave management, please do not hesitate to contact Dean Rocco or your regular Wilson Elser contact attorney.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

Contacts:

National Practice Chair

Ricki Roer
ricki.roer@wilsonelser.com

212.915.5375

Northeast

By Region:

Midatlantic
Robert Wallace
robert.wallace@wilsonelser.com

Southeast
Sherril Colombo
sherril.colombo@wilsonelser.com

Midwest
David Holmes
david.holmes@wilsonelser.com

Southwest
Linda Wills
linda.wills@wilsonelser.com

West
Dean Rocco
dean.rocco@wilsonelser.com

Steve Joffe
steve.joffe@wilsonelser.com

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