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Workplace law trends for 2015 and beyond.
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Call Me, Maybe: **Flexible Workplace Issues, Including Flex-Work as a Disability Accommodation, Wage & Hour Implications of Telecommuting and Leaves**

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Overview

- What is flexible work?
- Telecommuting as a reasonable accommodation under the ADA and California's FEHA
- Risks implicated by telecommuting
 - FLMA
 - Wage and hour issues
 - Reimbursement issues
 - Travel time
 - Mileage
 - Other expenses



Overview

- **Risks implicated by telecommuting**
 - **Company property**
 - **Confidential information**
 - **Performance management challenges**
 - **Workers compensation issues**
 - **ADA and state law issues**
- **Questions**



Flexible Work

- **Examples:**
 - **Telecommuting**
 - Working from a home office or other remote location
 - **Non-traditional working hours**
 - **Inconsistent work schedule**



Telecommuting

- **When to permit it**
 - Is it required?
 - Is it optional? If so, what factors might influence decision to permit telecommuting?
 - Can an employer require it?
- **Risks, rewards, and other considerations implicated by permitting telecommuting**

Must employers permit telecommuting as a form of reasonable accommodation?

The EEOC's View

- “An employer must modify its policy concerning where work is performed if ... needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.
- Effectiveness “will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- e.g., food server, cashier in a store.”
- *EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Question 34 (Oct. 17, 2002).*

Must employers permit employees to telecommute?

California's Amended Disability Regulations Under the FEHA

- **Examples of reasonable accommodation include, “permitting an employee to work from home.”**
- **Cal. Code Regs., tit. 2, § 11065**

Telecommuting as an Accommodation

Ask:

1) Is the employee a qualified individual under the ADA/FEHA?

2) Has the employee requested an accommodation?

3) Is physical attendance an essential function of the employee's job?

4) Would permitting telecommuting be an undue burden?

Is the employee a qualified individual under the ADA?

If the employee is not a qualified individual, the employer need not permit the employee to telecommute as a reasonable accommodation.

- **Recent Case: *Adams v. District of Columbia*, 2014 WL 2918883 (D.D.C. June 27, 2014)**
 - Plaintiff's job required him to travel to various locations, communicate over the phone with customers, and sit in front of a computer for long hours. Plaintiff had mobility issues, had to lie down frequently, and had difficulties communicating orally.
 - Because Plaintiff's disabilities would prevent him from doing the essential functions of his job even if employer permitted him to work at home, he was not a qualified individual under the ADA.

Has there been a request for accommodation?

A long-exposure photograph of a car at night, showing bright red and white light trails from the taillights and headlights respectively, curving away into the distance against a dark background.

Plaintiff notified employer that she would be taking a medical leave for gastroenteritis, and asked her assistant to send her work-related files to her so that Plaintiff could work from home during leave.

Q: Has Plaintiff requested an accommodation?

Has there been a request for accommodation?

A. Possibly.

- ***Fuller v. Interview, Inc.*, 2014 WL 2601376 (S.D.N.Y. May 14, 2014)**
 - Plaintiff was never sent the files. The employer instructed Plaintiff not to contact clients or staff during her leave, and indicated it was not appropriate to send work to Plaintiff at home.
 - Plaintiff asserted failure to accommodate claims under the state and local anti-discrimination laws.
- **Holding: Summary judgment was denied; a fact-finder could conclude that Plaintiff made a request for accommodation when she asked her assistant to send work home**

Is physical attendance an essential function of the employee's job?



- If so, an employer need not permit telecommuting, even if an employee is disabled.
- Distinguish between whether attendance is an essential function or physical presence is the essential function.
- Recent Case: *Alexander v. Boeing Co.*, 2014 WL 3734291 (W.D. Wash. July 28, 2014).
 - Even if a regular and predictable work schedule was an essential function of plaintiff's job, there was a genuine dispute of material fact as to whether she could perform this essential function without being physically present.

Is physical attendance an essential function of the employee's job?



- Whether physical presence is an essential is a highly fact specific question.
- Factors to consider:
 - Written job descriptions
 - Business judgment of employer
 - Amount of time spent performing the function
 - Work experience of past and present in employees in the same or similar position
 - Courts not persuaded that positions that require a great deal of team work are inherently unsuitable to telecommuting arrangements.
 - *EEOC v. Ford Motor Co.*, 752 F.3d 634 (6th Cir. 2014)

A photograph showing light trails from a car at night, with red and white streaks against a dark background.

Would permitting telecommuting be an undue burden?

- *Vangas v. Montefiore Med. Ctr.*, 6 F. Supp. 3d 400 (S.D.N.Y. 2014)
- **Holding**: Summary judgment denied on plaintiff's failure to accommodate claims under the state and local anti-discrimination laws, because the record was unclear as to whether other employees in plaintiff's department had been permitted to work from home via remote access.

A photograph showing light trails from a car at night, with red and white streaks against a dark background.

Would permitting telecommuting be an undue burden?

True or False: If the employer has permitted an employee to work from home in the past, it can never argue that permitting work from home is an undue burden.

Would permitting telecommuting be an undue burden?

False. Although an employer who has permitted telecommuting in the past or for other similar employees may face an uphill battle in proving that attendance is an essential function or that telecommuting would pose an undue burden, it may be able to establish that:

- Telecommuting had previously only worked on a temporary basis;
- Telecommuting had previously not incorporated all essential functions;
- Other employees had different essential functions

Can an employer require an employee to telecommute?

In general, an employer could ask or require that an employee telecommute.

- **Examples**
 - **Holiday**
 - **Inclement Weather**

However, an employer may not require an employee telecommute if the employee is on a protected leave, such as FMLA.

- **Recent Case: *Evans v. Books-A-Million*, 762 F.3d 1288 (11th Cir. 2014) (finding employer interfered with FMLA leave by coercing employee to work on FMLA leave, which caused harm to employee by reassigning her based on poor performance during leave)**

Risks Implicated by Telecommuting: Wage and Hour Issues

- **Is the employee making the request exempt or non-exempt?**
 - **If non-exempt, not ideal, given practical issues of timekeeping requirements and attempting to treat all non-exempt workers similarly (i.e. all on same clock, under same level of supervision, etc.)**
 - **If non-exempt, need to be wary of employer knowledge of “at-home” work performed**
 - **Must be compensated, even if not approved!**

Risks Implicated by Telecommuting: Wage and Hour Issues

- **Is the employee making the request exempt or non-exempt?**
 - **If exempt, consider that the employer will have to pay the employee for a full day's work, even if only minimal work is performed.**
 - **Significant when exempt employees request to work from home while on leave.**

Risks Implicated by Telecommuting: Wage and Hour Issues



Telecommuting could mean working from either a personal device or employer-owned device

- If telecommuting is prohibited, non-exempt employees and their managers should understand that neither device should be used for work outside the office.
- If telecommuting is permitted, non-exempt employees and their managers should understand that all time worked must be recorded, regardless of which device is used.
- *See, e.g., Mohammadi v. Nwabuisi*, 990 F. Supp. 2d 723 (W.D. Tex. Jan. 2, 2014).

Risks Implicated by Telecommuting: Wage and Hour Issues



ABC Company has a number of employees that are permitted to perform their jobs remotely. ABC Company would likely to institute monthly meetings at which physical attendance at the company will be required, even for employees who regularly telecommute.

Q: Will ABC Company have to pay for the telecommuting employees' driving time for these required meetings?

Risks Implicated by Telecommuting: Wage and Hour Issues – Recent Case

A. TBD.

- ***Richie v. Blue Shield of California*, 2014 WL 6982943, (N.D. Cal. Dec. 9, 2014)**
 - Plaintiffs are commercial claims processors who are responsible for processing claims that were unable to be auto-processed. A number of commercial claims processors telecommuted on a regular basis.
 - Plaintiffs would like to be reimbursed for required travel to and from Blue Shield locations for required monthly meetings.



Richie v. Blue Shield of California, (Cont'd)

- **Blue Shield:**
 - Travel time and mileage is not reimbursed when the meetings take place during the regular hours of the employee, because that travel is part of the employee's normal commute.
 - Blue Shield remains the employees' "primary office"
- **Conditional certification of Plaintiffs' FLSA claim to reimburse travel time was granted.**

Reimbursing Employees for Necessary Expenses

- **Cal. Labor Code §2802 states the following:**
- **“An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his duties or of his or her obedience to the directions of the employer....”**

Reimbursing Employees for Necessary Expenses: Cochran v. Schwan's

- **Cochran:** An employee brought an action on behalf of customer service managers who were not reimbursed for expenses pertaining to work-related use of their personal cell phones.
- The Court held that employees required to use personal cell phones for business purposes must be reimbursed under Cal. Labor Code § 2802. The Court reasoned that the purpose of §2802 is “*to prevent employers from passing their operating expenses on to their employees.*” *Cochran v. Schwan's Home Serv. Inc.*, 228 Cal. App. 4th 1137 (2014).

Risks Implicated by Telecommuting: Confidential Information



- **Consider whether and how the company's confidential information (or that of its clients, customers, vendors, etc.) can be protected if an employee is working remotely.**
 - **Compliance with regulatory obligations?**
 - **Compliance with agreements with third parties?**
 - **Enforcement?**
- **Consider risk of disclosure, and extent to which it could be remedied**

Risks Implicated by Telecommuting: Company Property



- Will telecommuting arrangement make it more difficult to protect and/or secure Company property?
 - Consider: Computers, printers, scanners, USB drives, other electronics, records, files, media, data, etc.
- Will telecommuting arrangement make it more difficult to obtain Company property after termination?
- Does employer have an obligation to provide duplicate Company property to facilitate employee's work from home?

Risks Implicated by Telecommuting: Performance Management Challenges

- **Want to ensure telecommuting employees and employees at Company office will be treated as similarly as possible, where applicable.**
 - **Will telecommuting prevent comparable evaluations of employees? Comparable processes? Comparable metrics?**
 - **Will telecommuting hinder employer's ability to supervise, manage, mentor, and correct employees?**

Risks Implicated by Telecommuting: Workers' Compensation Issues

- **State law applies; highly fact specific inquiries**
 - **Is the employer liable for injuries or accidents that take place while an employee is telecommuting?**
 - Can employer shift liability to employee? Require employee to get particular insurance?
 - Can employer take steps to ensure employee is in a safe work environment? Monitor safety in employee's home office?
 - **Is the employer liable to third parties injured by an employee who is telecommuting?**
 - Scope of employment
- **Disclosure and/or discussion of telecommuting arrangement with insurer.**

Risks Implicated by Telecommuting: FMLA Issues

- **Q: Is a request to work from home tantamount to a request for FMLA (or CFRA) leave?**
- **A: Not necessarily, but the employer should consider other factors in context to determine whether an employee has indicated they need an FMLA leave.**
- ***See, e.g., Anderson v. McIntosh Constr., LLC, 2015 WL 105979 (6th Cir. 2015)***
 - **Finding that at most, employee requested permission to work from home. “But working from home is still working; so that request was not a request for leave under FMLA.”**

Risks Implicated by Telecommuting: ADA and state laws



While denial of a request to telecommute is generally not an adverse employment action under Title VII, employers should take care to treat disabled and non-disabled employees similarly.

- **Recent Case: *Ward v. McDonald*, (D.D.C. 2014)**
 - Dissent notes that employer's request for medical documentation from an employee requesting to work from home because of her disability was problematic, because it was not required of non-disabled employees who made the same request.
 - "A reasonable jury thus could find that this case involves supervisors throwing up obstacles to an accommodation that were not applied to other employees and that have no bearing on the reasonableness of the accommodation sought. That employers may not do."

Questions?

