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Employees May Be ‘Out of Sight’ While Teleworking, But the ADA Should Not Be ‘Out of Mind’

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Within just a few months, the COVID-19 pandemic forced employers to reorganize their businesses to allow their staff to work remotely, with no clear end to this arrangement in sight. In fact, after more than six months, the Centers for Disease Control and Prevention is still imploring employers to “encourage options to telework,” while some companies—including notable technology companies—have announced long-term or even permanent remote work arrangements. (“Guidance for Businesses & Employers,” located at www.cdc.gov/)

Of the many new considerations facing employers in this environment, a burgeoning challenge is meeting the needs of teleworking employees with disabilities—both physical and psychological—who require accommodations to perform their essential job functions.

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While often difficult in the physical workplace, these issues are exacerbated when employees are teleworking, as routine communication can be challenging, supervision limited, and the physical workspace out of the employer’s control. This is all the more so as employees navigate the numerous tolls associated with COVID-19—from physical illness to mental or psychological challenges, like depression and even post-traumatic stress disorder.

Employers must continue to accommodate employees wherever they are working—whether at the office or from their kitchen table.

So what are an employer’s obligations to workers with disabilities in a “teleworking” environment? And are there special considerations for employees experiencing disabilities stemming from COVID-19?

The short answer to these questions is that anti-discrimination laws like the Americans with Disabilities Act (ADA) and state and local equivalents still apply. This means that employers must continue to offer reasonable accommodations to staff to the same extent that



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they would in the physical workplace, and that the same considerations for determining whether an accommodation is appropriate still govern.

The Legal Landscape

Broadly, the ADA and state and local laws like the New York State and City Human Rights Laws (NYSHRL and NYCHRL, respectively) require that employers reasonably accommodate qualified employees with a disability, where such an accommodation would enable the employee to perform their essential job functions without causing an “undue hardship” to the employer.

Disabilities can include “a physical or mental impairment that substantially limits one or more of the major life activities,” or having a record of or being regarded as having a disability. This includes “[a]ny mental or psychological disorder, such as...emotional or mental illness,” like major depression,

bipolar disorder, and anxiety disorders, e.g., panic disorder and post-traumatic stress disorder.

To determine if it would be feasible for an employer to offer an accommodation, the ADA and the NYSHRL require that an employer engage in an “interactive process” with the employee following a request for an accommodation. Generally, this process requires a dialogue between the employee and employer to determine what accommodation, if any, is being requested and can be provided. This may include exchanging information from the employee’s healthcare provider, and exploring different types of accommodations, before an ultimate decision is reached.

The NYCHRL is even more employee-friendly. Among other things, it (i) places an affirmative duty on employers to initiate discussions about accommodations if they are on reasonable notice of a needed accommodation; (ii) requires a “cooperative dialogue” (which arguably is a more demanding version of the interactive process); and (iii) mandates that employers provide a written, final determination identifying any accommodation granted or denied.

An employer’s obligations remain the same in the “virtual” setting. Employers must ask questions, gather information on what employees may need to perform their job, discuss alternatives, document the outcome, and assess whether the accommodation is effective going forward. Employers also may need to embrace flexibility in the virtual setting.

As the Equal Employment Opportunity Commission (EEOC) cautions, given the increase in requests and the changed work environment, employers should

consider “interim solutions to enable employees to keep working as much as possible,” including giving consideration to alternatives to traditional medical certifications requirements—due to limited healthcare resources, employers should consider if other information may suffice, such as reports from teledocs, personnel records reflecting a history of disability or impairment, or approving accommodations request without medical documentation. (“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” located at www.eeoc.gov/)

The bigger challenge may, in fact, be recognizing when an employee needs an accommodation, particularly under the NYCHRL’s heightened requirement that employers must initiate a cooperative dialogue upon reasonable notice. Given

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that virtual managers do not have the same in-person oversight, it may be easier to overlook or discount certain behaviours—like lagging performance, non-responsiveness or working outside of normal work hours—as being attributable to the remote environment, when in fact they may be attributable to a mental disability.

Providing Reasonable Accommodations

Employers may also encounter challenges when assessing accommodation



requests, particularly given the necessarily limited access to employees in a remote setting. In many instances, employers will still face the same accommodation obligations: where appropriate, they may be required to provide physical devices, modify work schedules, or provide similar accommodations, as appropriate, although the calculus of what constitutes “reasonable” and an “undue hardship” may be changed.

For instance, one issue is whether an accommodation that previously did not create an “undue hardship” now does due to the teleworking arrangement, because an accommodation may now cause “significant difficulty or expense.” By way of example, during the pandemic, it may be far more challenging to provide temporary assignments, remove marginal functions of the job or hire temporary workers for specialized positions. Likewise, modifying at-home workspaces to accommodate physical needs may be far more expensive than doing so in-office. For example, while an employer can easily send an ergonomic keyboard to a remote employee, if that employee requires an entire revision of their at-home workspace as an accommodation, this could be vastly more expensive than a similar modification in-office.

As noted by the EEOC, issues such as whether an employer has lost a substantial portion of its income stream(s)

and lacks discretionary funds due to COVID-19 may impact the undue hardship determination. That said, while income is one consideration, employers do not have a free pass to simply deny accommodations that cost money. Instead, employers will still want to weigh the cost of an accommodation against its overall budget.

Another consideration is managing employees with ongoing health concerns: what if a remote employee believes COVID-19 has worsened their mental health and requests a modified schedule (or other accommodation) in order to perform? According to EEOC guidance, employees with certain pre-existing mental health conditions such as anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder may experience more difficulties managing the COVID-19 pandemic. (“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” located at www.eeoc.gov/).

Someone with an anxiety disorder, for instance, who works remotely, may need more frequent breaks, additional time to perform tasks, a modified work schedule to attend appointments or even an app to help minimize anxiety or stress. Even before the pandemic, companies were confronting growing mental health issues, and these issues are likely to increase as employees continue to work through COVID-19.

Additionally, as businesses reopen their offices, employers may have difficulty distinguishing between employees who do not wish to return to the office because of a diagnosable mental or physical health concern that are protectable under the ADA, and those

employees who have generalized anxiety or simply prefer to continue working remotely. Like any accommodation request, employers should discuss with the employee whether they have a qualifying disability, and if necessary, ask the employee to provide medical documentation.

However, if an employee is merely hesitant to return to the office because they want to minimize their risk of COVID-19 exposure, while this hesitation is understandable, this alone is not a qualified disability under the ADA. Employers are encouraged to train managers to be attuned to these issues and bring them to human resources to be addressed properly.

In general, employers may wish to keep the following suggestions in mind when managing accommodation requests.

Consider whether an employee who previously received an accommodation needs one while teleworking, a modification to same, or if either might create an undue hardship.

Train supervisors to proactively partner with human resources in identifying and addressing potential accommodation requests or, in the case of the NYCHRL, the potential need for same, and remind managers to be mindful not to retaliate against employees requesting or receiving accommodations.

As workers return to the office, avoid singling out employees in high-risk categories for COVID-19, such as older adults, those with underlying medical conditions, and those who are pregnant, such as by prohibiting them from returning to the office. While employers understandably may wish to protect their most at-risk staff, employers

generally may not treat workers in high-risk populations differently—such as by excluding them from meetings or the workplace—unless the employer can show that there would be a “direct threat” to the employee which could not be ameliorated with a reasonable accommodation; this can be a high threshold to satisfy.

Revise policies or create a teleworking policy to explain how accommodation requests will be handled. This can also include information on other teleworking issues, like how non-exempt employees should record their hours (the US Department of Labor recently provided guidance on this); safeguarding confidential information; setting clear expectations for teleworking; and reaffirming the continuing application of the employer’s anti-harassment and anti-discrimination policies. (US Department of Labor, Field Assistance Bulletin, No. 2020-5, located at dol.gov/)

Periodically check-in with employees to determine whether an accommodation is effective or if an alternative is necessary.

The full impact of COVID-19 on businesses and their employees, including a long-term transition to more remote working, remains to be seen. But we know that employers must continue to accommodate employees wherever they are working—whether at the office or from their kitchen table.