

Reasonable Accommodation Post-COVID: *Managing Remote Work Requests & Employee Mental Health in a Post-Pandemic World*

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Today's Topics

- Brief ADA Requirements Overview
- EEOC Guidance re: Remote Work
- Case Examples re: Remote Work
- Remote Work Reasonable Accommodation Analysis
Emphasis Using Post – COVID Example
- Accommodations- Other recent developments
- COVID-19/ADA- Other issues
- Questions as we go

ADA Refresher

ADA Covers

- Protection is provided to individuals:
 - With a **physical or mental disability**, [have it]
 - With a **history** of having such a disability, [had it] or
 - Who are **regarded** as having such a disability. [you think I have it]



Employers Must

- Provide reasonable accommodations to qualified individual
- Who have an actual disability or a disability record
- If such reasonable accommodations are necessary for individual to perform the essential job functions

Disability

- A disability is a physical or mental condition that makes it more difficult for an individual to do something important, or that impacts one of his or her major bodily functions in comparison to the general population
- The determination should not demand an extensive analysis
- Short-term conditions are disabilities if they are “substantially limiting”

Essential Job Functions

- Be prepared to articulate & support why a job requirement is essential. Can a manager and/or a supervisor provide credible, solid & sworn testimony?
- What will the employees who perform the job say?
- If you do not know, better find out before you act.



Reasonable Accommodation

- Reasonable accommodations are meant to remove barriers to job performance
- The ADA requires employers to explore alternatives that would still allow the employees to get the work done
- Employees do not have to invoke the “ADA” or even know that they have an ADA-covered disability



Reasonable Accommodation

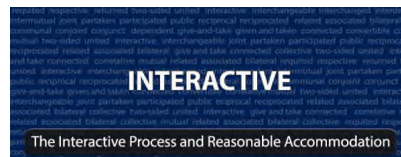
- Accommodation must be provided up to the point of undue hardship
- **Undue hardship** means an accommodation would be:
 - Unduly costly
 - Substantial
 - Disruptive
 - Would fundamentally alter the nature or operation of the business
- Employers are not required to allow an employee to work if there is a direct threat to the employee or others

Interactive Reasonable Accommodation Process

- When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition
- To request accommodation, an employee may use “plain English.”
- No need to mention the ADA or use the phrase “reasonable accommodation”

ADA Interactive Process Requires

- Dialogue with employee
- Identify any current or expected work restrictions
- Explore all accommodation options that will serve to allow employee to perform essential functions
- Get doctor’s buy-in to several options
 - Employee’s doctor
 - Employer’s doctor



ADA Interactive Process (Cont.)

Requires:

- Preparation prior to the interactive dialogue meeting
- Consider Job Accommodation Network as a starting point [Askjan.org]
- View suggested accommodations by disability
- Understand the disabilities better
- Ask the employee to bring a written list of proposed suggested accommodations

ADA Interactive Process

Document the process:

- Employee's requested/proposed accommodation(s) and why
- Other potential accommodations
- Pros and cons of all accommodations discussed
- Employee's reaction
- Which accommodation was chosen and why



Reasonable Accommodations Examples

[In order of priority]:

- Job restructuring [Which now more than ever will require consideration regarding remote work]
- Modified work schedules
- Acquiring or modifying equipment
- Reassignment to a vacant position
- Leaves of absence



Reasonable Accommodations Examples (Cont.)

- Remember, today we are only discussing Remote Work as the requested reasonable accommodation
- If Remote Work is not an appropriate reasonable accommodation, likely that a leave of absence is the next ADA reasonable accommodation analysis



EEOC Guidance: Remote Work & COVID-19 Accommodations

EEOC Remote Work Statements:

- 2005:
 - “The ADA does not require an employer to offer a telework program” but where an employer chooses to do so, the employer “must allow employees with disabilities an equal opportunity to participate in such a program.”

EEOC 2020: What You Should Know About COVID-19 and the ADA

- [Last updated 7/12/22]
- D. 15.
 - “Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID 19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA / Rehabilitation Act accommodation?”

EEOC 2020: What You Should Know About COVID-19 and the ADA

- [Last updated 7/12/22]
- A:
 - **No** ...Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. **If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation.**
 - ...

EEOC 2020: What You Should Know About COVID-19 and the ADA

- [Last updated 7/12/22]
- A [continued]:
 - ... To the extent that an employer is permitting telework to employees because of COVID 19 and is choosing to excuse an employee from performing one or more essential functions, then a request – after the workplace reopens – to continue telework as a reasonable accommodation **does not have to be granted if it requires continuing to excuse the employee from performing an essential function.** ...

EEOC 2020: What You Should Know About COVID-19 and the ADA

- Last updated 7/12/22]
- A [continued]:
 - ...The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID 19, or otherwise chose to permit telework, **does not mean that the employer permanently changed a job's essential functions**, that telework is always a feasible accommodation, or that it does not pose an undue hardship. **These are fact-specific determinations.** ...

EEOC 2020: What You Should Know About COVID-19 and the ADA

- [Last updated 7/12/22]
- D. 16.
 - ... Assume that prior to the emergence of the COVID 19 Pandemic, an employee with a disability had requested telework as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. **However, after the COVID crisis has subsided and temporary telework ends, the employee renews the request for telework as a reasonable ...**

EEOC 2020: What You Should Know About COVID-19 and the ADA

- [Last updated 7/12/22]
- D. 16.
 - ... accommodation. Can the employer again refuse the request?
- A:
 - Assuming all the requirements for such a reasonable accommodation are satisfied, **the temporary telework experience could be relevant to considering the renewed request.** In this situation, for example, the period of providing telework because of the COVID 19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely . . .

EEOC 2020: What You Should Know About COVID-19 and the ADA

- [Last updated 7/12/22]
- D. 16.
 - ... accommodation. Can the employer again refuse the request?
- A:
 - ... and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

EEOC 2022: COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws

- [3/14/22]
- Q5.
 - “Do employees have a right under federal employment discrimination laws to reasonable accommodations such as telework ... because they are caregivers?”
- A.
 - “**In general, no.** ... However, employees who are unable to perform their job duties because of ... related medical conditions must be treated the same as other employees who are temporarily unable to perform job duties.”

Conclusions Regarding EEOC Remote Work Statements:

So, as we predicted last year in this seminar, the EEOC is now starting to litigate cases arguing that remote work is a potential reasonable accommodation on a case-by-case basis

Treat all remote work accommodation requests just like you treat any other ADA reasonable accommodation request.

Down To Earth Practical Advice Regarding Remote Work Requests:

- Remote Work / COVID-19 Accommodation Process
 - Employee generated, not Employer generated
 - Comply with all ADA accommodation best practice requirements
 - Do not discriminate (gender, disability, religion, familial status, association with a disabled person)
 - Apply consistently
- [Remember: We are focusing on Remote Work; but request could also be for an LOA for a period of time to be able to RTW in person or to remote work]

Some Underlying Reasons for Remote Work Accommodation Requests:

- [These remote work requests don't work where the employee performs manufacturing production work at the employer premises as an essential function]
- "I'm still not convinced that the workplace is COVID safe and my anxiety is kicked into overdrive about RTW."
- "I'm just as productive working from home as I am working at the office."
- "I have an underlying pulmonary condition which makes it too risky for me to work in the office."

Some Underlying Reasons for Remote Work Accommodation Requests:

- The CDC still indicates that individuals with the following medical conditions are more at risk related to COVID:
 - Diabetes
 - High blood pressure
 - Obesity
 - Cystic Fibrosis
 - Liver disease
 - High risk mental condition [depression & anxiety]

COVID-19 Accommodation Request Form

- Consider creating one which includes
- Employee and position/job title
- Employee explaining reason for request
- If based on a health condition, description of condition
- Employee identifying a preferred accommodation(s)
- Employee signature

Disability-Related Requests

- For disability-related requests for remote work, require Accommodation Medical Verification Form which includes:
 - Description of medical condition
 - List Essential Job Functions employee unable to perform
 - Duration of need for remote work accommodation
 - Explanation whether able to perform other positions
 - Whether leave rather than or in conjunction with remote work would allow employee to return and perform Essential Job Functions
 - If so, whether need for remote work is indefinite

Interactive Reasonable Accommodation Process

- Review nature of request
- Evaluate potential accommodations
- Assess undue hardship
- NOTE: Due to nature of COVID-19, the length of many requests may be indefinite or unknown. That is a relevant factor for both reasonableness and undue hardship.

ADA; FMLA; WC; Policies & Procedures

- Think of helium filled balloons
- All these laws and your policies and procedures are happening simultaneously



What the Courts Are Saying About Remote Work, Mental Health Conditions, and COVID-19?

[Pre-COVID] The 6th Circuit Said:

- “For many positions, regular attendance at the work place is undoubtedly essential.”
- It is not necessarily true “that the ‘workplace’ is the physical worksite provided by the employer,” and that “the workplace and an employer’s brick-and-mortar location [are] synonymous.”

Telecommuting



[Pre-COVID] The 6th Circuit Said (Cont.):

- “[A]s technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, **attendance at the workplace can no longer be assumed to mean attendance at the employer’s physical location.** Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the ‘workplace’ is anywhere that an employee can perform her job duties.”

Some Highlights

- “The employer also may ask you to submit a letter from your health care provider documenting that you have a mental condition, and that you need an accommodation because of it.”
- “Your employer might also ask your health care provider whether particular accommodations would meet your needs.”
- Practical Suggestion: Be proactive. Ask the health care provider why your employee needs remote work as the reasonable accommodation

EEOC v ISS Facility Services [USDC ND Georgia, 2021]

- EEOC's first COVID-19 related disability accommodation suit
- Employee has chronic obstructive lung disease & High blood pressure
- Around the same time employee diagnosed, ISS sent employees home for remote work four days each week due to COVID

EEOC v ISS Facility Services [USDC ND Georgia, 2021] (Cont.)

- This helped employee control her medical conditions
- Employee was asking for 2 of 5 days remote work
- Employer denied even though more than six months remote work 4 days a week during COVID
- Employer terminated employee for poor performance, but the allegation is that the termination was really because employee refused to RTW and her disability required remote work

EEOC v. ISS Facility Services [USDC ND Georgia, 2021] (Cont.)

- EEOC arguing that “presence at work” is not an essential function
- For positions that are not on-site production-based, this is going to be a significant trend related to reasonable accommodation requests
- This case is set for summary judgment arguments
- Practical Implication: This case confirms that employers should consider remote work as a reasonable accommodation option and be prepared to articulate the undue hardship if the accommodation is denied

Conway v. Detroit Public Schools [E.D. Mich 2021]

- 2020: Detroit public school teachers were remote
- 20-21: Option to teach remote or in-person
- 21-22: In-person teaching, generally
 - Virtual School: students could be remote, but teachers present in a classroom
 - Teachers with “demonstrated medical conditions” were given preference for Virtual School jobs
- Employee requests Virtual School assignment; all spaces filled
- Later, more slots opened and District offered Employee to teach in virtual classroom 3 days/wk and from home 2 days/wk

Conway v. Detroit Public Schools [E.D. Mich 2021] (Cont.)

- Employee wanted to teach fully remote, declined District's offer, failed to report to work.
- District continued to have communication with Employee
- Employee filed suit, asked Court to issue an injunction that would prohibit District from requiring Employee to reach in person
- Holding: Injunction denied
 - Employee likely caused the interactive breakdown by refusing to provide additional health information
 - District provided reasonable accommodation (it can pick among multiple reasonable accommodations)

Maertens v. JAC Products, Inc. [E.D. Mich 2021]

- Employee suffered from a stroke, doctor provided a note requesting Employee to work from home *because he could not drive to work* for 3 weeks.
- Employee requested to WFH for 3 weeks, after Employer pushback, Employee eventually made other arrangements to get to work
- Employee files a failure to accommodate claim
- Holding:
 - **Competing testimony** about whether job could be performed remotely and **unclear job description** warranted denial of summary judgment on question of whether employee was qualified to perform the essential functions with or without accommodation

Des Jardins v. Community Action Alger Marquette [W.D. Mich 2021]

- Employee was supervisor, diagnosed with an anxiety disorder
- Employee requested transfer from one worksite to another
- Employer denied request, Employee brought failure to accommodate claim
- Holding:
 - Employees job as a supervisor was an ‘interactive job’
 - Employer rule that ‘regularly attending work on-site’ was an essential job function, especially for an interactive job
 - When employee was unable or refused to work on-site, he lacked the qualifications to perform essential job functions
 - As a result, employee was not a “qualified individual with a disability.”

Haas v. Adtegrity.com [W.D. Mich 2021]

- Issue: Evidence to establish “unreasonableness” of an accommodation request and undue hardship standard
- Employer sometimes, but not always, permitted Employee to work from home following previous surgical procedures
- Employer denied subsequent WFH request
- Employee brought claims under ADA/PWDCRA
- Holding:
 - Employer failed to identify authority establishing that Employee’s WFH request was per se unreasonable or imposed undue hardship on Employer
 - Could be exceptions to general rule that regular attendance is an essential function of the job.

Hypo

Hypo Example: Jeff

- Jeff is an attorney
- He has performed work remotely since January 1, 2021 due to COVID [servicing clients through Teams calls]
- Jeff's employer is demanding he RTW in person and service clients in person where client requests 10/15/22
- Law firm is taking the position that "presence / on-site attendance is an essential job function"
- Jeff has provided medical documentation which confirms that he has:
 - PTSD related to COVID
 - Generalized Anxiety
 - Agoraphobia [fear of confined spaces and crowds]

Hypo Example: Jeff

- PTSD - ADA covered
- Generalized Anxiety - ADA covered
- Agoraphobia [fear of confined spaces and crowds] - ADA covered
- ADA reasonable accommodation work from home?

Hypo Example: Analysis

- What would the Court focus on?
 - Jeff has a disability, but does his disability require telework?
 - What does the medical documentation say tying the disability to remote work?
 - What are Jeff's essential job functions?
 - Focus: Core job duties, not marginal ones
 - 6th Circuit has told us factors to consider:
 - Amount of time spent on particular functions
 - Employer's judgment (some weight, but not determinative)
 - Written descriptions for the position
 - Consequences of not requiring the employee to perform the particular functions
 - Did Jeff satisfactorily perform all essential job functions while working remotely during COVID-19?

Accommodations – Other Recent Developments

ADA: Gender Dysphoria

- ADA: Excludes “gender identity disorders” from its coverage
- August 2022: *Williams v. Kincaid*
 - 4th Circuit (Virginia, North Carolina, South Carolina, Maryland, West Virginia)
 - Gender dysphoria: A medical condition where an “incongruence between an individual’s gender identity and assigned sex” results in “clinically significant distress.”
 - Holding: Rejects the idea that all individuals who experience differences between their gender identity and assigned sex are automatically disabilities under the ADA.
 - Rather, only those individuals who experience clinically significant distress because of the incongruency have an impairment that may substantially limit a major life activity.
- EEOC issues “Sexual Orientation and Gender Identity” resource
 - <https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination>

Discrimination, Access, Pronouns

- SCOTUS: Bostock v. Clayton County (June 2020)
- EEOC: A dignity and respect issue
 - “Although accidental misuse of a transgender employee’s preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.”
 - “Prohibiting a transgender person from dressing or presenting consistent with that person’s gender identity would constitute sex discrimination.”
- Rouch World LLC et al v. Michigan Dept of Civil Rights et al (July 2022): ELCRA prohibits discrimination on the basis of sexual orientation



COVID-19/ADA – Other Issues

Medical Inquires and Exams

- July 2022:
 - “Job related and consistent with business necessity”
 - Assess whether current pandemic circumstances and individual workplace circumstances justify viral screening testing of employees to prevent workplace transmission.
 - Factors may include:
 - Level of community transmission
 - Vaccination status of employees
 - Accuracy and speed of processing testing
 - Degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations
 - Ease of transmissibility of the current variant(s)
 - Possible severity of illness from current variant
 - What types of contacts employees may have with others in the workplace
 - Potential impact on operations if an employee enters the workplace with COVID-19



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