MANAGING REQUESTS FOR REMOTE WORK OUTSIDE THE ADA ACCOMMODATIONS PROCESS

In 2020, the world seemingly shut down as Covid-19 took hold of all aspects of our society. Quarantines replaced business lunches, and companies were forced to look for innovative ways to stay open during the pandemic. In response to stay-at-home mandates, the concept of working from home soared – a concept now widely known as "remote work." Covid-19 forced employers to reimagine the traditional office setting thereby transforming homes into remote workplaces.

As people slowly emerged from isolation, many workers realized the pandemic provided a small silver lining: ***their first opportunity to work from home***. Now, with the height of the Covid pandemic in the past[i], many employees want to continue working from home. Employers are seeing an increase in requests for remote work as an accommodation under the Americans with Disabilities Act (ADA)[ii]. But, requests to work from home are not limited to employees covered by the ADA or other anti-discrimination laws. With labor shortages and unfilled positions, employees are in a better position to negotiate more attractive employment terms, such as working from home; thus, some employers are feeling the pressure to allow employees to work from home or risk losing talented members of their workforce.

When managing remote work requests, preparation is the key to success. Companies should anticipate remote work requests, and be prepared with a written policy <u>before</u> receiving the first request to assure employers have sufficient time and information to fully evaluate the relevant considerations that should go into deciding whether to allow remote work. Remember, each remote work decision becomes a comparator and benchmark for all future requests. Thus, employers should be careful not to make hasty decisions that result in a precedent that is inconsistent with the company's overall philosophy on remote work.

Some employers are hesitant to create a written policy on remote work based on a misperception that having a policy will encourage employees to seek out remote work opportunities when they would not otherwise do so. In reality, most employees are already aware of the current remote work trends but may be unclear on what their employer's remote work policy is. Thus, a written policy provides clarity on whether remote work is permitted, the circumstances under which it is permitted, and the procedure for making the request.

For employers who are willing to embrace the idea of work from home, a robust written policy reduces the risk of miscommunications, solidifies expectations, and assures continuity between remote employees and those working in the office. Conversely, for employers that oppose the concept of remote work, a comprehensive policy makes it easier to deny requests to work from home because the policy sets out the specific circumstances under which remote work is (or is not) permitted. Thus,

the employer can simply rely on its own written policy when responding to a remote work request, which simplifies the decision-making process, and reduces subjectivity and inconsistency caused by variable facts and decision-makers.

A clear policy also serves to re-enforce the employer's philosophy on remote work, which may discourage requests if employees understand remote work is not permitted except under the clearly defined exceptions. Thus, if the employee's situation does not fall within one of the enumerated exceptions, (1) the employee may be dissuaded from requesting remote work at all; and (2) the employer can swiftly deny the request with support from the written policy. Moreover, having and enforcing a non-discriminatory workplace policy will mitigate claims of discrimination and unfair treatment. Employers should invest time to evaluate how allowing employees to work from home will affect all aspects of the business. Here are a few key points to consider:

1. ***State the Company Philosophy:*** First, the written policy should clearly state the company's position on whether remote work is permitted. There should be no doubt when employees read the policy whether the employer will entertain requests to work from home. If the company expects all employees to be in the office, then clearly state so in the preamble to the policy: "**THE COMPANY DOES NOT PERMIT WORK FROM HOME EXCEPT AS OUTLINED IN THIS POLICY OR REQUIRED BY APPLICABLE LAW**."

The policy should then outline the specific exceptions to the office mandate. While some employers may be inclined to allow no exceptions to its "No Remote Work" policy, doing so will result in zero flexibility in approving remote work requests under exigent circumstances. Worse yet, failure to include an avenue for approving exceptions will likely result in a deviation from the written policy if an exception is made in the future. The better approach is to carve out very narrow exceptions that allow for remote work in only the most extreme situations (unless mandated by federal, state or local law)[iii]. The key to a strong written policy is assuring the company follows and applies it uniformly in all situations. Once the employer deviates from the written policy in one case, other employees will expect similar deviations, which ultimately renders the policy relatively useless if it is not going to be followed.

2. ***Identify Positions Eligible (or Ineligible) for Remote Work:*** A fundamental part of crafting a remote work policy is evaluating and knowing which jobs can (and cannot) be done effectively from a remote location. The company should begin by creating an inventory of all positions, including a description of the job duties for each job. Job descriptions should be thorough, accurate and should match what the employee does in **actual practice** - - - as opposed to what the individual drafting the policy believes the job should entail. When drafting a job description, observe employees doing the job, and then talk to both the employee and manager to assure all job duties are accurately captured. If some job duties are more important than others, specify essential job functions vs. secondary responsibilities. Also, include

whether physical presence at the worksite is essential to the job, and include a list of any machinery or equipment that is necessary to do the job, including whether the company allows the equipment to be removed from its premises.

Next, create a list of jobs that can be done from home. This will eliminate ambiguity related to whether a job is eligible for remote work or not. If it's not on the list, the job is not eligible for remote work. Employers can use the list as a threshold consideration for remote work, and summarily deny requests when the employee's job is not eligible for remote work.

3. ***Create a Process for Requesting, Evaluating and Approving Remote Work Requests***. A uniform process promotes consistency and reduces the risk of disparate treatment of employees. The process should include:

> ***Remote Work Considerations and Criteria.*** Create a set of uniform criteria to be evaluated and considered so that all requests are judged according to the same standards. Provide a checklist for decision-makers to assure all relevant factors are considered. Establish remote work criteria to assure remote workers continue to perform at the same levels as employees working in the office by requiring satisfactory job performance, acceptable attendance history, adequate production numbers (or a minimum threshold for consideration), a specified length of service (e.g. eligible after 12 continuous months of employment) or a lack of discipline or counseling within a specified timeframe.

> ***"Remote Work Request" Forms.*** Create a form that requests the same information from all employees so remote work requests are evaluated on the same factors.

> ***Create Checks and Balances in the Process.*** Assign responsibility for evaluating requests to a single department (*e.g.* HR or benefits) as opposed to allowing individual managers to make remote work decisions. Managers may be permitted input, but there should be a designated decision-maker or decision-making unit to assure all decisions are consistent with prior decisions, and comport with all other company policies and practices (and applicable laws).

> ***Assess Disparate Impact on Protected Classes.*** Employers should be cognizant of whether any aspect of the policy results in a disproportionate number of individuals in a protected class being denied the opportunity for remote work, thereby exposing the employer to potential discrimination claims. For instance, if the cost of buying necessary equipment and supplies results in a disproportionate impact on one class, the employer may need to revise the policy to alleviate the financial impact on those affected employees so that all employees have an equal opportunity for remote work.

4. ***Provide Training for Managers who Supervise Remote Employees.*** Managing remote employees is different than managing employees who are physically present in the same work space as the manager. Employers should train managers to:

➢ Ensure the remote work environment is safe, and free from discrimination and harassment (*i.e.* harassing emails or inappropriate video conferences);

➢ Communicate effectively with remote workers (e.g. email, video conferencing);

➢ Secure company-provided equipment, information systems and technology;

➢ Protect confidential information and trade secrets;

➢ Monitor attendance, productivity and performance;

➢ Maintain effective working relationships;

➢ Monitor the health and safety of remote workers (e.g. mental health due to social isolation, drug or alcohol abuse); and

➢ Spot issues that require consultation with legal or experts, such as assessing the tax consequences of having remote employees in a state different from their assigned workplace or compliance with applicable wage and hour laws for non-exempt employees.

Finally, once a written policy is in place, the employer should continue to monitor and evaluate the remote work policy to assure it continues to align with the company's core objectives and supports the needs of the business. Employers should continually monitor fluctuations in attendance, performance or productivity; evaluate employee retention and job satisfaction; and assess the quality and quantity of job applicants applying for positions that include the opportunity for remote work.

A robust remote work policy may also provide new opportunities to expand diversity, equity and inclusion initiatives, and provide a competitive advantage for employers who struggle to fill positions due to labor shortages. A well-planned remote work program can provide mutual benefits to both the company and the employee. Conversely, poor planning (or a failure to plan altogether) may result in a decision-making process that does not accurately reflect the company's business objectives, inconsistency in the decision-making process, and lack of uniformity and fairness in the allowance of remote work . . . which are the fundamental building blocks of a discrimination lawsuit. Planning and forethought before being faced with a deluge of remote work requests will pay off down the road by establishing clear parameters for work-from-home requests, which can then more easily be applied to case-by-case requests as employees continue trying to find ways to establish their own homes as their primary workplace.

For more information on issues related to remote work, including best practices, policies and training resources, please contact the author.

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[i] *See U.S. Covid-19 Global Response & Recovery Framework* (updated Sept. 2022) by Centers for Disease Control (CDC), https://www.whitehouse.gov/wp-content/uploads/2022/09/U.S.-COVID-19-GLOBAL-RESPONSE-RECOVERY-FRAMEWORK-_clean_9-14_7pm.pdf

[ii] *See Work at Home/Telework as a Reasonable Accommodation*, EEOC Technical Assistance Document (issued 2/3/2023), https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation

[iii] As a reminder, this article focuses solely on remote work requests that are determined to fall outside the protections of the ADA or other anti-discrimination laws.