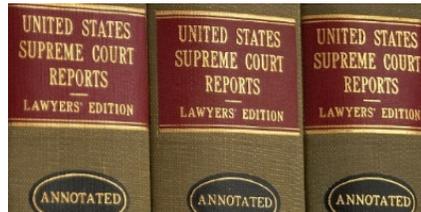




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POST PANDEMIC EMPLOYMENT LAW: Your Questions Answered

WORKING REMOTELY

FACULTY

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**COVID 19 Return To Work Series -
Topic Two
Is It Legal To Mandate that All
Employees Must Return to Work in
the Office?**

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July __, 2021

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Daniel V. Duff III is a principal in the Long Island, New York, office of Jackson Lewis P.C. He has more than 18 years of experience in advising clients in a wide array of employment law and litigation areas, with a focus on affirmative action, diversity, EEO and pay equity matters.

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Introductory Statement

THE MATERIALS CONTAINED IN THIS HANDOUT WERE PREPARED BY THE LAW FIRM OF JACKSON LEWIS P.C. FOR THE ATTENDEES' OWN REFERENCE IN CONNECTION WITH MANAGEMENT EDUCATION SEMINARS PRESENTED BY THE FIRM. SINCE THESE MATERIALS AND RELATED DISCUSSIONS ARE INFORMATIONAL AND EDUCATIONAL IN NATURE AND REPRESENT THE SPEAKER'S OWN VIEWS, ATTENDEES SHOULD CONSULT WITH COUNSEL BEFORE TAKING ANY ACTIONS AND SHOULD NOT CONSIDER THESE MATERIALS OR DISCUSSIONS THEREABOUT TO BE LEGAL OR OTHER ADVICE. PROFESSIONAL ADVICE SHOULD BE OBTAINED BEFORE ATTEMPTING TO ADDRESS ANY LEGAL SITUATION OR PROBLEM.

**Is it Legal to Mandate that Employees Return to
Work in the Office?**

Generally, Yes

- Employers are permitted to require employees to work in the office.
- The courts will not “second guess” the business judgment of employers in this regard, provided the decisions are consistently applied and non-discriminatory in nature.
- The EEOC has stated that it will not use the fact that employers have required employees to work from home during the COVID-19 pandemic as a basis for determining whether working in the office is an essential function of the job in ADA matters. [Add cite]

But . . .

- This rule is subject to important exceptions:
 - State or local orders regarding COVID-19 restrictions;
 - **reasonable accommodations** under the Americans With Disabilities Act and the state and local human rights laws; and
 - disparate impact.

Assessing Reasonable Accommodations In General?

The Interactive Process: Generally

- Accommodations must generally be requested by employee or someone on employee's behalf
- Employer is obligated to engage in the interactive process by working with the employee to:
 - Determine limitation
 - Assess the need for an accommodation
 - Provide a reasonable and effective accommodation
- An employer must discuss with a disabled person/applicant what reasonable accommodation(s) will allow them to perform the essential job functions

Medical Documentation

- Do not assume that an employee is entitled to a reasonable accommodation
- If a disability is not obvious, an employer is entitled to documentation from a health care professional establishing a qualifying disability
- Employer is only entitled to information necessary to determine whether the employee can perform the essential functions with or without reasonable accommodation or work without posing a direct threat
- Requested information should be “job-related and consistent with business necessity”

Medical Documentation

- If disability or need for reasonable accommodation is not obvious, the employee must provide medical documentation
- The company is generally entitled to more information than a “prescription paid” doctor’s note
- Medical documentation is information to consider as part of the interactive process
- Employees who fail to provide medical documentation are not “qualified individuals with disabilities.”

More on Reasonable Accommodations

- If an employee asks to work at home due to a disability the employer MUST engage in the interactive process.
- Employers and employees may find it helpful to consult the [Job Accommodation Network \(JAN\) website](#) as a resource for different types of accommodations. JAN's materials about COVID-19 are available at <https://askjan.org/topics/COVID-19.cfm>.
- An employer MUST consider if telework is an option for that particular job as an accommodation.

Reasonable Accommodations: Generally

- Analysis is fact-specific
- Do not have to provide the best or most expensive accommodation
- Do not have to create a job
- Do not have to lower productivity levels
- Examples:
 - Unpaid leave of absence
 - Equipment/furniture
 - Frequent breaks/schedule changes
 - Reassignment

What Is Not a Reasonable Accommodation

- Removing essential job functions
- Diluting uniformly enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Promotion
- Bumping an employee from a job
- Creating a job
- Changing a supervisor



Good Faith in the Interactive Process

- **IMPORTANT** – It is a violation not to engage in the reasonable accommodation process even if it would have been unsuccessful
- The employer should meet with the employee
- HR should request information about the condition and what limitations the employee may have
- Ask the employee what he or she specifically wants; consider the employee's request

Good Faith in the Interactive Process

- Discuss available alternatives
- Document entire process IN WRITING
- Avoid using legal terms – “disability,” “reasonable accommodation,” and “disabled”
- Don’t make assumptions – utilize the interactive process

The Interactive Process

- The interactive process is all about communication
- A snapshot in time
 - If something changes reengage in interactive process
- Ensure communications are clear
- Communicate in writing when process closes

Undue Hardship

- Undue hardship defense applies under the ADA
- In applying the undue hardship standard, an employer's size and resources come into play.
- While the standard is easier to establish under Title VII than the ADA, employers should be weary in relying on the defense either statute since courts are often unsympathetic to the defense.

Telecommuting As A Reasonable Accommodation

Vulnerable Populations

- The CDC addresses vulnerable populations and provides this very simple and straightforward guidance to employers: Protect employees at higher risk for severe illness through supportive policies and practices.
 - Older adults and people of any age who have serious underlying medical conditions are at higher risk for severe illness from COVID-19.
 - Support and encourage options to telework, if available.
 - Consider offering vulnerable workers duties that minimize their contact with customers and other employees (e.g., restocking shelves rather than working as a cashier), if the worker agrees to this.
 - Offer flexible options such as telework to employees. This will eliminate the need for employees living in higher transmission areas to travel to workplaces in lower transmission areas and vice versa.
 - Ensure that any other businesses and employers sharing the same workspace also follow this guidance.



Telecommuting

- Permitting an employee to work at home can be a reasonable accommodation, even if an employer has no telework program
- Well-established general rule that regular attendance at site is essential to most jobs
- Essential functions generally defer to employer's judgment and written job description
- It is reasonable for most jobs to require regular, predictable on-site attendance from all employees
- EEOC's own regulations support general rule
 - An employer may refuse a telecommuting request when, among other things, the job requires "face-to-face interaction and coordination of work with other employees," "in-person interaction with outside colleagues, clients, or customers," and "immediate access to documents or other information located only in the workplace"



Telecommuting

- Issue is whether modifying an employee's worksite is a reasonable accommodation
- Company policies restricting or placing conditions on telecommuting
- EEOC: Employer must modify policies regarding work location to allow employee to work at home if it's an effective accommodation and no undue hardship
- EEOC acknowledges certain limited jobs can only be performed at a worksite (e.g., food servers, cashiers, truck drivers)

Telecommuting – COVID Impact

- EEOC Guidance:

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-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request?

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, 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.

5 Questions to Ask When Considering a Telecommuting Accommodation

1. What are essential functions of the job – must the duties be performed in the workplace?
2. What is company policy and practice on telecommuting?
3. Is the requested accommodation reasonable?
4. Are there other accommodations that would effectively accommodate the employee's limitations?
5. What hardship, if any, would be imposed if telecommuting is allowed?

Confidentiality and Non-Retaliation

Under the ADA, it is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.

Disparate Impact

- If an employer's policy of employees to return to work have a adverse impact on a protected group, it could be a violation of Title VII.
- If adverse impact results from such a policy, the burden falls on the employer to show that the policy was justified by business necessity and was consistently applied.

Questions?

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Thank **you.**



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