Spotlight On Legal Complexities Of Telecommuting After Second Circuits Calls It Potential Reasonable Accommodation

The Second Circuit Court of Appeals recently ruled that telecommuting is a potential reasonable accommodation under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. Although new technologies have made telecommuting more commonplace, not all employers have embraced the work-from-home concept. The Second Circuit's recent opinion, as well as recently proposed and enacted telework legislation, highlight that employers cannot ignore telecommuting, and should consider the myriad legal issues that telecommuting presents, including wage-and-hour liability, privacy and data protection concerns, workplace safety, and other obligations.

The Second Circuit's Opinion on Telecommuting as a Reasonable Accommodation

In *Nixon-Tinkelman v. N.Y. City Dep't of Health & Mental Hygiene*, No. 10-3317-cv, 2011 WL 3489001 (2d Cir. Aug. 10, 2011), the plaintiff suffered from several physical ailments including cancer, heart problems, hearing impairment, and asthma. The plaintiff had worked at the New York City Department of Health and Mental Hygiene ("DOHMH" or the "Department") since 1984 and had worked out of DOHMH's Queens office for 21 years as a Regional Director. In January 2006, she was transferred to the Department's Manhattan location. The transfer resulted in a longer and more difficult commute for Ms. Nixon-Tinkelman. As a result, she requested, as an accommodation for her disability, to be reassigned to a "work location closer to home in order to reduce the stress and anxiety associated with the hour and a half commute each way every day." Representatives from the Department met with Ms. Nixon-Tinkelman to discuss possible alternative assignments. DOHMH concluded that one of the assignments in which Plaintiff expressed an interest was "inappropriate" because the job required extensive travel and therefore would not resolve Ms. Nixon-Tinkelman's commuting issue. DOHMH further concluded that Ms. Nixon-Tinkelman's suggestion of a transfer to the Department's Pest Control Office in Queens was not a

"viable" option. Because the Department believed that there was no suitable reassignment that could be made within the organization to accommodate Ms. Nixon-Tinkelman, they denied her request. Ms. Nixon-Tinkelman filed suit under the ADA and sections 501 and 504 of the Rehabilitation Act, alleging that the Department failed to make a reasonable accommodation.

Under the ADA and Rehabilitation Act, an employer has an affirmative duty to provide a reasonable accommodation when it is aware that an employee has a qualifying disability that prevents the employee from performing essential job functions, so long as the accommodation does not unduly burden the employer. Granting summary judgment for the defendant, the Southern District of New York ruled that commuting was beyond the scope of the plaintiff's job, and "not within the province of an employer's obligations under the ADA and the Rehabilitation Act." The Second Circuit reversed, relying on two prior cases in which the Second Circuit ruled that an employer might have an obligation to assist with an employer's commute: *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512 (2d Cir. 1995); and *DeRosa v. Natl's Envelope Corp*, 595 F.3d 99 (2d Cir. 2010).

In *Lyons*, the Second Circuit reversed the dismissal of an ADA claim alleging that Plaintiff's employer failed to accommodate her request for a parking space near her office. The district court dismissed the case on the ground that the accommodation requested by Lyons was unreasonable as a matter of law; however, on appeal, the Second Circuit ruled that the complaint stated a claim on which relief could be granted, holding that "there is nothing inherently unreasonable . . . in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work." In *DeRosa*, the Second Circuit suggested that permitting a disabled employee to work from home was a reasonable accommodation. The *DeRosa* court vacated an award of summary judgment for the employer, in which the district court ruled that the plaintiff was judicially estopped from bringing an ADA claim. In so doing, the Second Circuit did not question the reasonable accommodation--working from home--that the Plaintiff sought. The *Nixon-Tinkelman* court's reliance on *DeRosa* implies that the Second Circuit interprets the decision as standing for the proposition that working from home can be a reasonable accommodation.

In *Nixon-Tinkelman*, the Court of Appeals explained that the determination of whether an accommodation is "reasonable" must be made on a case-by-case basis and remanded the case back to the trial court to conduct the required "fact-specific inquiry." The Second Circuit made clear that employers cannot categorically deny requests for an accommodation to work from home or to receive other commuting accommodations. Rather, employers must assess the circumstances of such requests on an individualized basis as they would with any other request for an accommodation. The Second Circuit suggested a non-exhaustive list of factors for the trial court to use in evaluating the reasonableness of a potential accommodation, such as:

- The number of individuals employed by the employer;
- The number and location of the employer's offices;
- Whether other available positions existed for which the employee was qualified;
- Whether the employee could have shifted to a more convenient office without unduly burdening the employer's operations; and
- The reasonableness of allowing the employee to work from home without on-site supervision.

The Second Circuit further provided illustrative examples of commuting accommodations that the district court should consider, including whether DOHMH could: (1) transfer Ms. Nixon-Tinkelman back to Queens, (2) permit her to work from home, or (3) provide her a car or parking permit to minimize the burden of her commute and make it easier for her to travel to and from her doctor's appointments.

Recent Legislative Initiatives to Increase the Availability of Telecommuting

The Second Circuit's decision is in line with a recent trend favoring telecommuting. On December 9, 2010, President Obama signed into law the Telework Enhancement Act, which gave federal agencies a six-month window of time to establish a telework policy and notify employees of their eligibility under the policy. The new law requires each agency to implement a telework policy, designate a telework managing officer to oversee the agency's telework program, and ensure continuity-of-operations planning, particularly when employees' commutes are affected by inclement weather. Several states, including Connecticut, Florida and

Virginia, have also recently implemented or proposed legislation regarding telecommuting. For example, New Jersey has proposed legislation that provides private sector tax incentives for certain business telecommuting program development and implementation costs and a separate bill that requires state agencies to adopt telecommuting programs. In June 2010, Connecticut enacted a law to develop and implement telecommuting guidelines for state employees with the goal of having a positive effect on worker efficiency, the environment, and traffic congestion. In New York, legislation has been proposed to require public employers to establish policies and programs allowing public employees to perform all or a portion of their duties remotely (*see, e.g.*, A00206 / S 1381) as well as establishing tax credits for employers who enact policies to encourage teleworking (*see* S 2065). This wave of legislative activity, along with the Second Circuit's recent opinion, provide a good opportunity for employers to consider the legal, operational, and administrative issues related to telecommuting.

Wage-and-Hour Concerns Arising from Telecommuting

The *Nixon-Tinkelman* decision acknowledges that lack of supervision may pose difficultly in allowing an employee to work from home. This may be particularly true for non-exempt employees. Aside from the more obvious concern of some employers about a loss of productivity absent on-site supervision, there is also a converse risk that overzealous non-exempt employees would work "off-the-clock," *i.e.*, engage in work without reporting their time, absent on-site supervision. In the work-from-home context, where the ability of employers to monitor an employee's activity is limited, allegations of violations of federal and state wage and hour laws for such off-the-clock work may prove more difficult to refute than those brought by employees who work at an employer site under direct supervision. Given this reality, it is important for employers to have specific, well enforced wage and hour policies governing work-from-home employees.

Privacy and Data Security Concerns Arising from Telecommuting

In addition, employees who do work from home are most likely able to do so via remote electronic access to the employer's network, which can raise a whole host of concerns over the privacy and security of

personal information and confidential company information that the employee may be able to access remotely:

- Whether the remote access to the employer's network will be made via secure connection, which decreases the risk of a security breach while information is in transit, and whether employees will be able to download files directly to their personal computer, reducing the employer's ability to protect the security of those files.
- Whether the employee will be using a company-issued computer or a personal computer. Employee-owned computers increase security risks because the employer has limited ability to monitor the software on the computer and restrict user access. For example, a personal computer might contain third-party data sharing software that could access company information that has been downloaded to the computer. Moreover, employers have limited ability to ensure that other home users of an employee-owned computer would not be able to access company files if, for example, the remote connection is left open. Either situation could trigger notice obligations under state data breach notification statutes if covered personal information is accessed or acquired by an unauthorized person.
- Whether necessary files and data can be transferred only via a secure network or whether portable media, such as thumb drives, will also be permitted for file and data transfers, and if so, what level of security, such as encryption and password protection, will be required. The shrinking size of portable media provide greater freedom, flexibility, and mobility, but also pose greater risk of loss or theft due to their diminutive size.
- How to ensure the security of a work-from-home employee's workstation. For example, will the screen be visible to others and how will the remote employee secure paper files?

Employers will need to develop and implement both administrative mechanisms, such as clear policies that put employees on notice of their rights and responsibilities, and operational mechanisms, such as implementing encryption and monitoring technology and other electronic security measures, that balance the need to preserve confidentiality and maintain security while allowing for the flexibility and mobility the employer's off-site employees' need.

Workplace Safety Issues and Liabilities Arising from Telecommuting

Further, although telecommuters are not at the workplace, employers must still be concerned with workplace safety issues. Workers compensation laws, OSHA and other workplace safety regulations can still apply to remote employees, so employers must develop ways to ensure that work-from-home employees comply with relevant safety protocols even in their home offices. Although OSHA has announced that it will not conduct inspections of employees' home offices, and does not expect employers to conduct inspections, the agency will hold employers responsible for injuries or hazards at remote locations, including home offices, if they are caused or created by materials, equipment, or work processes that the employer provides or requires the employee to use at the remote location. As well, OSHA will conduct inspections of home-based work sites when it receives a complaint or referral that indicates a violation of a safety or health standard that threatens physical harm. Most state workers' compensation laws, including New York, are not limited to work related injuries that occur at the employer's fixed physical location, and therefore can apply to work-related injuries occurring at a home office or other work location. The employee will still have to establish that the injury arose out of and in the course of employment, and not during a break or other non-work related activity.

Another recent area of liability, brought about by the technologies that have helped expand the mobile workforce, stems from injuries and damages caused by employees texting and talking while driving. For example, in *Bustos v. Dyke Industries Inc.*, Miami Dade Case No. 01-13370 (2001), an employer settled for over $16 million, after a jury initially awarded over $21 million in damages to an elderly woman who was hit and severely disabled by a salesman who was making a work related call on his cell phone while driving, resulting in the accident. Again, due to the lack of on-site supervision, employers should, at minimum, enact clear policies on workplace safety issues that consider the particular circumstances of remote employees.

There may certainly be other concerns associated with remote employees in particular industries, and the issues noted above are but a sample of the concerns that telecommuting can raise. Given the recent trend towards telecommuting, and the Second Circuit's decision clarifying

that, in certain circumstances, it can be required as a reasonable accommodation, employers should take the opportunity to review their own telecommuting policies and procedures and consider the various issues that may arise when their own employees work from home or other remote locations.

This post was authored by Matt Lampe, Joseph Bernasky, David Krieger, and Mariya Nazginova of Jones Day. The views and opinions expressed herein are those of the authors and do not necessarily reflect the views of Jones Day or the New York State Bar Association.

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