THE LITTLER REPORT

TELEWORK UNDER THE ADA & OTHER NONDISCRIMINATION LAWS

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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I. INTRODUCTION

A workforce that adheres to a traditional work style, or a consistent eight-hour workday in the same location – with no offsite work or interaction with business colleagues or customers – is increasingly becoming a relic in many settings. Whether at a coffee house, commuter train, airport lounge, or soccer field, transactions, communications, and decisions take place on a range of devices away from the brick-and-mortar jobsite. This very Report is a telework collaboration of individuals exchanging ideas and drafts from homes, offices, and other sites around Washington, D.C., San Diego, Los Angeles, New Jersey and Milan, Italy.

The terms "telecommuting" and "telework" came to prominence in the 1990s to describe full-time employment at a private, non-profit or government organization where the employee worked at least half the time at home. Early on, telecommuting and telework served mainly as an accommodation to working parents, providing an opportunity to work part-time or irregular hours in response to family demands. Alternatively, telework was associated with specific job types (e.g., call centers).

Over time, the terminology and definitions morphed to include, among others: mobile, remote, flexible, virtual, dispersed, agile, and distributed work. It applies to a wider range of workers at every business level. The rationale or need for such arrangements has also adapted. As discussed in later sections, while flexible work arrangements increasingly can support employees with child care, elder care and disability accommodation needs, among others. They can also provide employees with the opportunity to pursue community involvement, volunteerism, education and travel, and eliminate inefficiencies associated with commuting time in congested urban areas. In settings conducive to telework, it can also trim overhead costs associated with office space. Admittedly, it does not and cannot work in every conceivable setting. "Agile work," however, has become a mainstream discussion at water coolers and dinner tables, regardless of generation, gender, age, lifestyle, and socio-economic status.

In this first in a series of Littler Reports on Telework, we discuss the evolution of telework, practical considerations for employers, and certain legal implications — particularly involving employee requests to work remotely as an accommodation under the Americans with Disabilities Act (ADA) and similar state laws.

A. Workplace Flexibility is on the Rise

Key drivers of the growth of flexible work practices across geography and industry sectors include, but are not limited to, improved ability to leverage technology, increased globalization of the workforce, need to mitigate heavy workload/turnover, and the entry and impact of millennials in the workforce. To date, "the push for flexibility has been strongest in North America and Europe."[1] More recently, there has been a greater drive for flexibility in countries including India, in particular, among emerging economies in which heavy workloads contribute to employee burnout.[2] Commentators expect that employers across Asia (including China, Singapore and Hong Kong) will embrace it as they strive to compete globally.[3]

Reliance on agile work is on the rise. A recent *Gallup* poll reports that 37 percent of Americans have worked from home.[4] Intuit reports that by 2020, more than 40 percent of the American workforce, or more than 60 million people, will be freelancers, contractors, and temp workers.[5] According to an Ipsos/Reuters poll, approximately "one in five workers around the globe, particularly employees in the Middle East, Latin America and Asia, telecommute frequently and nearly 10 percent work from home every day."[6]

In the UK, for example, 94 percent of larger organizations offer agile work in some respect.[7] In half of such institutions, flexible arrangements have become standard practice and management widely expects flexible work to become the norm within five years.[8]

In more than 80% of companies, the most prevalent types of agile programs offered to employees are teleworking, flextime and part-time scheduling.[9] In a 2012 study, 47 percent of the global sample group of employees reported that they teleworked or had some other flexible arrangement.[10] In most organizations across the globe, regardless of size, some form of non-traditional work is or soon will be taking place.

B. Forces Driving Telework Are Expanding

As agile work spreads, the following workplace trends create growing opportunities for managers, teams and employees.

- *Technological Advances:* Rapid advancement of digital technology provides easier access to work and information (e.g., wifi, cloud access, smartphones, laptops, virtual desktops, and paperless document systems). These advancements provide greater ease in transacting business at any time.

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1 PricewaterhouseCoopers LLC, *A Flex-able Future: Integrating Flexibility at Financial Institutions*, at 2 (Nov. 2014), http://www.pwc.com/us/en/financial-services/publications/viewpoints/assets/pwc-workplace-flexibility-integration-financial-institutions.pdf.

2 *Id.*

3 *Id.*

4 Jeffrey M. Jones, *In U.S., Telecommuting for Work Climbs to 37%*, Gallup (Aug. 19, 2015), http://www.gallup.com/poll/184649/telecommuting-work-climbs.aspx (noting a four-fold increase in this figure since 1995).

5 Intuit, *Intuit 2020 Report: Twenty Trends That Will Shape the Next Decade*, at 20–21 (Oct. 2010), https://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf; *see also* Mitra Toossi, *Labor Force Projections to 2020: A More Slowly Growing Workforce*, Monthly Labor Review, Bureau of Labor Statistics, Jan. 2012, at 1 (projecting the labor force in 2020 to total 164.4 million).

6 Patricia Reaney, *About One in Five Workers Worldwide Telecommute: Poll,* Reuters (Jan. 24, 2012), http://www.reuters.com/article/us-telecommuting-idUSTRE80N1IL20120124 (reporting that more than half of Indian workers toiled from home).

7 Institute of Leadership & Management, *2020 Vision: Future Trends in Leadership & Management*, at 2 (May 2014), https://www.i-l-m.com/-/media/ILM%20Website/Documents/research-reports/future-trends/ilm-research-reports-future-trends%20pdf.ashx. That being said, the use of flex work is not increasing at the same pace across all UK workforces but remains prevalent with larger employers. *Id.*

8 *Id.*

9 WorldatWork, *Survey on Workplace Flexibility 2013*, at 5 (Oct. 2013), https://www.worldatwork.org/adimLink?id=73898.

10 Towers Watson, *2012 Global Workforce Study, Engagement at Risk: Driving Strong Performance in a Volatile Global Environment*, at 6 (July 2012), https://www.towerswatson.com/Insights/IC-Types/Survey-Research-Results/2012/07/2012-Towers-Watson-Global-Workforce-Study.

- *Flow of Work:* To be truly customer- and task-centric, jobs and tasks are being broken down to allow work to stream more effectively across time zones and elicit inputs in a more logical or efficient sequence.[11]
- *Talent Access:* As a result of shifts in where talent will be sourced, companies have needed to adapt their workplaces to attract, engage and manage cross-cultural talent. According to a recent study by Oxford Economics, 54 percent of the world's college graduates are now "coming from Brazil, China, India, Indonesia, Mexico, Russia and Turkey," marking a greater diversity in the trained talent pool.[12]
- *Multi-Generational Workplace:* Progressive inclusion leaders realize that honoring different work styles is another element of inclusion. While there is much debate regarding differences among the generations (Boomers, Generation Xers and millennials), one common characteristic is that they all value workplace flexibility. Of particular note are millennials – more than 80 million strong[13] – who will comprise nearly half of the American workforce by 2020.[14] Arguably, millennials not only seek out greater work/life integration, but expect it to be an accepted practice by their employers.
- *Increased Acceptance:* While there are employers who continue to see telecommuting as a privilege or accommodation for employees, a shift is underway – increasingly, management has started to accept that flexible work arrangements can be good for business. Questions businesses should ask when considering whether flexible work arrangements will be a good fit include: how will workplace flexibility enhance our products and customer service? How will it make our workplace better and more attractive? How will it enable our people to work more efficiently and productively?[15]

C. Business Advantages

The roster of employer advantages of implementing agile work continues to grow, as companies grasp how workplace flexibility aligns with their core values, operations and direction. Furthermore, devising a workplace strategy that puts people first – by providing individuals the ability to leverage the right technology, space and overall support – optimizes productivity and employee satisfaction. Specific employer advantages realized to date include:

- *Continuity of Business Operations:* Domestic and international incidents, inclement weather, natural disasters, and pandemics have raised awareness that even when the traditional office is inaccessible, work must continue and individuals need resources at their fingertips to keep operations running. One well-respected insurance company, with little flex work practices underway, suddenly evacuated lower Manhattan to transition operations to Jersey City as a result of Hurricane Sandy. Not only did it adapt successfully, but, upon return post-Sandy, it realized there were advantages to flexible work and committed itself to carrying such practices forward.
- *Reduction in Real Estate Costs:* The rising cost of commercial office space (numbers such as $180/square foot are not uncommon), especially in prime urban areas such as London and New York, provides a catalyst for companies to reconfigure office space with a drastic reduction in square footage assigned to employees. For individuals who do not need dedicated office space, some employers are offering other alternatives such as collaborative, shared spaces and hoteling options.
- *Reduction in Other Costs:* Video and teleconferencing can reduce travel expenses and travel time. Additionally, according to a UK study, flexibility can reduce the rate and cost of absenteeism.[16] Some predictions suggest that

11 *Id.* at 4, 6.

12 *Id.* at 6 (noting the shift in location of college graduates, who traditionally, predominantly haled from European countries and the U.S.).

13 Press Release. U.S. Census Bureau, Millennials Outnumber Baby Boomers and Are Far More Diverse, Census Bureau Reports (June 25, 2015), http://www.census.gov/newsroom/press-releases/2015/cb15-113.html (reporting that millennials, born between 1982 and 2000, number 83.1 million).

14 PricewaterhouseCoopers LLC, *Millennials at Work: Reshaping the Workplace*, at 3 (2011), http://www.pwc.ru/en/hr-consulting/publications/millenials-survey.html.

15 FlexPaths, *Agile Work Benchmarks for a Changing Insurance Industry*, (Sept. 2014) (Proprietary Study).

16 Deborah Smeaton, Kath Ray, and Genevieve Knight, *Costs and Benefits to Business of Adopting Work Life Balance Working Practices: A Literature Review*, Department for Business Innovation & Skills, Policy Studies Institute, at vii–viii, 19–21, 24, 30–35 (June 2014), http://www.census.gov/newsroom/press-releases/2015/cb15-113.html; *see also id.* at 48–49, 80, 124, 126–27.

full-time teleworkers can save companies approximately $20,000 per employee. A White House report roughly estimated that if all U.S. firms adopted flexible work schedules, as a means to prevent absenteeism, they could save $15 billion per year.[17]

- *Increased Productivity:* Seventy-two percent of firms participating in a global study by Regus reported that increased productivity is a direct result of flexible working practices.[18] Responses from China (90 percent), India (79 percent), and Mexico (84 percent) in particular supported the connection between productivity and agile work.[19]
- *Effectuating Green Initiatives:* Flexible workers tend to use less paper and generate fewer documents, especially if they do not have printers at home. Reduced commuting cuts traffic congestion, fuel consumption and associated greenhouse gases. The skills that flexible workers develop with e-mail, social media and mobile devices can be compatible with corporate goals to 'go green' and reduce paper-based costs to the company and environment.[20]
- *Talent Access:* Promoting a connected culture through company mission statements and customer promises can send a strong inclusivity message. Consider AT&T's messaging: "AT&T's 137-year history of innovation is a story about people from all walks of life and all kinds of backgrounds coming together to connect people to their world… anywhere, anytime and on any device."

While there may be many practical advantages for companies considering implementing flexible work, employers should be cognizant of whether telework will be a good fit for their company culture and the needs of their market or audience. Part of that process is managing the many moving parts of a successful and productive agile work program (e.g., employee engagement, effective communication, etc.). In addition to these practical considerations, employers should also consider how agile work and employee requests to work from home implicate obligations under employment laws – specifically the Americans with Disabilities Act (ADA) and other non-discrimination laws. Telecommuting also raises issues under data privacy, workplace safety and wage and hour laws – particularly for employees not exempt from overtime requirements. These issues will be the subject of a separate piece.

II. THE ADA & OTHER NON-DISCRIMINATION LAWS

Companies facing requests from employees to work from home may need to consider a number of factors before granting or denying such requests – including whether the traditional limitations on requests to telecommute still apply. This is particularly true in the context of accommodation requests under the ADA and similar state law protections. A request to telecommute from an employee with a disability must be analyzed under the traditional disability accommodation framework. Employers (and sometimes courts) must determine whether such a request is reasonable under the circumstances. Other considerations, including whether a policy against telecommuting may have a disproportionate impact on a particular group of employees or whether the employee or the employer will be positively or negatively impacted if the employee is permitted to telecommute, also must be weighed. Each of these issues is addressed in the following section of this Report.

A. ADA Considerations

Telecommuting may be requested by employees as an accommodation for their temporary or longer-term medical condition or disability. Conditions as diverse as mobility impairments, immune disorders, anxiety disorder, and irritable bowel syndrome may prompt employees to request to telecommute. Employees with conditions that rise to the level of

17 Regus, *Flexibility Drives Productivity*, at 4 (Feb. 2012), http://www.regus.com/images/Flexibility%20Drives%20Productivity_tcm8-49367.pdf (referring to Executive Office of the President, Council of Economic Advisers, *Work-Life Balance and the Economics of Workplace Flexibility*, at 19 (Mar. 2010), https://www.whitehouse.gov/blog/2010/03/31/economics-workplace-flexibility); *see also* Catherine Skrzypinski, *White House Advisor: Workplace Flexibility 'Will Keep America Competitive*,' Soc'y for Human Res. Mgmt. Blog (June 21, 2011), http://blog.shrm.org/public-policy/white-house-advisor-workplace-flexibility-will-keep-america-competitive.

18 Regus, *supra* note 18, at 7.

19 *Id.* at 17.

20 FlexPaths, *supra* note 15.

disabilities have a right to a reasonable accommodation — which may in certain instances include telecommuting —under the ADA.[21]

Employers have an affirmative duty to identify and provide a reasonable accommodation to qualified employees or applicants with a disability.[22] The reasonable accommodation concept often challenges traditional notions of how a job typically is performed versus what the individual in the job ultimately must accomplish. Under amendments to the ADA, a far larger number of individuals can now claim protection and a right to a reasonable accommodation—including individuals with temporary conditions that usually failed to qualify as "disabilities" prior to the 2009 amendments.[23]

The reasonable accommodation concept developed first under the Rehabilitation Act of 1973 (Rehabilitation Act),[24] a precursor to the ADA applicable to federal government employees and contractors. The Rehabilitation Act requires covered employers to make reasonable accommodations to permit otherwise qualified applicants to perform essential job functions.[25] The ADA followed Rehabilitation Act principles.[26] Congress later amended the Rehabilitation Act to harmonize its standards barring employment discrimination (which includes failure to make a reasonable accommodation) with the ADA.[27]

Although the ADAAA expanded the definition of who is entitled to a reasonable accommodation, it also limited the reasonable accommodation analysis in two discrete situations. First, employers need not engage in the reasonable accommodation process with persons protected only on the basis of being "regarded as" having a disability. Second, the ADAAA explains that there are no "reverse discrimination" claims under the ADA. As such, the ADAAA does not allow an individual to claim that he or she "was subject to discrimination because of the individual's lack of disability." "Reverse discrimination" claims, while rare, would arise in the context of an employer providing reasonable accommodation to another employee. The ADAAA clarifies that persons without disabilities cannot claim discrimination because they were treated less favorably or were not provided the same accommodations. In the few court cases raising such reverse discrimination issues, courts have not allowed reverse associational disability claims – grounded on alleged favoritism toward employees caring for individuals with special needs.[28] For example, allowing an employee to telecommute to accommodate his or her disability does not mean that other employees without disabilities can support legal claims to a similar right to telecommute.

1. Reasonable Accommodation Concepts Under the ADA

The duty to provide a reasonable accommodation applies to all stages of the employment relationship, including recruiting, hiring, and assignment of work.[29] EEOC regulations break down accommodations into three categories:

(1) accommodations that are required to ensure equal opportunity in the application process;

(2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and

(3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.[30]

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21 42 U.S.C. §12112(b)(5)(A) (defining discrimination under the ADA to include failure to accommodate a qualified individual with a disability).

22 *Id.*

23 The ADA defines *disability* as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(1)(A)-(C). After a long series of court decisions narrowing the scope of individuals protected under the ADA, Congress passed the Americans with Disabilities Amendments Act (ADAAA), which became effective in January 2009. The ADAAA did not change the core definition of "disability," but clarified and expanded what it means for an impairment to "substantially limit" a "major life activity." It calls for courts to construe the law "in favor of broad coverage of individuals." 42 U.S.C. § 12102(4). The ADAAA also called for the Equal Employment Opportunity Commission (EEOC) to issue regulations addressing the meaning of a substantial limitation. Under the EEOC's rules of construction, the EEOC explained that an impairment lasting fewer than six months may still be "substantially limiting" in evaluating whether one has an actual disability. 29 C.F.R. § 1630.2(j)(1)(ix). For a thorough discussion on the ADAAA, its legislative history, and its effect on prior court decisions narrowing the scope of "disabilities," see Peter Susser & Peter Petesch, Disability Discrimination and the Workplace (2d ed.) (BNA 2011).

24 29 U.S.C. §701 *et seq.*

25 *See* 42 U.S.C. §794a(a)(1).

26 42 U.S.C. §12201(a).

27 29 U.S.C. §§791(f), 793(d) & 794(d).

28 *E.g., Ingram v. Henry Ford Health Sys.*, No. 13-11567 (E.D. Mich. April 21, 2014).

29 42 U.S.C. §12112(a).

30 29 C.F.R. pt. 1630, app. §1630.2(o).

The ADA identifies the following non-exhaustive list of suggested accommodations:

1. "making existing facilities used by employees readily accessible to and usable by individuals with disabilities";
2. "job restructuring";
3. "part-time or modified work schedules";
4. reassigning a disabled individual to a vacant position;
5. acquiring or modifying equipment or devices;
6. appropriately adjusting or modifying "examinations, training materials or policies";
7. providing "qualified readers or interpreters"; and
8. "other similar accommodations for individuals with disabilities."[31]

Employers may not deny a reasonable accommodation to an individual unless the accommodation would pose an "undue hardship,"[32] or if the individual being accommodated poses a direct threat to the health or safety of other individuals in the workplace, or to the individual himself or herself.[33]

Significantly, employers are required to accommodate only "qualified" individuals with disabilities.[34] An individual is "qualified" under the ADA if the individual: (1) possesses "the requisite skill, experience, education and other job-related requirements" for the position; and (2) is able to perform the "essential functions" of the position desired or held with or without a reasonable accommodation.[35]

An accommodation must flow from the individual's disability and substantial limitations.[36] In *Didier v. Schwan Food Co.*,[37] for example, the court held the employee's request to be unreasonable because there was no nexus between the claimed disability (substantial limitation in the ability to care for himself) and the requested accommodation. That said, accommodations may include honoring requests for time off to attend medical appointments related to the disability, leave in connection with the disability, or other adjustments that may better enable the employee to care for his or her condition or get to work.[38] This is where telecommuting may come into play if the request bears a connection to the employee's claimed disability.

In *Yindee v. CCH Inc.*,[39] the court held against the employee because there was an insufficient link between her claimed disability (infertility resulting from treatment for endometrial cancer) and another condition (inability to drive due to vertigo). The employee did not ask for accommodations related to her claimed disability. Instead, the employee asked to continue to telecommute (despite performance problems) on the grounds that her vertigo (not the claimed disability) precluded her from driving and that vertigo was connected with the cancer condition. The court disagreed, stating that there was no evidence that would allow a reasonable jury to find that the employee's vertigo was an aspect of her actual claimed disability. This sort of principle could also arise when an employee with a disability requests telecommuting not as an accommodation for their condition, but because the employee has a suspended drivers' license (unrelated to a disability, such as epilepsy) or because the employee needs to care for another individual. Although an employer may not discriminate against individuals associated with another person with a disability, caregivers are not entitled to reasonable

31 42 U.S.C. §12111(9)(A), (B).

32 42 U.S.C. §12112(b)(5)(A).

33 42 U.S.C. §§12112(b)(6), 12113(a), (b). The EEOC regulations provide that an employer may screen out individuals with a disability—and defend against a claim of discrimination—not only for risks that he or she would pose to others in the workplace but for risks on the job to his or her own health or safety as well: "The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. §1630.15(b)(2).

34 42 U.S.C. §§12111(8); 12112(a).

35 29 C.F.R. §1630.2(m).

36 *Wood v. Crown Redi-Mix*, 339 F.3d 682, 686–87 (8th Cir. 2003) (finding that an individual whose major life activity of procreation was substantially limited could not establish a prima facie case of disability discrimination due to rejection of his requested accommodation); *see also Felix v. New York City Transit Auth.*, 324 F.3d 102, 106–07 (2d Cir. 2003) (holding that subway clerk's request for reassignment to above-ground position due to posttraumatic stress disorder was not reasonable, because the request did not flow from her disability).

37 465 F.3d 838, 842–43 (8th Cir. 2006).

38 *E.g., Alastra v. National City Corp.*, 2010 U.S. Dist. LEXIS 121038, at *27–31 (E.D. Mich. Nov. 16, 2010) (denying summary judgment where jury could find that employer unlawfully refused accommodation of later start time for employee needing additional sleep for seizure condition); *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976, 986–87 (N.D. Ind. 2010) (denying summary judgment where employer failed to show that employee's request to work from different office was an undue hardship).

39 458 F.3d 599, 601–03 (7th Cir. 2006).

accommodations under the ADA. Some states, including California, are now extending accommodation obligations to caregivers. Telecommuting for caregivers is discussed further below.

a. Emphasis on Essential Job Functions

The concept of "essential job functions" frequently ties into telecommuting cases. The essential functions of a job or, the "fundamental job duties of the employment position" must first be identified to determine whether an individual with a disability is qualified for the position *and* how best to accommodate the individual.[40] The analysis of whether a function is essential requires consideration of: (1) "whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential"; and (2) "whether removing the function would fundamentally alter that position."[41] A job function is essential if the job exists to perform the function.[42] It may also be essential if there are a "limited number of employees available" to perform the function, or among whom the "function can be distributed."[43] Under these principles, although answering the telephone may not be an essential function for a file clerk in all offices, it may be an essential function for a file clerk to answer the telephone at a small, busy office where each employee must perform many different tasks, including answering the telephone.[44] Additionally, a job function is essential if it is highly specialized and the individual is hired for his or her ability to perform that specialized function.[45]

The following factors are considered (but are not necessarily dispositive) to determine if a particular job function is "essential":

1. "the degree of expertise or skill required to perform the function";
2. "written job descriptions";
3. "the employer's judgment as to what functions are essential";
4. "terms of a collective bargaining agreement";
5. "[t]he work experience of past employees in the [same] job or [of] current employees in similar jobs";
6. "the time spent performing the particular [job]"; and
7. "the consequences of failing to require the employee to perform the function."[46]

An employee's inability to perform the essential functions of his or her job disqualifies the employee from ADA protection and entitlement to an accommodation, because the employee is not a "qualified individual with a disability."[47]

Courts in the past have determined that an employee who is unable to come to work on a regular basis is unable to satisfy the essential functions of the job.[48] Along these lines, one court of appeals held that arriving at work on time can be an essential function of an employee's position of retail store area coordinator.[49] The court recognized that the employer's policies placed a high value on punctuality, the importance that the area coordinator be at her shift on time to prepare the store or to relieve another area coordinator, and that there were few employees in the area coordinator position and few area coordinators on duty at any given time. The court found that this employee failed to prove that any

40 42 U.S.C. §12111(8).

41 29 C.F.R. pt. 1630, app. §1630.2 (n).

42 29 C.F.R. §1630.2(n)(2)(i).

43 29 C.F.R. §1630.2(n)(2)(ii).

44 29 C.F.R. pt. 1630, app. §1630.2(n) (citing *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983)).

45 29 C.F.R. §1630.2(n)(2)(iii).

46 29 C.F.R. pt. 1630, app. §1630.2(n).

47 29 C.F.R. pt. 1630, app. §1630.2(n).

48 *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) ("[I]if one is not able to be at work [for a nursing job], one cannot be a qualified individual."); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119–124 (10th Cir. 2004) (noting that jobs that can be performed entirely from home, instead of at the workplace, are the exception to the rule, such that "physical attendance in the workplace is itself an essential function of most jobs."); *EEOC v. Yellow Freight Sys.*, 253 F.3d 943, 948–52 (7th Cir. 2001); *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445–46 (8th Cir. 1998) (holding that employee suffering from Crohn's disease could not perform essential functions of his job without accommodation, because he was unable to attend work on regular basis); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir. 1997) ("Because [the employee] was unable to come to work on a regular basis, he was unable to satisfy any of the functions of the job in question, much less the essential ones.").

49 *Earl v. Mervyns*, 207 F.3d 1361, 1365–67 (11th Cir. 2000) (finding that a woman suffering from obsessive compulsive disorder was not a qualified individual with disability, because her disability prevented her from coming to work on time); *see also Jackson v. Veterans Admin., Dep't of Veterans Affairs*, 22 F.3d 277, 279 (11th Cir.) (noting that punctuality is an essential function of housekeeping aide position), *cert. dismissed*, 513 U.S. 1052 (1994).

accommodation would enable her to arrive at work on time, and, thus, the employee did not qualify for protection under the ADA. Similarly, in *Durning v. Duffers Optical, Inc.*,[50] a court dismissed the claims of an outside salesperson whose disability rendered him unable to communicate effectively, make in-person sales calls to distant locations, or to make presentations to customers.

This concept also appears in telecommuting cases. In *Mulloy v. Acushnet Co.*,[51] an employee's request to work remotely to accommodate his asthma, aggravated by exposure to workplace chemicals, was deemed unreasonable, because physical presence at the jobsite was an essential function of the electrical engineer's job. This principle was also discussed in *McEnroe v. Microsoft*;[52] the court held that a previous accommodation of telecommuting was not required for a new position sought by the employee as a promotion, as in-person attendance was determined to be an essential function of that job.

Separation of essential job functions from marginal job functions becomes a fact-intensive inquiry in cases involving the accommodation of job restructuring, which at times relates to telecommuting as an accommodation. While the employer must consider whether nonessential functions can be reassigned or modified, the ADA does not require that an employer reallocate the essential functions of a position.[53] If telecommuting enables an individual to perform essential functions, but leaves questions as to whether certain marginal job functions can be performed from home, then the overall accommodation may involve restructuring the marginal job functions.

In one case involving telecommuting, allowing an employee, whose essential job functions included physical presence at the jobsite, to work remotely was deemed unreasonable, as doing so would be tantamount to creating a new job for the employee. The court in *Mulloy v. Acushnet Co.*,[54] discussed above, considered such a job restructuring proposal per se unreasonable, as it amounted to a redefinition of the employee's job, not merely an accommodation of the employee's asthma due to chemical exposure at the workplace. Although allowing an employee to work remotely might be a reasonable accommodation in some instances, it would not be reasonable when it involves removing an essential function, such as instances when the job truly demands the employee's physical presence. This concept formed the cornerstone in another important and recent telecommuting case, discussed below.

b. Limited Deference to Employers' Job Descriptions

As a general matter, the analysis of the essential functions of the job does not extend to the point of second-guessing the employer or requiring a company to lower its standards.[55] The employer has the right to define the job. Preexisting written job descriptions will provide evidence of what functions are "essential" to a position, and are accorded some deference.[56] If, however, an employer's actions are challenged in a court or administrative action, neither the employer's judgment nor a job description is dispositive in setting the "essential functions" of a particular job or whether an applicant or employee is a "qualified" individual with a disability.[57] Whether a function is "essential" is often a highly fact-specific inquiry that varies by employer and the type of position at issue.[58]

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50 1996 U.S. Dist. LEXIS 1685, at *16–22 (E.D. La. Feb. 14, 1996) (granting employer summary judgment because employee could not perform essential functions of his position and thus was not qualified for ADA protection).

51 460 F.3d 141, 147–54 (1st Cir. 2006).

52 2010 U.S. Dist. LEXIS 122477,at *5–8 (E.D. Wash. Nov. 18, 2010).

53 29 C.F.R. pt. 1630, app. §1630.2(o).

54 460 F.3d 141, 147–54 (1st Cir. 2006).

55 29 C.F.R. pt. 1630, app. §1630.2(n).

56 29 C.F.R. pt. 1630, app. §1630.2(n); 42 U.S.C. § 12111(8); *Jones v. Nationwide Life Ins. Co.,* 696 F.3d 78, 88 (1st Cir. 2012) (explaining that courts give significant deference to employer's business judgment about the necessities of a job).

57 *See Holiday v. City of Chattanooga*, 206 F.3d 637, 643 (6th Cir. 2000) (holding that employer could not use doctor's report as dispositive evidence of employee's inability to perform essential functions of job).

58 *See, e.g.*, *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 201–02 (6th Cir. 2010); *Laurin v. Providence Hosp. & Mass. Nurses Ass'n*, 150 F.3d 52, 57–61 (1st Cir. 1998) (finding that a requirement to work rotating schedule was essential function for maternity nurse position, where night shifts were undesirable and all employees required to take turns); *Jasany v. U.S. Postal Serv.*, 755 F.2d 1244, 1251 (6th Cir. 1985) (addressing need for scheduling flexibility under Rehabilitation Act); *Salmon v. Dade County Sch. Bd.*, 4 F. Supp. 2d 1157, 1161 (S.D. Fla. 1998) ("Unlike other jobs that can be…deferred until a later day, a guidance counselor must counsel students at the school during the hours in which the children are in attendance."); *Mackie v. Runyon*, 804 F. Supp. 1508, 1511 (M.D. Fla. 1992) (finding there that flexibility in pertinent working variable schedule is an essential function).

c. Undue Hardship Principles

Employers are not required to provide reasonable accommodations that would cause the employer to suffer "undue hardship." The ADA defines "undue hardship" as "an action requiring significant difficulty or expense."[59] The employer bears the difficult burden of showing undue hardship.[60]

Factors considered in connection with an undue hardship defense include:

1. "the nature and cost of the accommodation needed";
2. "the overall financial resources of the facility" making the reasonable accommodation;
3. "the overall financial resources," size, number of employees, and the type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
4. "the type of operation" of the employer, including the "structure [ ] and functions of the workforce; the geographic separateness," and the "administrative, or fiscal relationship of the facility" involved in making the accommodation to the employer; and
5. "the impact of" the accommodation "upon the operation of the facility."[61]

Neither the ADA nor its legislative history embrace cost-benefit analysis for a requested accommodation. Yet some courts have applied cost-benefit analysis to evaluate undue hardship. In *Vande Zande v. Wisconsin Department of Administration*,[62] the Seventh Circuit applied cost-benefit analysis in finding that an employee's request to be accommodated with a desktop computer for her home and lowered sinks in kitchenettes near her office was unreasonable, because the costs of such adjustments outweighed the benefits.[63]

d. Threat to Safety or Health

The employer also is not required to provide an accommodation that would pose a direct threat ("significant risk of substantial harm") to the health and safety of other employees or the individual.[64] In determining whether an individual poses a significant risk of substantial harm to the employee or others, the employer should rely on an objective evaluation and "not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes."[65] In most circumstances, this principle might not seem applicable in telecommuting situations, though there may be instances when working in an unsupervised home environment could pose certain risks to the individual – depending on the job tasks.

2. Claims for Failure to Provide a Reasonable Accommodation

a. Employer Obligations

Failing or refusing to provide a reasonable accommodation where it would be possible to do so violates the ADA. A plaintiff establishes that an employer has failed to accommodate a disability of the employee by demonstrating: "1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith."[66] The employee must file a charge with the EEOC within 300 days of the last instance of refusal.[67]

59 42 U.S.C. §12111(10)(A).

60 *See* 29 C.F.R. pt. 1630, app. §1630.15(d).

61 42 U.S.C. §12111(10)(B).

62 44 F.3d 538, 545 (7th Cir. 1995).

63 44 F.3d at 545.

64 29 C.F.R. §1630.15; *see also Echazabal v. Chevron USA, Inc.*, 536 U.S. 73, 78–85 (2002) (holding that the direct-threat defense applies to instances where the individual's employment poses or would pose a direct threat to the health and safety of his or her own health and safety, as well as to circumstances in which the individual poses a direct threat to others).

65 29 C.F.R. pt. 1630, app. §1630.2(r).

66 *E.g., Jones v. United Parcel Serv.*, 214 F.3d 402, 408 (3d Cir. 2000).

67 42 U.S.C. §12117 (applying the 300-day statute of limitations set forth in 42 U.S.C. §2000e-5e to ADA claims).

Cases and EEOC regulations require that the employer "initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[68]

The interactive process between the employer and employee generally is triggered when the employee notifies the employer of the employee's disability and limitations and the employee's desire for some sort of reasonable accommodation. At this point, or once the employer becomes apprised of such a need, the employer is expected to participate in good faith in the interactive process in an attempt to develop a reasonable accommodation.[69] Both parties have an obligation to proceed in a reasonably interactive manner, but "'[t]he exact shape of this interactive [process] will necessarily vary from situation to situation and no rules of universal application can be articulated.'"[70] An employer need not necessarily provide the specific accommodation requested by the employee if another equally effective accommodation is available. An employer's willingness to engage in the interactive process and suggest an alternative, equally effective accommodation, reflects sufficient compliance with the obligation, even if the employee demands a different accommodation.[71] Although the desires of the disabled employee should be given consideration, the employer has the ultimate discretion and responsibility to select a reasonable accommodation.[72] As such, a demand to telecommute need not necessarily be honored if other effective accommodations that keep the employee in the workplace are available. Finally, if there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the EEOC recognizes that "the employer may choose the less expensive or burdensome accommodation as long as it is effective," without having to prove that the rejected accommodation would pose an undue hardship.[73]

Even in the absence of the interactive process, however, where an employee cannot demonstrate that a reasonable accommodation would have been possible, the employer's lack of investigation into reasonable accommodation typically does not give rise to liability under the ADA. An employer should not be held independently liable under the ADA for failing to engage in an interactive process to determine reasonable accommodations.[74]

Accommodations are seldom a single-step process. An employer may be required to make multiple efforts to identify and implement a reasonable accommodation, or reevaluate the effectiveness of a current accommodation. This is certainly applicable to telecommuting situations.

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68 29 C.F.R. §1630.2(o)(3); *see also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000) (stating that once employee requests assistance in accommodating disability, employer has duty to initiate interactive process in effort to come up with appropriate accommodation).

69 29 C.F.R. §1630.2(o)(3).

70 *Hines v. Chrysler Corp.*, 2000 U.S. App. LEXIS 11338, at *6 (10th Cir. May 19, 2000) (unpublished opinion) (quoting *Smith v. Midland Brake*, 180 F.3d 1154, 1173 (10th Cir. 1999)).

71 *Fink v. Richmond*, 405 F. App'x 719, 722–23 (4th Cir. 2010) (affirming summary judgment where employer provided alternative accommodation to employee, though not the specific assignment requested); *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 457–59 (6th Cir. 2004) (explaining that an employee cannot demand a different accommodation if offered accommodation is effective); *Jay v. Internet Wagner, Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000) (noting that employer is not obligated to grant employee his choice of accommodation, especially where employee's requested accommodation infringes on rights of others).

72 EEOC, Notice No. 915.002, Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act [hereinafter EEOC Enforcement Guidance-Accommodations/ADA], at Questions 8–9 (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html. The guidance document was published initially on March 1, 1999, and was superseded by an updated document published on October 17, 2002.

73 EEOC Enforcement Guidance-Accommodations/ADA, at Question 9.

74 *See Basden v. Professional Transportation, Inc.*, 714 F.3d 1034 (7th Cir. 2013) (even though the employer failed to engage in the interactive process, plaintiff's failure to present evidence she was a qualified individual doomed her accommodation claim; in this instance, employer established that regular attendance was an essential job requirement and plaintiff's multiple sclerosis prevented her from coming to work regularly); *Hennagir v. Utah Dep't of Corr.*, 581 F.3d 1256, 1265 (10th Cir. 2009), *amended on other grounds,* 587 F.3d 1255 (10th Cir. 2009) (rejecting claim for failure to engage in interactive process because the plaintiff's desired accommodations were unreasonable); *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894 (8th Cir. 2006) (setting out the elements of a claim based on failure to engage in the interactive process). A plaintiff must demonstrate not only the *employer's failure* to engage in the interactive process, but that such failure resulted in a failure to identify an appropriate accommodation. *EEOC v. Federal Express Corp.*, 2005 U.S. Dist. LEXIS 47007, at *9–14 (D. Md. Sept. 13, 2005) (citing *Walter v. United Airlines, Inc.*, 2000 U.S. App. LEXIS 26875, at **11–12 (4th Cir. Oct. 25, 2000)); *see also Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000) (employer's failure to engage in interactive process is not in and of itself ADA violation because employee still must allege that failure to engage in interactive process resulted in failure to identify appropriate accommodation).

b. Employee Obligations

One of the employee's obligations is to alert the employer to the need for an accommodation.[75] "[A]n employer would not be expected to accommodate disabilities of which it is unaware."[76] According to the EEOC, however, the employer has a duty to explore accommodations any time the disability is known, even if the employee has not specifically requested an accommodation.[77] The EEOC maintains that the employer should initiate the interactive process if the employer knows of an employee's disability, knows or has reason to know that the employee is experiencing difficulty in the workplace because of the disability, and knows or has reason to know that the disability prevents the employee from requesting an accommodation.[78]

The employee need not necessarily incant the word "accommodation" or identify the specific accommodation needed. To request an accommodation, the employee or someone acting on the employee's behalf simply needs to put the employer on notice that he or she needs a job adjustment or modification because of a medical condition. The accommodation request does not have to be in writing. Rather, the employee must only notify the employer in "plain English" that he or she needs an accommodation.[79] In *Graves v. Finch Pruyn & Co.*,[80] a plaintiff alleged that his employer refused to provide him with unpaid leave as an accommodation. The employer contended that the employee did not specifically request such an accommodation. The court, however, noted that while the employee did not use the phrase "unpaid leave of absence," he did explain to the company his need to receive medical care, and that it would take several weeks to do so. The court noted that a reasonable jury could infer that the employee had, indeed, requested a reasonable accommodation.

As part of the interactive process, the employee has the duty to cooperate and to provide job-related medical information needed to evaluate his or her needs, limitations, and the existence of a disability. If an employer offers an effective accommodation other than the accommodation requested by the employee, and the employee refuses, an employee's failure-to-accommodate claim is more likely to fail. For example, in *Bellino v. Peters*,[81] an employee with a knee injury who declined a transfer to a sit-down job, with the identical pay and similar responsibilities, could not support a Rehabilitation Act claim.

An employee's failure to engage in an interactive process by rejecting an offered accommodation without explanation may also result in the rejection of his or her claim.[82] In *Beck v. University of Wisconsin Board of Regents*,[83] the court found that an employee frustrated her employer's efforts to determine how to reasonably accommodate her disabilities. She refused to sign a release that would have enabled her employer to obtain more information from her doctor and failed to respond to reasonable requests for additional information about how to accommodate her disability. The court concluded that the employer was unable to obtain a satisfactory understanding of what action it should take and could not be found liable for failing to accommodate.

In *Haulbrook v. Michelin North America, Inc.*,[84] the employee refused to speak with company representatives, preferring instead to communicate through late-night telecopy transmissions. The court upheld his termination,

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75 *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010).

76 29 C.F.R. pt. 1630, app. §1630.9; *see also Jovanovic v. In-Sink-Erator Div., Emerson Elec. Co.*, 201 F.3d 894, 899 (7th Cir. 2000) (reiterating the general rule that employee with disability must request reasonable accommodation before employer can be found liable for failure to provide one); *Mole v. Buckhorn Rubber Prods., Inc.,* 165 F.3d 1212, 1217–18 (8th Cir. 1999), *cert. denied*, 528 U.S. 821 (1999) (employer that previously made accommodations relating to employee's multiple sclerosis cannot be found liable under ADA for failure to provide additional accommodation if employee fails to request one); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (holding that request for reasonable accommodation is too late when it is made after employee has committed infraction warranting termination); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928 (7th Cir. 1995) (the ADA does not require employers to be "clairvoyant" and retain unproductive employees on chance they may suffer from disability).

77 29 C.F.R. pt. 1630, app. §1630.9.

78 EEOC Enforcement Guidance-Accommodations/ADA, at Question 40; *see also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1020–22 (8th Cir. 2000) (reversing grant of summary judgment because employer's awareness of employee's condition triggered its duty to initiate the interactive process, even though employee had not specifically requested an accommodation).

79 EEOC Enforcement Guidance-Accommodations/ADA, at Question 1.

80 457 F.3d 181, 184–87 (2d Cir. 2006).

81 530 F.3d 543, 549–50 (7th Cir. 2008).

82 *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 950–52 (7th Cir. 2001) (en banc).

83 75 F.3d 1130, 1135–36 (7th Cir. 1996) (faulting employee for breakdown of interactive process, because her failure to provide employer with relevant medical information precluded it from accommodating her); *see also Jackson v. City of Chicago*, 414 F.3d 806 (7th Cir. 2005) (employee's failure to cooperate doomed accommodation claim); *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040 (8th Cir. 2005) (accommodation claim denied after employee refused to provide employer with an updated physical evaluation necessary to assess her need).

84 252 F.3d 696, 704–07 (4th Cir. 2001).

noting that the employee could not refuse the employer's reasonable requests for information on his condition or accommodation requests. In *Wells v. Shalala*,[85] the employee failed to engage meaningfully in the interactive process, and balked at the employer's insistence that travel, an essential function of the position, remain an element of the position. The employee's insistence on removal of this essential job function and rejection of a reassignment warranted rejection of his accommodation claim.

3. Other Accommodation & ADA Nondiscrimination Principles

a. Altering Policies to Effect an Accommodation

Many employers have policies barring or severely restricting telecommuting—sometimes for valid security reasons, and sometimes simply to keep employees under better observation and interaction within a physical space. But, while an employer's policies may bear upon the types of accommodations the employer may find reasonable, they are not always dispositive. In an early ADA decision, *Wood v. Alameda*, the court recognized that the duty to accommodate employees with disabilities "may require employers to alter existing policies or procedures that they would not change for nonhandicapped employees, [as] that is the essence of reasonable accommodation."[86] There are exceptions, such as accommodations asking the employer to deviate from seniority systems, such as in *EEOC v. Sara Lee Corp*.[87] The Supreme Court addressed this issues in *U.S. Airways v. Barnett*[88] and held that, when the interests of a disabled worker seeking assignment to a particular job as a reasonable accommodation collide with those of other workers with higher seniority rights under a seniority system, "the seniority system will prevail in the run of cases."[89] In the Court's view, the ADA does not ordinarily require an employer to upset seniority rights unless "the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, [thus] reducing employee expectations that the system will be followed—to the point where one more departure needed to accommodate an individual with a disability, will not likely make a difference."[90]

b. Confidentiality Issues & Addressing the Concerns of Other Employees

If an exception to a policy barring or restricting telecommuting is made as a reasonable accommodation to an employee with a disability, other employees wishing to work remotely for other reasons (commuting challenges, family responsibilities, etc.) are likely to ask why one colleague can telecommute do so and they cannot. The response to inquiries of this nature is not simple. Absent the free consent of the employee receiving the accommodation, employers are not allowed to disclose to others in the workplace that an individual employee is receiving a reasonable accommodation. Disclosures of that nature would violate the individual employee's right to keep private the fact that he or she has a disability.[91] If and when an individual's coworkers ask their employer why an individual is receiving special or different treatment, the EEOC suggests responding that the organization is "emphasizing its policy of assisting any employee who encounters difficulties in the workplace."[92] This is often an unsatisfying response, and is not likely to quell questions or criticism.

c. Telework & Enabling the Employee to Enjoy the "Benefits and Privileges of Employment"

Employees who are not physically present at the workplace may miss certain opportunities and benefits from being at the workplace—often under the adage "out of sight, out of mind." According to EEOC Enforcement Guidance on accommodations under the ADA, aside from accommodating the employee's ability to work, the employer must also

85 228 F.3d 1137, 1144–46 (10th Cir. 2000).

86 1995 U.S. Dist. LEXIS 17514, at *33 (N.D. Cal. 1995) (internal quotation omitted).

87 237 F.3d 349, 354–55 (4th Cir. 2001).

88 535 U.S. 391 (2002).

89 535 U.S. at 394.

90 535 U.S. at 405.

91 42 U.S.C. §12112(d)(3)(B), (d)(4)(C); 29 C.F.R. §1630.14(b)(1). There are limited exceptions to the ADA confidentiality requirements, which include: (1) disclosures to "[s]upervisors and managers…[about] necessary restrictions on the work or duties of the employee and [about] necessary accommodations;" (2) disclosure to "First aid and safety personnel…if the disability might require emergency treatment;" and (3) disclosure to "Government officials investigating compliance with [the ADA must be given] relevant information on request." 29 C.F.R. §1630.14(b)(1)(i)–(iii).

92 EEOC Enforcement Guidance-Accommodations/ADA, at Question 42.

accommodate the employee's ability to enjoy the "benefits and privileges of employment." Examples of benefits and privileges include:

1. employer-sponsored training, including optional training;
2. employer-sponsored services (e.g., employee assistance programs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, and transportation);
3. employer-sponsored parties or other social functions; and
4. equal access to any information communicated in the workplace regardless of whether the information is necessary to perform the job.[93]

In an example described in the EEOC's Enforcement Guidance, the employer regularly communicates information about meetings and upcoming events to employees via the public intercom system. To accommodate a hearing-impaired (or, for that matter, a telecommuting) employee's inability to receive these announcements, the EEOC suggests that the employer provide an e-mail in advance of the broadcast conveying the same information, enabling the hearing impaired employee to enjoy the same benefits and privileges as employees able to hear announcements.[94] Similarly, employers need to be mindful to keep telecommuting employees in the communication loop, and employees working remotely have a parallel responsibility to stay informed of developments at the workplace.

d. Making Existing Facilities Accessible to Employees with Disabilities

In some instances, an employee may request an accommodation that keeps the individual in the workplace even though allowing the individual to telecommute might be an easier solution for the employer. Although employers may choose among equally effective accommodations, as described above, requiring an employee telecommute—and isolating the individual—creates the risk of marginalizing the employee and denying the employee equal benefits and privileges of employment. Moreover, being isolated or "out of sight, out of mind," may deny the individual certain work assignments or opportunities to advance.

When possible, it may be more effective to make existing facilities accessible to the employee with a disability—an accommodation expressly listed in the ADA and EEOC regulations.[95] This may entail removing, among other things, architectural, communication and transportation barriers such as stairs, revolving doors, narrow entrances and hallways, and sidewalks without ramps.

4. The Development of Telecommuting as a Reasonable Accommodation

a. Earlier Cases Siding Against Telecommuting

The EEOC has long suggested telecommuting as a reasonable accommodation to enable an employee with a disability to perform the essential functions of the job.[96] EEOC guidance explains that some of the considerations underlying allowing telecommuting "include whether there is a need for face-to-face interaction and coordination…with other[s], and "whether in-person interaction with outside colleagues, clients, or customers is necessary."[97] In 2005, the EEOC published a fact sheet—Work at Home/Telework as a Reasonable Accommodation—which includes the following Q&A regarding telecommuting as a reasonable accommodation:

> **1. Does the ADA require employers to have telework programs?**
>
> No. The ADA does not require an employer to offer a telework program to all employees. However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.
>
> In addition, the ADA's reasonable accommodation obligation, which includes modifying workplace policies, might require an employer to waive certain eligibility requirements or otherwise modify its telework program

93 EEOC Enforcement Guidance-Accommodations/ADA, at "Reasonable Accommodation Related to the Benefits and Privileges of Employment" and Questions 14-15.

94 EEOC Enforcement Guidance-Accommodations/ADA, at Question 14; *see also EEOC v. Life Techs. Corp.*, 2010 U.S. Dist. LEXIS 117563, at *21–24 (D. Md. Nov. 4, 2010) (finding that employer's failure to provide interpreter for various meetings as accommodation may constitute violation, where employee needed interpreter to enjoy equal benefits and privileges of employment).

95 29 C.F.R. pt. 1630, app. §1630.2(o).

96 EEOC Enforcement Guidance-Accommodations/ADA, at Question 34.

97 EEOC, Fact Sheet, Work at Home/Telework as a Reasonable Accommodation, at Question 4 (Oct. 27, 2005), http://www.eeoc.gov/facts/telework.html.

for someone with a disability who needs to work at home. For example, an employer may generally require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its one-year rule for this individual.

2. May permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program?

Yes. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. However, an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective. (See Question 6.)

3. How should an employer determine whether someone may need to work at home as a reasonable accommodation?

This determination should be made through a flexible "interactive process" between the employer and the individual. The process begins with a request. An individual must first inform the employer that s/he has a medical condition that requires some change in the way a job is performed. The individual does not need to use special words, such as "ADA" or "reasonable accommodation" to make this request, but must let the employer know that a medical condition interferes with his/her ability to do the job.

Then, the employer and the individual need to discuss the person's request so that the employer understands why the disability might necessitate the individual working at home. The individual must explain what limitations from the disability make it difficult to do the job in the workplace, and how the job could still be performed from the employee's home. The employer may request information about the individual's medical condition (including reasonable documentation) if it is unclear whether it is a "disability" as defined by the ADA. The employer and employee may wish to discuss other types of accommodations that would allow the person to remain full-time in the workplace. However, in some situations, working at home may be the only effective option for an employee with a disability.

4. How should an employer determine whether a particular job can be performed at home?

An employer and employee first need to identify and review all of the essential job functions. The essential functions or duties are those tasks that are fundamental to performing a specific job. An employer does not have to remove any essential job duties to permit an employee to work at home. However, it may need to reassign some minor job duties or marginal functions (i.e., those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home. If a marginal function needs to be reassigned, an employer may substitute another minor task that the employee with a disability could perform at home in order to keep employee workloads evenly distributed.

After determining what functions are essential, the employer and the individual with a disability should determine whether some or all of the functions can be performed at home. For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs some or all of the duties can be performed at home.

Several factors should be considered in determining the feasibility of working at home, including the employer's ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone, and information can be exchanged quickly through e-mail.

If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs. For example, an employee may need to meet face-to-face with clients as part of a job, but

other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to review documents and write reports from home.

5. How frequently may someone with a disability work at home as a reasonable accommodation?

An employee may work at home only to the extent that his/her disability necessitates it. For some people, that may mean one day a week, two half-days, or every day for a particular period of time (e.g., for three months while an employee recovers from treatment or surgery related to a disability). In other instances, the nature of a disability may make it difficult to predict precisely when it will be necessary for an employee to work at home. For example, sometimes the effects of a disability become particularly severe on a periodic but irregular basis. When these flare-ups occur, they sometimes prevent an individual from getting to the workplace. In these instances, an employee might need to work at home on an "as-needed" basis, if this can be done without undue hardship.

As part of the interactive process, the employer should discuss with the individual whether the disability necessitates working at home full-time or part-time. (A few individuals may only be able to perform their jobs successfully by working at home full time.) If the disability necessitates working at home part-time, then the employer and employee should develop a schedule that meets both of their needs. Both the employer and the employee should be flexible in working out a schedule so that work is done in a timely way, since an employer does not have to lower production standards for individuals with disabilities who are working at home. The employer and employee also need to discuss how the employee will be supervised.

6. May an employer make accommodations that enable an employee to work full-time in the workplace rather than granting a request to work at home?

Yes, the employer may select any effective accommodation, even if it is not the one preferred by the employee. Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making workplaces accessible (e.g., installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters. An employer can provide any of these types of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace. For example, an employee with a disability who needs to use paratransit asks to work at home because the paratransit schedule does not permit the employee to arrive before 10:00 a.m., two hours after the normal starting time. An employer may allow the employee to begin his or her eight-hour shift at 10:00 a.m., rather than granting the request to work at home, if this would work with the paratransit schedule.

Notwithstanding the EEOC's position advocating telecommuting in appropriate situations, courts, until recently, had generally taken a skeptical view toward telecommuting in accommodations cases. Courts had sided with employers and against telecommuting based on conclusions that the discretion sought by the individual was not reasonable,[98] or that the individual would not be able to perform all of the job's essential functions at home.[99] In *Smith v. Ameritech*,[100] for example, the court found that the employer was not required to allow an employee with a disability to work at home if the arrangement diminished the quality of his or her work performance. Also, in *Tyndall v. National Education Centers of California, Inc.*,[101] the court held that an employee with lupus in an instructor position was not a qualified person with a disability. The employee's request to telecommute could not be granted because attending the classes he taught was an essential function of the instructor job.[102] In *McEnroe v. Microsoft*,[103] mentioned previously, the court held that an employee's previous accommodation of telecommuting was not required in connection with a promotion sought by that employee, as in-person attendance was determined to be an essential function of that job.[104]

98 *Rauen v. United States Tobacco Mfg.*, 319 F.3d 891, 896–97 (7th Cir. 2003).

99 *Kvorjak v. Maine*, 259 F.3d 48, 54–58 (1st Cir. 2001); *Heaser v. Toro Co.*, 247 F.3d 826, 831–32 (8th Cir. 2001).

100 129 F.3d 857, 867 (6th Cir. 1997).

101 31 F.3d 209, 213 (4th Cir. 1994).

102 31 F.3d at 213.

103 2010 U.S. Dist. LEXIS 122477, at *5–8 (E.D. Wash. Nov. 18, 2010).

104 *See also Gomez-Gonzalez v. Rural Opportunities,* 626 F.3d 654, 664–65 (1st Cir. 2010) (finding employee's request to work more from home unreasonable for individual in management position responsible for supervising others).

The court in *Vande Zande v. Wisconsin Department of Administration*[105] held that the employer was not required to accommodate a paraplegic employee who requested that her employer provide her with a desktop computer so that she could work from home. The court reasoned that the request was unreasonable because the employer showed that it did not have enough work for her to perform individually at home, and the nature of her job required teamwork under supervision to maintain its optimal quality.[106]

In *Yindee v. CCH Inc.*,[107] a programmer-analyst's wrongful discharge claim was dismissed at summary judgment because her request to continue working from home was unconnected to her disability. In that case, the employee sought to work from home to accommodate her inability to drive, which, she claimed, was caused by vertigo connected with her infertility. The court found that no reasonable jury could conclude that vertigo was a symptom of infertility, a condition that resulted from treatment for the employee's endometrial cancer. As such, there was no connection between her request to continue working from home and her asserted disability.

These cases were fact-specific, and the courts did not hold that telecommuting could never be a reasonable accommodation. In *Carr v. Reno*, for example, the court recognized that "in appropriate cases, [the Rehabilitation Act] requires an agency to consider work at home, as well as reassignment in another position, as potential forms of accommodation."[108] In *Humphrey v. Memorial Hospitals Association*,[109] the court found that it *would* be reasonable for an employer to allow an employee with obsessive-compulsive disorder, which prevented her from arriving on time to work, to telecommute. The employee, a transcriptionist, could have performed the essential functions of her job—transcribing medical records—from her home without causing any hardship on the employer.[110]

In *Woodruff v. Peters*,[111] where the employee's supervisor revoked permission for the employee to telecommute, the court found that it was a jury question as to whether the employee could perform the essential functions of his job while telecommuting. The plaintiff had previously been granted the ability to telecommute under two different supervisors, and the employer's policy permitted telecommuting five days a week. Further, the supervisor could not point to any changes that suddenly made the accommodation unreasonable.

b. EEOC v. Ford Motor Company & Shifting Views on Telecommuting

Most recently, in *EEOC v. Ford Motor Company*,[112] the U.S. Court of Appeals for the Sixth Circuit *initially* concluded that allowing a problem-solver in a fast-moving team environment to telecommute *could* be a legally required reasonable accommodation and that traditional assumptions on the need to be physically present in the workplace sometimes fall by the wayside. This holding, however, was overturned by the court's subsequent *en banc* decision.

In *Ford* I, the employee was a "resale buyer," acting as an intermediary to ensure a steady supply of steel to Ford's parts manufacturers. The job entailed troubleshooting supply interruptions, interacting with suppliers, and group problem-solving with other members of her team. Her managers believed that the group problem-solving meetings were most effective when handled in person, face-to-face. The employee developed Irritable Bowel Syndrome ("IBS"), which caused her to soil herself unpredictably. The symptoms impeded her commute, and limited her ability to move about the office without sudden episodes of fecal incontinence.[113]

The employer had allowed other employees to telecommute, depending on the nature of their jobs and work environments. The employer in turn allowed the employee to try flex-time telecommuting on a trial basis, but believed that the experiment was unsuccessful because she could not establish regular and consistent work hours. The employer concluded the telecommuting prevented her from participating effectively in team problem-solving or accessing suppliers during normal work hours. Still, the employee requested to do her job at home during standard work hours for at least 80 percent of the time. The employer declined this request, but offered the accommodations of a cubicle closer to a restroom or a transfer to another position better suited to telecommuting as an accommodation—accommodations

105 44 F.3d 538, 545 (7th Cir. 1995).

106 *See also Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1565–66 (N.D. Ga. 1995) (concluding that employee's request to work at home was unreasonable, because employer would sacrifice security, supervision, and availability of computer resources).

107 458 F.3d 599, 601–03 (7th Cir. 2006).

108 23 F.3d 525, 530 (D.C. Cir. 1994).

109 239 F.3d 1128, 1136–37 (9th Cir. 2001).

110 239 F.3d at 1136–37.

111 482 F.3d 521, 526–28 (D.C. Cir. 2007).

112 *EEOC v. Ford Motor Co.*, 752 F.3d 634, 640–47 (6th Cir. 2014) (*Ford* I).

113 752 F.3d at 636–43.

that the employee declined. The employee began a pattern of unpredictable absences from work due to her IBS condition. Her work suffered, and coworkers bore the brunt of filling-in for her and correcting her errors. She filed a discrimination charge with the EEOC, claiming failure to accommodate her disability. Shortly thereafter, she was placed on a performance improvement plan and was ultimately terminated.[114]

The EEOC sued on the employee's behalf, alleging failure to accommodate and retaliation. The trial court granted summary judgment for the employer, holding that the employee was not a "qualified individual with a disability" because of her absenteeism and because the employer's judgment on the unsuitability of telecommuting for her job should not be disturbed.

The Sixth Circuit's initial panel reversed the trial court, and held that there were genuine issues of fact to be resolved at trial on whether the former employee remained "qualified" and whether telecommuting was a reasonable accommodation under her circumstances. It ruled that the EEOC and the employee presented sufficient evidence to suggest that she remained qualified for her position if the employer eliminated the requirement that she be physically present, and instead worked during regular business hours by telecommuting. The court further observed that the employer then shouldered the burden of showing that the employee's physical presence was indeed an essential job function or that telecommuting created an undue hardship. Proving undue hardship, the court added, does not equate to a mere "showing that an accommodation would be bothersome to administer or disruptive of the operating routine."[115]

The court acknowledged that "[f]or many positions, regular attendance at the workplace is undoubtedly essential" (e.g., passenger service agent at an airport, neo-natal nurse, filing clerk, pharmacy technician, or even positions where telecommuting would undermine the quality of the employee's work). Yet, it challenged the assumption "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." It reasoned that "as 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." This, the court noted, is a "highly fact specific question." In the employee's instance, the court held that telecommuting was not necessarily antithetical to the job's requirement of interacting regularly with team members during core business hours—so long as the employee could be available during the business day and maintain predictable (albeit remote) attendance.[116]

In the *Ford* I decision, the Sixth Circuit panel refused to pigeon-hole the claimant's troubleshooter position into other jobs where the employee's constant physical presence is still necessary. Although the employer argued that, in its business judgment, face-to-face interactions best facilitated group problem solving, the court rejected that justification on summary judgment. The court said "we are not persuaded that positions that require a great deal of teamwork are inherently unsuitable to telecommuting arrangements."[117] The court, however, noted the tension between employees who improperly attempt to redefine the essential functions of their jobs "based on their personal beliefs about job requirements" and employers who "redefine the essential functions of an employee's position to serve their own interests."[118]

The dissent to the majority opinion stated that the majority had upset the assumption that "attending work on a regular, predictable schedule is an essential function of a job in all but the most unusual cases, namely, positions in which all job duties can be done remotely."[119] The dissent did not believe that the EEOC and the former employee had sufficiently demonstrated that she could perform all of her essential job functions by telecommuting 80 percent of the time. Finally, the dissent warned that:

> [T]he lesson for companies from this case is that, if you have a telecommuting policy, you have to let every employee use it to its full extent, even under unequal circumstances, even when it harms your business operations, because if you fail to do so, you could be in violation of the law. Of course, companies

114 752 F.3d at 636–46.

115 752 F.3d at 640–47 (internal quotation omitted).

116 752 F.3d at 641.

117 752 F.3d at 642.

118 752 F.3d at 642.

119 752 F.3d at 650.

> will respond to this case by tightening their telecommuting policies in order to avoid legal liability, and countless employees who benefit from generous telecommuting policies will be adversely affected by the limited flexibility.[120]

This final warning did not account for the possibility that telecommuting may still be a reasonable accommodation option in workplaces that do not otherwise allow telecommuting—as modification of certain policies may be reasonable accommodations.

The Sixth Circuit then agreed to re-hear the case *en banc*—with the full panel of appellate judges.[121] In briefing, Ford argued "[i]n work and life alike, there is simply no substitute for showing up" and that team interactions are most effective done face-to-face. It maintained that regular and in-person attendance was an essential function of the job. Ford argued that the Sixth Circuit had not given sufficient deference to Ford's judgment on the essential functions of the job, and that the EEOC and the employee should not be permitted to define the essential functions of her job based solely on their personal views. The EEOC argued that the employer's view on essential functions was one among multiple considerations in deciding whether a function, such as a requirement of attendance at the workplace, is essential. It maintained that whether in-person attendance is essential is a jury question and that a jury should also decide whether the request to telecommute was reasonable. The EEOC argued that the majority of the employee's interactions with others could be performed by phone.

In its *en banc* decision, the Sixth Circuit swung the telecommuting pendulum back. This time, the court sided with the employer. The full panel held that regular and predictable on-site job attendance was an essential function of the job in question. The court cited prior holdings, explaining that "[m]uch ink has been spilled establishing a general rule that, with few exceptions, 'an employee who does not come to work cannot perform any of his job functions, essential or otherwise.'"[122] It noted that the evidence showed that the employee could not work from home on an unpredictable, as-needed basis without lowering production standards. The court stated: "[b]etter to follow the commonsense notion that non-judges (and, to be fair to judges, our sister circuits) hold: Regular, in-person attendance is an essential function – and a prerequisite to essential functions – of most jobs, especially the interactive ones."[123]

The court also rejected the EEOC argument, which the court explained was "without citation to the record or any case law, that technology has advanced enough for employees to perform at least some essential job functions at home." In doing so, the appellate court noted that "technology changing *in the abstract* is not technology changing *on this record*. ...[N]o record evidence – *none* – shows that a great technological shift has made this highly interactive job one that can be effectively performed at home."[124]

As with other telecommuting decisions, the appellate court's full panel did not conclude that telework could never be a reasonable accommodation. It simply was not a reasonable accommodation in the facts presented on the record in this instance. For the time being, however, the momentum from the Sixth Circuit's initial decision on increased attention to telecommuting as a reasonable accommodation appears to have slowed.

B. FAMILY RESPONSIBILITIES CONSIDERATIONS

Like those employees seeking telecommuting as an accommodation for their medical condition or disability, telecommuting often is an option requested by employees who have caregiving responsibilities or other work/family conflicts. Such responsibilities may include, for example, mothers or fathers caring for young children, employees caring for their elderly parents, or employees caring for their ill spouses, partners, or for family members with disabilities.

120 752 F.3d at 656.

121 782 F.3d 753 (6th Cir. 2015), (vacating *Ford* I panel opinion (Aug. 29, 2014)).

122 782 F.3d at 761.

123 782 F.3d at 762.

124 782 F.3d at 765 (emphasis in original).

1. Potential Bases of Discrimination Against Workers with Caregiving or Family Responsibilities

Federal EEO law,[125] and the majority of state fair employment laws,[126] currently do not prohibit discrimination against caregivers per se or protect against discrimination based on family responsibilities. Under the ADA, individuals associated with an individual with a disability may be protected from discrimination, but are not entitled to a reasonable accommodation.[127] The EEOC also concedes this is the case, though *discrimination* against persons with caregiving obligations may form the basis for a cognizable claim.[128] As such, a caregiver to a person with a disability denied the ability to telecommute could conceivably support a disparate treatment claim if other employees without caregiving responsibilities are allowed to telecommute, for no valid reason. Although the general principle that caregivers are not entitled to ADA accommodations holds under federal law, some state courts (e.g., California) have held under their broader statutes that persons such as caregivers may be entitled to a reasonable accommodation under the law.[129]

Moreover, employees seeking to telecommute to fulfill their family or caretaking responsibilities have a right to have their request considered without discrimination on the basis of race, sex, national origin, religion or other protected characteristic. Consequently, when a worker with caregiving or family responsibilities seeks to telecommute or obtain some other accommodation from an employer and is denied such request or harassed for making the request, and that treatment can be traced to a protected ground under either federal or state law, such treatment could rise to unlawful treatment by the employer. As a result, employers not only must avoid overt discrimination when considering whether to grant an employee's telecommuting request, but also must implement telecommuting arrangements without imposing a disparate impact on or causing the disparate treatment of certain protected groups of employees.

EEOC Enforcement Guidance on caregivers, issued in 2007, explained the circumstances under which discrimination against workers with caregiver or family responsibilities could constitute discrimination prohibited by various federal laws, including Title VII.[130] Since then, *family responsibilities discrimination* has come to be defined as follows: when "an employee suffers an adverse employment action based on unexamined biases about how workers with family caregiving responsibilities will or should act, without regard to the workers' actual performance or preferences."[131]

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125 Several federal statutes, nevertheless, impose legal obligations that may circumscribe treatment of workers with caregiving and family responsibilities. *See, e.g.,* Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq.*; Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d); Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*; Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*; 42 U.S.C. § 1983, and Executive Order 13152, 65 Fed. Reg. 26,115 (May 2, 2000) (prohibiting discrimination based on parental status in federal employment practices).

126 Several states and localities, however, have enacted legislation that prohibits employment discrimination based on caregiving or family responsibilities. *See, e.g.,* Alaska Stat. § 18.80.220 (prohibiting discrimination based on "parenthood"); Conn. Gen. Stat. § 46a-60 (prohibiting requesting information on an individual's familial responsibilities); D.C. Code Ann. § 2-1402.11 (prohibiting discrimination based on "family responsibilities"); Mich. Comp. Laws § 37.2102 (noting as a civil right "[t]he opportunity to obtain employment...without discrimination because of...familiar status"); Minn. Stat. § 363A.08 (prohibiting discrimination based on familial status); Atlanta, Ga., Ordinances ch. 94, art. V, § 112 (prohibiting discrimination based on "parental status" and "familial status"); Milwaukee, Wis., Ordinances ch. 109, subch. 3, § 45 (prohibiting discrimination based on "familial status"); Tampa, Fla. Ordinances ch. 12, art. II, § 26 (prohibiting discrimination based on "familial status"); Cook County, Ill., Ordinances ch. 42, art. II, §§ 32, 35 (prohibiting discrimination based on "parental status"); Howard County, Md., Ordinances tit. 12, subtit. 2, § 208 (prohibiting discrimination based on "familial status").

127 *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482 (6th Cir. 2011)., s*ee also Magnus v. St. Mark United Methodist Church*, No. 11-3767 (7th Cir. Aug. 8, 2012) (ADA does not provide protections to caregivers of individuals with disabilities); *Copeland v. Mid-Michigan Regional Med. Ctr.*, No. 1:11-cv-10633 (E.D. Mich. Feb. 16, 2012) (associational prong of ADA provides no right to leave to care for partner with disability).

128 *See* EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities (May 2007), s*ee also EEOC v. DynMcDermott Petroleum Operations Co.*, No. 12-40424 (5th Cir. July 26, 2013) (applicant with spouse with cancer supported claim based on evidence that employer denied job in part based on perception that spouse's condition would distract applicant); *Ruiz v. Edcouch-Elsa Indep. School Dist.*, No. 7:13-cv-00443 (S.D. Tex. April 9, 2014) (plaintiff needing to care for son with disability and claiming disparate treatment – closer scrutiny and termination – could support associational claim); *Terpo v. RBC Bank* (USA), No. 12-2325 (N.D. Ala. Oct. 2, 2013) (employee terminated shortly before leave to care for daughter could sustain disparate treatment claim).

129 *See Castro-Ramirez v. Dependable Hwy. Express, Inc.*, Slip Op. B261165 (Cal. 2d App. Dist. Aug. 29, 2016).

130 EEOC, Notice No. 915.002, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities [hereinafter EEOC Enforcement Guidance-Caregivers] (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html; *see also* EEOC, Questions and Answers about EEOC's *Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), http://www.eeoc.gov/policy/docs/qanda_caregiving.html.

131 Cynthia Thomas Calvert, *Family Responsibilities Discrimination: Litigation Update 2010*, The Center for WorkLife Law, at 6 (2010), worklifelaw.org/pubs/FRDupdate.pdf; *see also Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 982 (W.D. Wis. 2003), *aff'd as modified*, 383 F.3d 580 (7th Cir. 2004); EEOC Enforcement Guidance-Caregivers.

Family responsibilities discrimination can be overt or far more subtle. Some examples of circumstances that could give rise to a claim of family responsibilities discrimination include:

- terminating pregnant employees because they are pregnant or need to take maternity leave, or refusing hiring women of child-bearing age because, at some point, they might get pregnant or might miss too much work;[132]
- reassigning women to less-desirable projects or denying promotions to women who have children because the perception is they are less committed to their jobs;[133]
- firing employees when they return from maternity or paternity leave for no business reason, or giving those returning employees less responsibility because the employer assumes they want to be home with their children;[134]
- denying parents the ability to have flexible work schedules while giving nonparents flexible schedules;[135]
- treating mothers, mothers-to-be, or female caregivers differently from fathers and fathers-to-be, or male caregivers;[136] and
- penalizing workers who take time off to care for their aging parents, sick spouses, partners, or children, or writing employees up for absenteeism, even when they have taken intermittent or protected leave.[137]

In the context of telecommuting, to the extent an employer permits other employees to telecommute but refuses to grant a pregnant employee's request to telecommute because, for example, she will be leaving on maternity leave anyway, such a decision could be subject to challenge on grounds it was based on that employee's family or caregiver responsibilities.

Absent a category protected by Title VII, or other federal or state law, however, actions taken against workers with caregiver or family responsibilities may not constitute discrimination. So, for example, refusing to approve a telecommuting arrangement because of an employee's poor work performance, rather than assumptions or stereotypes borne out of that employee's status as a caregiver, generally would not violate federal or state law, even if the employee's unsatisfactory work performance was attributable to caregiving responsibilities.[138] Similarly, since Title VII and most state laws do not prohibit discrimination based solely on parental or other caregiver status, an employer does not generally violate federal or state laws' disparate treatment proscription if, for example, it permits both working mothers and working fathers to telecommute but does not afford the same flexibility to childless workers.[139]

Finally, individuals caring for a close relative with a serious medical condition may be entitled to leave under the Family and Medical Leave Act or under parallel state leave laws, if the employer is covered by the law(s) and if the employee qualifies (by virtue of the statutory tenure and hours worked over the last year) to take the unpaid leave. Although the existence of leave laws has no readily apparent connection to telecommuting, making telecommuting available to employees in appropriate circumstances may foreclose the need for an employee to take extended and disruptive leave under applicable leave laws – and provide a better alternative for the employee and employer alike.

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132 *Venturelli v. ARC Cmty. Servs.*, 350 F.3d 592, 597 (7th Cir. 2003) (finding comments about how "some women change their mind once they have the child in their arms" could be interpreted as an indication that an employer did not desire to hire pregnant women); *Stern v. Cintas Corp.*, 319 F. Supp. 2d 841, 859 (N.D. Ill. 2003) (finding statement by the decisionmaker that "Defendant's management does not 'view women as being long-term employees…because they tend to get married and have babies'" circumstantial evidence that could support a claim of family-responsibilities discrimination).

133 EEOC, Questions and Answers about *EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.*

134 *Stern*, 319 F. Supp. 2d at 858 (finding an employer's decision that it would not be fair to the company to give plaintiff a sales position or performance review until she returned from maternity leave to be evidence of discrimination under Title VII).

135 *Siddique v. Macy's*, 923 F. Supp. 2d 97, 105 (D.D.C. 2013) (finding that, had the plaintiff provided evidence his employer provided other sales associates with flexible schedules for reasons not pertaining to family responsibilities but denied him his requested 15-minute grace period because of his childcare responsibilities, he might have sustained his burden to prove his claim of family responsibilities discrimination).

136 *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (finding distinct hiring policies for women who have pre-school-age children and men who have pre-school-age children not permitted under Title VII).

137 *Ehrhard v. LaHood*, 2012 U.S. Dist. LEXIS 43287, at *25–38 (E.D.N.Y. Mar. 28, 2012) (denying summary judgment in favor of employer on Title VII gender discrimination claim where male plaintiff had been denied leave to care for a child when his wife could not to care for her even though female employees were permitted to take leave without pay under similar circumstances); *see also* EEOC, Questions and Answers about *EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*.

138 EEOC Enforcement Guidance-Caregivers, at Example 5.

139 EEOC Enforcement Guidance-Caregivers, at Example 1. As noted above, however, there may be state or local legal requirements prohibiting such treatment.

2. Reducing the Risk of Claims for Unlawful Disparate Treatment of Caregivers

Since issuing its Enforcement Guidance on Caregivers, the EEOC has issued supplemental guidelines.[140] In its "Employer Best Practices for Workers with Caregiving Responsibilities," the EEOC advocates for the adoption of flexible workplace policies as a means for employers to reduce the chance of claims of discrimination against caregivers.[141] The EEOC further provides several examples of best practices for employers to reduce the chance of discrimination claims, which—by the EEOC's own admission—go beyond federal nondiscrimination requirements.[142] In the context of telecommuting, such flexible work arrangements include offering employees the option to telecommute, work from home or other "flexplace" options that enable employees to work from locations outside of the typical or traditional office setting.[143]

III. POTENTIAL IMPACTS OF TELECOMMUTING ARRANGEMENTS

The constructive possibilities that telecommuting provides to both employers and employees and its continued increase notwithstanding,[144] such arrangements do have the potential to raise several policy issues that employers and employees should consider.

A. The Business Case v. Potential Impact on Resources

Employers who have permitted employees to telecommute generally have found that such employees—mostly out of necessity—are better organized and more focused than their in-office colleagues.[145] This largely is attributable to fewer office-environment distractions. Employees who are permitted to telecommute also are more engaged, more motivated, and, as a result, more loyal to their employers.[146]

The question is, of course, at what cost. As discussed earlier, the belief is that, with increasing numbers of employees working from home or from other remote locations, employers save overhead costs. However, many employers who have been through the experience of having a portion of their workforce work remotely recognize that telecommuting relationships take far more time to manage than those on-site. Both managers of telecommuters and the telecommuting employees themselves have to work hard at staying connected and being visible to one another. They also have to work harder at communicating with one another when the typical modes of office communication no longer are at their disposal.

The indirect costs associated with having to increase (and maintain) technological capabilities, increase IT staff, and make sure staff is available for technological issues and troubleshooting outside of normal business hours also reduces the cost savings employers might otherwise realize when a portion of their workforce is working remotely. Employers also typically lose control over telecommuting employees. Sometimes, loss of control can mean loss of production.

In addition to the loss of production due to the loss of oversight, telecommuting employees often report a loss of "synergy" or teamwork. This can occur through the lack of connection with coworkers due to the telecommuter's absence from meetings and workplace events, as well as from water cooler or lunchroom chatter. More typically, telecommuters tend to miss out on extemporaneous thinking, impromptu brainstorming, and essential cross-organizational collaboration that often only can come through in-person dialogue and interaction. The general perception is that innovation happens faster if people work collaboratively at the same office: face time results in higher performance, greater efficiency, and greater productivity.[147]

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140 EEOC, Employer Best Practices for Workers with Caregiving Responsibilities (Jan. 19, 2011), http://www.eeoc.gov/policy/docs/caregiver-best-practices.html.

141 EEOC, Employer Best Practices for Workers with Caregiving Responsibilities.

142 EEOC, Employer Best Practices for Workers with Caregiving Responsibilities.

143 EEOC, Employer Best Practices for Workers with Caregiving Responsibilities, "Terms, Conditions, and Privileges of Employment."

144 As mentioned earlier, the rate of telecommuting appears to be on the rise. For example, according to some estimates, the rate of telecommuting rose 79% between 2005 and 2012, and makes up 2.6% of the U.S. workforce—equivalent to 3.2 million employees. *See* Alina Tugend, *It's Unclearly Defined, but Telecommuting Is Fast on the Rise*, N.Y. Times, Mar. 8, 2014 at B6.

145 The Center for Work & Family, Boston College Carroll School of Management, *Bringing Work Home: Advantages and Challenges of Telecommuting* at 13, http://www.bc.edu/content/dam/files/centers/cwf/research/publications/pdf/BCCWF_Telecommuting_Paper.pdf.

146 In a 2013 study, employers surveyed reported a "positive to extremely positive" effect of flexibility programs on employee engagement (64%), motivation (65%) and satisfaction (73%). WorldatWork, *Survey on Workplace Flexibility 2013*, at 5 (Oct. 2013), https://www.worldatwork.org/adimLink?id=73898.

147 Penelope Trunk, *Yahoo kills telecommuting. Three cheers for Marissa Mayer!*, (Feb. 27, 2013), http://blog.penelopetrunk.com/2013/02/27/yahoo-kills-telecommuting-three-cheers-for-marissa-mayer/ (linking face time and higher performance to propinquity—the word to describe why people work better if they are in the same room); *see also* Brad Power, *In Praise of Face Time*, Harvard Bus. Rev. (Dec. 21, 2012).

IV. CONCLUSION

As detailed above, there are many practical advantages—for employers and employees alike—to agile work. Depending on the needs of the parties, and the services to be performed, flexible working arrangements can help ensure an organization's continued effectiveness in a changing workplace landscape. Employers offering flexible work may not only reap the benefits of increased employee productivity and loyalty, but may also save on overhead, such as rent and travel expenses. Given these opportunities and the increasing demand from employees who value this way of working, employers of all sizes are incorporating agile work into their cultures. Of course, with these potential rewards come potential risks, both practical and legal.

As a practical matter, not all employers permitting agile work may see significant returns on their investment. Some organizations may find that the benefits are not outweighed by the resultant increase in technology costs. Productivity and innovation may suffer if employees are not able to easily and meaningfully communicate and if companies don't properly invest in training and support. Employees, too, may find that telework limits their opportunities to interact with colleagues, to fully collaborate, and to further their career goals. The key is to ensure that individuals are set up for success having the best work spaces and workstyles to be productive and engaged and therefore, put forth their best work.

On top of these practical considerations, the ADA and Title VII add another factor to the complex telework equation. Courts have not been a leading force backing telecommuting as an accommodation for disabilities, but as technology and the nature of work evolve, that may not always be the case. Moreover, court decisions rejecting telecommuting as an accommodation are careful to explain that this is a case-by-case determination based on the nature of the job. The decisions do not conclude that telecommuting can never be required as an accommodation. In many circumstances, working from home can constitute a reasonable accommodation for an employee with a disability. Even if an employer does not currently have a telework policy, it has a duty under the ADA to engage in an interactive process with an employee seeking such an accommodation – and vet the possibility. In addition, employees have a right to ask for flexible arrangements to fulfill their family responsibilities without facing disparate treatment (based on their sex, for example) or retaliation. Requests for flexible scheduling posed by either individuals with disabilities or caregivers therefore should be taken seriously. Employers fielding such requests should consider whether the employee's essential duties can be accomplished remotely and whether granting the request would disparately impact others within the organization. Employers should also address how telework can be instituted consistently with existing policies, how to maintain confidentiality, and how to integrate remote employees so that they can continue to enjoy available benefits and privileges on an equal basis.

Telework can be a thorny issue with so many interests in play. But, when properly implemented, it can create an opportunity for modern employers to accommodate employee needs while also maximizing their potential.

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