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Evaluating Remote Work as a Reasonable Accommodation

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With many employers contemplating return-to-work directives and many employees seeking and/or needing an accommodation to continue remote work arrangements, employers must be mindful of their obligations under the Americans with Disabilities Act (ADA) and related state law. As workplaces have evolved and emerged from the COVID-19 pandemic, remote work has increasingly become a common accommodation requested by employees when employees are faced with a directive to return to the office.

Before the COVID-19 pandemic made remote work a more common occurrence for many employers and more common in many industries, courts were nearly uniform in their position that regular in-person attendance at work was an essential function of many jobs. Fast forward to today and more courts are willing to examine the reasonableness of a remote work accommodation, particularly in light of technological advances made by many organizations to cope with the pandemic. With this understanding, employers should thoughtfully consider work-from-home accommodation requests under the framework provided by law, just as they would for other workplace accommodation requests.

Do employers have a duty to engage in the interactive process?

Upon receiving any request for a workplace accommodation, including a request to continue or to engage in remote work, an employer must engage in the interactive process under the ADA and any corresponding state law. The interactive process is a collaborative dialogue between employer and employee to determine whether there is a reasonable accommodation which may be made to enable the employee to perform the essential functions of their job.

What is an essential job function?

An essential job function refers to the fundamental duties and responsibilities that must be completed to perform the job. To determine what is and is not an essential function of the job, employers

should consider the following:

- The amount of time the employee spends performing this duty;
- Whether certain equipment is required to perform this duty;
- Whether the duty involves collaboration with others;
- The number of other employees qualified to perform this duty or to whom it could be re-assigned;
- Whether the position exists to perform this duty; and
- Whether the employee's job would be fundamentally altered if they were no longer required to perform this duty.

Determining whether something is essential requires discussion amongst the appropriate business stakeholders, often including the employee's supervisor, members of the leadership team, and the human resources partner. This is a fact-specific analysis, and the relevant factors and decision-making process should be well documented.

How does an employer engage in the interactive process with the employee?

Once the employer identifies the essential functions of the job, the employer should engage the employee in a verbal discussion to help determine whether remote work is a reasonable accommodation which would allow the employee to perform the essential functions of the job. To do so, employers must gain a clear understanding of the specific limitations and parameters of the employee's disability and requested accommodation, including whether such limitations are permanent or temporary, the frequency with which the employee would need to work from home, and how working from home would allow the employee to effectively perform the essential functions of their job. Employers should maintain a written record of all communications regarding the interactive discussion with the employee. Creating a template document to use for each and every accommodation request that is made to the employer can help in this process and allow for consistent evaluation of accommodation requests.

Is an employee entitled to a remote work accommodation?

An employee is not entitled to their requested or preferred accommodation. An employer may choose among reasonable accommodations as long as the chosen accommodation is effective. When considering whether to offer an accommodation at all or whether to offer an alternative accommodation, an employer may consider whether the requested accommodation presents an undue hardship on the employer. An undue hardship is an "action requiring significant difficulty or expense" when considered in light of the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation. Undue hardship is determined on a case-by-case basis. An employer should be prepared to demonstrate any reasons for concluding that an accommodation creates an undue hardship and is not otherwise practicable for the employer's operations.

If a remote work accommodation is approved, may an employer monitor the effectiveness of the work arrangement on a going forward basis?

Yes, an employer can and should monitor and evaluate the effectiveness and work ability of any accommodation provided to an employee. Accommodations are not necessarily permanent, as an employee's needs for an accommodation, or for a particular accommodation, may change over time. One common concern with remote work is the ability to effectively monitor performance and correct performance deficiencies. Employers are not required to lower their performance standards when they accommodate an employee. Employers should follow their standard procedure for addressing and documenting performance deficiencies but must remain mindful not to discipline for the lack of physical presence alone.

This article is not meant to be an exhaustive summary of the interactive process. If you have any questions on how to appropriately evaluate a remote work accommodation request, contact your Vorys attorney.