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Telecommuting Tradeoffs

*Freedom and the law*

By Lori D. Bauer

Working at home: An idea whose time has come or a concept fraught with fantasy?

In the last few years, the workplace has dramatically changed. Rapid advances in technology have motivated employers to offer flexible work arrangements to attract and retain talented employees while lowering overhead, increasing productivity and gaining employee satisfaction. These new capabilities have launched telecommuting as a trend in today’s workplace. Although it is an attractive option for both employers and employees, telecommuting presents a new challenge for today’s employer to effectively manage its workforce.

Telecommuting is a flexible work arrangement that allows an employee to work at home or at another satellite location (which is linked, usually electronically, to a central office) during all or some portion of the work week. Computer or telephone technology brings the work to the workers instead of bringing the workers to work. Employees perform real work in a “virtual” office located in their home, a mobile office or telecommuting center.

The 21st century workplace has many forms, from restructured existing facilities, to new satellite offices, to the elimination of the traditional workplace altogether.

One form of telecommuting is known as “home-based.” Under this approach, employees work at home according to a set arrangement, typically for some regularly defined period. The arrangement is frequently on a part-time basis, but some companies also permit full-time, home-based work. Telecommuting employees often select this arrangement to avoid a lengthy commute or to care for children.
A second type of telecommuting is where employees work from a remote location known as telework centers or satellite offices. Telecommuting from a center can mitigate many of the disadvantages of telecommuting from home. The trip to the center, although shorter than the commute to the regular workplace, still provides an important barrier between work and home. Noise and interruptions from household members is eliminated. Telework centers also offer employees the opportunity for social and professional interaction.

For the employer, the center has a more professional image. Moreover, the supervisor may feel more confident that the employee is actually working. Even though home-based telecommuting has been the most popular to date, telework centers will likely experience a dramatic increase as commute times continue to increase and the availability of qualified workers tightens.

A third type of telecommuting is "the virtual office." Advances in technology have permitted employees to literally pack their offices on their backs. The increased efficiency of laptop computers and the proliferation of cell phones permit employees to work from airports, hotel rooms, Internet kiosks, and even directly from customers' facilities.

Finally, many employers have eliminated the concept of a "designated workstation" even at primary facilities. Nonterritorial offices are merely unassigned workstations, like those found in many hotel business centers. Typically, there are more employees than workstations in these locations. In a nonterritorial office, when an employee logs onto any computer, the computer network and related systems (that is, voice mail) automatically assign them to the workstation for that day. This arrangement allows employers to efficiently use resources, often permitting a significant reduction in office space, support staff and office equipment.

Telecommuting is best suited for jobs that require independent work, little face-to-face interaction, concentration, a measurable work product, and output-based (instead of time-based) monitoring, such as word processing, writing, data entry/processing, telemarketing, software development and sales. Work may not be suitable for telecommuting if, for example, it requires:

- extensive face-to-face contact with a supervisor, co-workers, clients or the general public;
- frequent access to material that cannot be removed from the central office; or
- special facilities, equipment or security clearance that cannot be duplicated at the alternative work site.

Employers should be aware of several legal issues before trying telecommuting. One major pitfall is the tension between the telecommuter "revolution" and the Americans with Disabilities Act. The ADA requires covered employers to make reasonable accommodations for otherwise qualified employees with disabilities. See 42 U.S.C. §12112(b)(5).

Telecommuting has become an attractive option for employees who cannot work in the office because of a disability. Although the ADA does not address telecommuting directly as a reasonable accommodation, several courts have suggested that employers at least must consider telecommuting as a possibility.

In ADA claims involving requests for reasonable accommodation, the burden is first on the plaintiff. McDonnell Douglas Corp. v. Green, 411 US 792, 802-04 (1973). See also Buckles v. First Data Resources, 176 F.3d 1098, 1101 (8th Cir. 1999). Under McDonnell Douglas, the plaintiff must first establish a prima facie case of discrimination by showing that "she is disabled within the meaning of the [ADA]; that she is qualified to perform the essential functions of her job with or without reasonable accommodation; and that she has suffered an adverse employment action because of her disability." Webb v. Mercy Hosp., 102 F.3d 958, 959-60 (8th Cir. 1996).

The plaintiff then must show that a reasonable accommodation that allows him or her to perform the essential functions of the job is possible. Zenaida Garcia-Ayala v. Lederle Parenterals Inc., 212 F.3d 638, 647 (1st Cir. 2000). The burden then shifts to the employer to prove that the plaintiff's proposed accommodation is an undue hardship. See Zenaida Garcia-Ayala, supra.

To be covered under the ADA, a plaintiff must show that a physical impairment substantially limits the performance of a major life activity, such
as performing manual tasks. See 29 CFR 1630.2(i).

In a recent U.S. Supreme Court case, the court held it is not enough for a plaintiff to argue that she is unable to perform a class of manual activities. *Toyota Motor Manufacturing, Kentucky Inc. v. Williams, 534 U.S._ (2002).* Rather, a plaintiff must demonstrate that she has an impairment that presents or severely restricts her from performing activities that are of central importance to most people's daily lives *Toyota Motor*, 534 US at ___.

Assuming the plaintiff has a disability under the ADA, the burden remains with the plaintiff to suggest a reasonable accommodation. The ADA does not require employers to retain disabled employees who cannot perform all of the essential functions of their jobs with or without reasonable accommodation. *Zenaida Garcia-Ayala*, 212 F.3d at 649.

Likewise, an employer is not required to accommodate an employee with a disability by eliminating one of the essential functions of the job. See, for example, *Treanor v. MCI Telecomm* 200 F.3d 570, 575 (8th Cir. 2000) When an employee seeks to work at home, the burden shifts to the employer to show that such an accommodation is unduly burdensome. *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994).

Employers normally are not required to offer a "work-at-home" accommodation. Generally, an employee "who does not come to work cannot perform any of his job functions, essential or otherwise." *Carr*, 23 F.3d at 527. In the context of the ADA, courts have held that regular attendance is an essential element of most jobs.

For this reason, courts have ruled that employers are not required to allow disabled workers to work at home, where their productivity would be greatly reduced. An exception would be where the employee can demonstrate that working at home would allow him or her to work full time regularly and predictably, perform all essential work duties to the employer's legitimate expectations and be cost effective. *Wojciechowski v. Emergency Tech. Serv., No. 95 C 3076, 1997 U.S. Dist. LEXIS 3740, *11 (N.D. Ill. 1997).

An employer is expressly afforded the right to determine a position's "essential functions" under the ADA. Courts therefore must look at the facts of the case to determine whether the essential functions of the job can be performed at home.

To determine whether at-home work would be unduly burdensome to the employer, courts evaluate the essential functions of the job to determine if they may reasonably be undertaken in the home environment. The factors that the courts have considered include the presence of teamwork; supervision rather than solitary unsupervised work; daily interaction with others; frequent face-to-face contact; and whether the home environment is conducive to work requirements.

As telecommuting becomes more common, courts are viewing "work in the home" as a natural evolution and a reasonable accommodation. That is particularly true when a substantial part of the employee's job is not performed in the office. As more employees have computers and fax machines at home, it is not always necessary for employees to be physically on site in order to perform their jobs.

The advent of high-speed telecommunications technology with cable modem has rapidly spread the use of the Internet as a work tool. Predictably, the Internet has made telecommuting easier and obviated some of the necessity for work from a central office. The proliferation of e-companies that rely on "cyber offices" has made the essential functions of an office worker seamlessly transferable to the home.

The ability to work online has thus cast doubt on the viability of physical presence as an essential function of work. As technology makes it easier to work away from the office, it is likely that more courts will begin to view telecommuting as a reasonable accommodation.

In fact, last year a federal jury in Philadelphia awarded $1.5 million to an insurance underwriter with Crohn's disease who worked for the Guardian Life Insurance Co. of America. The employee claimed her employer at first accommodated her disability by allowing her to work from home when she
was ill, but later insisted that she appear at the office two days a week and submit to a different performance review schedule than her colleagues.

She filed a disability discrimination and retaliation suit against her employer for failing to accommodate her with a fully flexible work-at-home arrangement. It took the jury only half a day (following a four-day trial) to return a verdict against the employer. *Davis v. Guardian Life Ins. Co. of America*, No. 98-CV-5209 (E.D. Pa., Verdict May 26, 2000).

As telecommuting becomes more common, employers must address the unique issues that arise from the use of e-mail and the Internet by the home-based worker. These matters include monitoring off-site e-mail and Internet use, accessing home-based company information, and protecting company secrets at remote locations.

While courts have ruled on the propriety of an employer accessing and monitoring an employee’s electronic communications, they have provided little guidance concerning the protection of company secrets stored in employee home computers.

At a minimum, companies can develop monitoring programs to track employees with access to sensitive information. Also, telecommuters (and other) employees should be trained how to handle such information, including security breaches, “confidentiality disclaimers” and encryption technology for transmission of work data.

As the number of telecommuters (as well as use of remote access to servers) grows, the opportunity for unauthorized access to corporate data also increases. For example, a telecommuter with remote access to a company server can attempt to crack security codes after hours. Employers can build various security levels, as well as monitor access, to help protect the integrity of telecommuting initiatives.

Companies, however, should use security and monitoring schemes in the least intrusive manner to help assuage the privacy concerns of their telecommuters, while maintaining their absolute right to monitor electronic communications during business hours and access home-based company information stored on computers used in telecommuting.

In 1938, Congress enacted the Fair Labor Standards Act to establish a minimum wage and encourage employers to create new jobs in order to avoid overtime payments. See 29 U.S.C. §§ 206(a)(1), 207(a)(1). Unless specifically exempt, the FLSA requires an employer to pay its employees both a minimum hourly wage for all hours worked and overtime payments for any hours worked beyond 40 hours a week.

The majority of compliance questions for telecommuting employees concern nonexempt rather than exempt employees. Telecommuting arrangements generally do not create compliance problems for exempt employees because — assuming they are properly classified — their compensation is not linked to hours worked. In contrast, nonexempt employees are compensated based on hours worked, which can be difficult to track in a telecommuting arrangement. This difficulty may create questions about whether telecommuting employees are properly compensated.

Neither the FLSA nor the U.S. Department of Labor’s interpretative regulations directly addresses nonexempt telecommuting employees; telecommuting was unknown when they were written.

However, the DOL has issued regulations relevant to the manufacturing sector concerning “home workers,” defined as anyone employed or suffered or permitted to perform industrial homework for an employer. 29 C.F.R. § 530.1(c). “Industrial homework” is “the production by any person in or about a home, apartment, tenement or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source . . . of the materials used by the home worker in such production.” 29 C.F.R. § 530.1(c).

While the DOL has not stated a position on whether telecommuting employees are “home workers,” it may construe this regulation broadly with respect to nonexempt, telecommuting employees.
Thus, telecommuting arrangements may engender FLSA compliance questions with respect to:

- identifying compensable working time;
- controlling unauthorized off-the-clock work; and
- controlling unauthorized reported work.

The DOL regulations specifically address whether an employee is "on duty" or "off duty." 29 C.F.R. §§ 785.15, 785.16. Because they work off-site, employers may struggle to determine when telecommuters are "on duty." Also, every employee experiences "waiting time" during his or her work day, such as, the receptionist who reads a book while waiting for phone calls or visitors. Whether to count waiting time as working time depends on the particular situation, and the question is whether the employee is "engaged to wait" or "waiting to be engaged." An employee "engaged to wait" is working when the inactivity is an integral part of the job.

Like other employees, telecommuters may have periods of inactivity when, for example, a computer system is down. Such on-duty or stand-by time is compensable working time when:

- the periods are unpredictable;
- they usually last for a short period; and
- the employee cannot use the time effectively for his or her own purposes. 29 C.F.R. § 785.15.

Whether the telecommuting employee can use the "downtime" effectively for his or her own purposes determines whether that time is compensable. One could argue that the telecommuting employee could perform household chores while waiting for the computer system to become available.

True "off duty" time is not compensable working time. An employee is off duty when he or she is completely relieved from duty and when the period is long enough for the employee to effectively use the time for his or her own purpose. 29 C.F.R. § 785.16(a).

Complete duty relief and ability to effectively use time generally requires that the employee receives advance notice that he or she can leave the job; and the employee receives advance notice that he or she will not have to start work until a definite, specific time. Conversely, short rest periods from five to 20 minutes must be counted as working time. 29 C.F.R. § 786.18.

Another troublesome issue for employers is the ability to control unauthorized, unreported "off-the-clock" work, which may occur when an employee performs work but fails to report this working time on his or her time card. In the telecommuting environment, it may include an employee's failure accurately to record the hours worked. Lacking physical supervision, employers offering telecommuting arrangements are thus uniquely susceptible to off-the-clock claims.

Claims of off-the-clock work by employees are increasing and have proven to be both an unexpected and substantial source of liability for many employers. The DOL and the courts repeatedly have emphasized that it is the employer's obligation to manage its employees to ensure that they are not working uncompensated hours.

Unfortunately, the DOL and the courts also have explained that the mere existence of a rule that prohibits off-the-clock work is an insufficient defense and that the employer must both establish and enforce a policy against all off-the-clock work to escape liability. Consequently, an employer's policy should communicate clearly that off-the-clock work is a serious violation of company policy, that employees who perform off-the-clock work will be subject to disciplinary action, and that the employer will police compliance.

Telecommuting, bolstered by the tremendous increase in availability of cost-effective technology, can be an appropriate workplace alternative. However, an employer should carefully review the advantages and disadvantages of telecommuting prior to putting it into action.

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Some preventive strategies

A successful telecommuting program will include these main elements:

- top management "buy in" and approval (based on need, value added, costs and benefits)
- a formal program (including a coordinator, policy, standard agreement, orientation process and pilot program)
- education and preparation of the entire work force
- training for telecommuters and telemanagers
- a written telecommuting policy.

Other concerns to consider when developing a program are:

- insurance
- workers' compensation coverage
- at-home work site design and inspection guidelines covering working/walking surfaces, electrical safety, electrical equipment, fire protection and suppression, storage, heaters, coffee pots, radiators, video display terminals/monitors, etc.
- "inventory list" for all hardware, software, data, furnishings and related materials and equipment, including who owns the equipment
- master calendar or schedule
- work assignment sheet
- Fair Labor Standards Act matters
- Americans with Disabilities Act reasonable accommodation requirements
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Telecommuting: The good, the bad and . . .

What are some employee and employer benefits?

Employees benefit from telecommuting because it affords:

- better family life
- more comfortable work environment
- more flexibility in scheduling work time
- no need to fight traffic or overcrowded public transportation
- more flexibility in deciding where to live
- increased job satisfaction
- financial savings on commuting and clothing costs.

Employers benefit in these areas:

- makes the company more attractive by offering new and flexible work arrangements
- broadens the applicant pool beyond full-time workers
- extends the geographic boundaries of the potential labor pool
- allows easier employment of individuals with limited mobility or other disabilities
- provides a desirable work/life balance
- reduces recruiting and training costs
- offers a flexible alternative to relocation
- improves employee morale
- reduces total office-space requirements
- promotes office elimination or office sharing
- reduces rental and associated costs (such as, janitorial, parking, water and power)
- increases productivity
- decreases stress level
- decreases distractions
- uses off-peak time share
- reduces travel and geographic barriers
- benefits employees mentally and emotionally
- provides accommodations so that, for example, individuals with temporarily disabling conditions, ill family members, child or elder care emergencies, etc., can remain productive through telework
- decreases sick leave
- supports disaster-recovery strategies
- complies with air-quality ordinances by reducing traffic.

But then there are certainly employee and employer drawbacks to telecommuting.

**Drawbacks found by employees include:**
- perceived hindrance of career advancement (less visibility at the central office)
- lack of support services (such as secretarial)
- isolation and lack of interaction with fellow workers
- household distractions
- reduced living space.

**Drawbacks for employers include:**
- management resistance and skepticism
- equipment, supplies and technology for home office may need to be provided
- not all workers are suited to telecommute, so the selection process is key
- control matters (difficulty in supervision)
- culture change (shift from managing attendance to managing performance)
- security of data/information stored at the “home office.”

— Lori D. Bauer
A few things to keep in mind

What are some matters your client’s company should consider when implementing a telecommuting program?

- Decide on the objective for your program.
- Determine the cost/benefit to your company.
- Start off with a small pilot program.
- Select only suitable candidates.
- Discuss the pros and cons with the candidates.
- Train/orient the candidates fully.
- Allow sufficient time to consult with information-services personnel to determine if the appropriate technology for the job is available.
- Define performance standards for the job in advance. Job responsibilities and assignments should be clearly defined and measurable.
- Determine if the job is hourly or exempt. Identify all applicable FLSA requirements.
- Provide necessary ergonomic tools, such as an appropriate chair, wrist rest and screen saver. Define up front what the employee must provide (such as, desk, computer, etc.).
- Develop appropriate written policies, agreements and checklists.

— Lori D. Bauer