

## IN THIS ISSUE

FEBRUARY 2003

*The EEOC's "Telework Fact Sheet" Reaffirms the Agency's Position That Employers Can Reasonably Accommodate Qualified Disabled Workers Through Telecommuting Programs in Some Circumstances*

## EEOC ISSUES "TELEWORK FACT SHEET" UNDER THE ADA

By Rod M. Fliegel

On February 3, 2002, the EEOC issued a "Telework Fact Sheet" (TFS) that explains when employers should consider offering telecommuting privileges as a reasonable accommodation under the ADA. This is not the Agency's first effort to address this topic. The EEOC's 1999 Enforcement Guidance regarding Reasonable Accommodation and Undue Hardship Under the ADA (which was revised and reissued in October 2001) declared:

Does an employer have to allow an employee with a disability to work at home as a reasonable accommodation? An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.

([www.eeoc.gov/docs/accommodation.html](http://www.eeoc.gov/docs/accommodation.html)). The TFS expounds on the Agency's prior guidance with respect to, among other things, whether employers have to offer telework as an accommodation if they do not allow employees to work at home.

State and federal courts are not bound by the EEOC's sweeping interpretation of the law and, notably, in its 1999 Enforcement Guidance, the EEOC even observed that "[c]ourts have differed regarding whether 'work-at-home' can be a reasonable accommodation." Nonetheless, judges regularly defer to the EEOC in areas of the law that the Agency enforces, including the ADA. Accordingly, HR professionals should familiarize themselves with the TFS so they understand the Agency's position concerning this subject area and to prepare for the potential increase in work-at-home accommodation requests.

The summary of the TFS in this ASAP is not exhaustive. Copies of the TFS are available on the EEOC's web site ([www.eeoc.gov/facts/telework.html](http://www.eeoc.gov/facts/telework.html)).

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### SUMMARY OF THE TFS

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**Does the ADA require employers to have telework programs?** No. The ADA does not require an employer to offer a telework program. However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program. In addition, an employer might be required to waive certain eligibility requirements or otherwise modify its telework program 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.

**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 further discussion below.)

**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 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.

**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. 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 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. Several factors should be considered, including:

- the employer’s ability to supervise the employee away from the workplace;
- whether any duties require use of certain equipment or tools that cannot be replicated at home;
- 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.

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.

**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. In these instances, an employee might need to work at home on an “as needed” basis, if this can be done without undue hardship.

**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. 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.

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HUMPHREY V. MEMORIAL  
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Employers with operations in the Ninth Circuit should be aware of the court’s fairly recent decision in *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128 (9th Cir. 2001). In that case, Judge Reinhardt concluded that the plaintiff could not be excluded from participation in the em-

ployer’s telecommuting program based upon her poor attendance, because there was evidence that the plaintiff’s absenteeism was directly related to her disability (obsessive-compulsive disorder). (For a further discussion, see Littler’s ASAP, “Exacerbating the Exasperating: Applying Attendance Control Policies to Workers with Disabilities,” available at [www.littler.com/nwsltr/asap\\_humphrey.html](http://www.littler.com/nwsltr/asap_humphrey.html).)

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CONCLUSION

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In sum, with the rise of requests for accommodation and increasing integration of technology into the workplace, HR professionals must familiarize themselves with the TFS. HR professionals should also carefully review:

- job descriptions – to ensure they list all of the essential functions, including the need to work on site, as appropriate;
- telecommuting and any related policies – to ensure that the policy terms are clearly defined and address all pertinent and potential issues; and
- past and existing situations where telecommuting has been permitted/denied – to ensure the even-handed and lawful administration of the applicable policies.

Employment counsel can help you comply with the ADA and related state laws, and can help you implement ADA policies, revise job descriptions conduct training and evaluate the risks of potential liability.

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*Rod M. Fliegel is a shareholder in Littler Mendelson’s San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Fliegel at RFliegel@littler.com.*

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