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<https://www.law.com/thelegalintelligencer/2023/11/22/back-to-the-office-you-go-issues-impacting-remote-work-in-a-post-pandemic-world/>**NOT FOR REPRINT**COMMENTARY

Back to the Office You Go! Issues Impacting Remote Work in a Post-Pandemic World

Employees now comfortable (and even excelling) with working from home may face new challenges if employers mandate a return to the office.

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By Jeffrey Campolongo and Scott M. Badami | November 22, 2023 at 01:37 PM

As 2023 comes to a close, there are a number of employment law issues that seem ready to percolate next year. For sure, one of those issues will be how employers deal with employees who wish to continue to work from home in the face of a workforce demanding they return to the office. With a subset of employers now seeking their workers back full time. Some surveys even report up to 90% of employers want their employees back in the office. Which leaves only a small minority of employees pleased about full time work from home. Employees now comfortable (and even excelling) with working from home may face new challenges if employers mandate a return to the office. Here is a quick primer of applicable law and some points of emphasis between employers and employees.

First, employers are generally permitted to set and maintain their own policies—which typically include items such as where and when employees are required to work. Accordingly, as long as employers follow the health and safety guidelines of the Occupational Health and Safety

Administration (OSHA), management can generally require workers to return to the office. To be sure, employees who are now accustomed to working from home can technically refuse—but in many circumstances that employee can be let go and even terminated.

One common approach is to proactively reach out to management to determine if a workplace either has (or would be willing to adopt) a hybrid remote work policy that would permit a split of working from the office and work from home. Particularly for highly performing employees, this is a win-win solution that employers can make sense. Employers will typically have a handbook or other internal guidance which describes current policy. For union employees, the contract between the union and management will spell out when and where employees are expected to work.

There are, of course, circumstances in which a refusal to return to the office can be protected under the law. Examples are individuals with certain disabilities (which can include underlying health or immunocompromised situations). Employees with those types of disabilities can seek a reasonable accommodation under federal or state law to continue to permit them to work from home.

During the pandemic, the Equal Employment Opportunity Commission (EEOC) issued guidance regarding telework in a post-COVID world called “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (Updated on May 15, 2023). The EEOC guidance provides useful questions and answers on when and how to accommodate post-COVID return-to-work issues. For example:

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation?

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The EEOC also emphasized that a workplace that participated in telework during the COVID-19 pandemic, will not be required to approve telework as a reasonable accommodation after the pandemic concludes, however, “the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely.”

In 2024, prepare to see employers seeking a return to the office to aggressively offer incentives to get their employees to come back. Generally, it is permissible for employers to put forward incentives (in the form of bonuses, raises, extra paid leave, fancy lunches/meals, gift cards and other perks) to get employees back to pre-pandemic schedules. An important caveat to these types of incentives is that employers need to be thoughtful to ensure the morale of disabled team members who work from home or would unfairly impact the morale of workers who continue to work remotely. Some states are trying to get involved—the California legislature passed (though the governor vetoed) a bill which would have required a 30-day notice period before issuing a back-to-the-office order.

Are there other options for employees? Well, in many fields, the labor market (particularly for high performing employees) is still tight. While employers may desire a full return to the office, there is a real risk that an employee (or a group of employees) may choose to resign and find another employer who will permit either work from home or a hybrid option. That’s a real world factor right now—are employers willing to risk losing high performing (and typically younger) workers who prefer to work from home some (if not all) of the time? So far, the answer generally seems to be it is not worth the risk. But that could change if the labor market changes. For now, having a flexible policy and approach to work from home should be the norm, not the exception.

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