

H.R. ALERT*

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Introduction

For employers and their key human resource professionals, keeping abreast of guidelines issued by the U.S. Equal Employment Opportunity Commission (“EEOC”) is no small feat. We try to inform our readers of the EEOC’s latest guidance through our *H.R. Alerts* and our electronic

newsletters. This month, the EEOC issued another key guidance on telecommuting as a “reasonable accommodation” under the Americans With Disabilities Act (“ADA”), which is discussed below. Additionally, we have also set forth for our readers a concise listing of some of the EEOC’s pertinent publications which are available on the EEOC’s Web site.

I. EEOC Offers Guidelines on “Teleworking” as a Reasonable Accommodation Under the ADA

As noted, the EEOC has just released guidelines for employers who are considering allowing an employee with a disability to “telework” as a reasonable accommodation under the ADA. The phrase “telework” or “telecommuting” refers to employees working at home, instead of the place of business, and has become a growing trend in the workplace. This can sometimes involve the use of a computer in an employee’s home to access the employer’s computer network or to otherwise utilize technology to perform work at home. The ADA requires employers to provide “reasonable accommodations” to the physical and/or mental limitations caused by an employee’s disability to the extent that it does not create an “undue hardship.”

The EEOC guidelines make clear that an employer is not required to offer a telework program to all employees. If an employer does offer telework, however, it must allow employees with disabilities to participate in the program. Reasonable accommodation under the ADA may require employers to modify or waive certain policies. For example, an employer may generally require employees to work at least one year before they are eligible to telework. 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 the requirement for that individual. The EEOC guidelines state that allowing an employee to work at home can be a reasonable accommodation, even if the employer

does not allow other employees to telework.

The determination of whether an employee may need to work at home is intended to be a flexible interactive process between the employer and employee that must begin with a request from the employee. Some of the factors to be considered include: (1) what limitations from the disability make it difficult to work in the workplace and why the work could be performed at home; (2) whether the employee’s condition is a disability as defined by the ADA; (3) whether the essential job functions of the job can be performed at home, and; (4) what other options, other than working at home, would be a reasonable accommodation. Under the ADA, an employer is not obligated to adopt an employee’s preferred or requested accommodation, and may offer alternate accommodations as long as they would be effective.

The EEOC guidelines state that an employee may work at home only to the extent that his or her disability makes it a necessity. For some people this could 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 cases where the effects of a disability become particularly severe on a periodic but irregular basis, the employer may accommodate these “flare-ups” by allowing work at home on an “as needed” basis, if this can be done without undue hardship.

II. Pertinent EEOC Guidances/Guidelines

Set forth below is a listing of some of the EEOC’s pertinent guidances available on the EEOC’s Web site at www.eeoc.gov:

A. Americans with Disabilities Act (ADA):

1. The ADA: A Primer for Small Business

2. Is It Legal to Ask. . . ? Exercise
3. Application of the ADA to Contingent Workers
4. EEOC Issues ADA Guidance to Field Offices to Address Supreme Court Rulings on Mitigating Measures

* H.R. ALERT is intended to provide late-breaking news in the employment arena.

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5. Disability-Related Inquiries and Medical Examinations of Employees under the ADA
 6. Preemployment Disability-related Questions and Medical Examinations
 7. The ADA and Psychiatric Disabilities
 8. Reasonable Accommodation and Undue Hardship under the ADA
 9. Workers' Compensation and the ADA
- B. Age Discrimination in Employment Act (ADEA):**
1. Guidance on *O'Connor v. Consolidated Coin Caterers Corp.*
 2. Waiver of Rights and Claims Under the ADEA
 3. Final Rule on ADEA "Tender Back" Issue
- C. Title VII of the Civil Rights Act of 1964:**
1. National Origin Discrimination
 2. Unlawful Retaliation Under Title VII following *Mattern v. Eastman Kodak Co.*
 3. Decision on Coverage of Contraception
- D. Harassment:**
1. Vicarious Employer Liability for Unlawful Harassment by Supervisors
- E. Retaliation:**
1. Retaliation
 2. Investigating/Analyzing Retaliation Claims
- F. Damages:**
1. Compensation and Punitive Damages
 2. Discrimination Compensation
 3. Compensatory and Punitive Damages Available under
- G. Temporary Employees:**
1. Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms
- H. Evidence:**
1. After-acquired Evidence and *McKennon v. Nashville Banner Publishing Co.*
- I. Arbitration:**
1. Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment
- J. Coverage/Threshold Issues:**
1. Threshold Issues
 2. Whether "Testers" Can File Charges and Litigate Claims of Employment Discrimination
 3. EEOC and *Walters v. Metropolitan Educational Enterprises, Inc.* (coverage under Title VII, the ADA, and the ADEA)
- K. General Waivers:**
1. Non-Waivable Employee Rights under EEOC Enforced Statutes
- L. Employee Benefits:**
1. Employee Benefits

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Inquiries concerning topics addressed in the H.R. ALERT may be directed to Nan Alessandra, Jane Armstrong, or Kim Boyle. Your comments, questions, and suggestions are encouraged.

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