



Engage in interactive process for continued telework upon return to the workplace

By Anjali Patel, Esq., **cyberFEDS®** Legal Editor Washington Bureau

IN FOCUS: Engaging in the interactive process in good faith is "really key" to ensuring a safe and smooth [return to the workplace](#) amid the coronavirus pandemic, Elisabeth Baker-Pham, an attorney at Kalijarvi, Chuzi, Newman & Fitch, told **cyberFEDS®** in an exclusive interview.

The concern has shifted dramatically over the past few months from whether to allow [telework](#) at all as a [reasonable accommodation](#) to what accommodations are available to make telework possible during the pandemic, Baker-Pham said. Many employees and practitioners now have "heightened concerns" about what the workplace will look like as they reopen and whether employees with underlying conditions can continue to telework as a reasonable accommodation.

"The best practice is for employers to recognize that their obligation to participate in the interactive dialogue continues," she said. Agencies should approach requests for continued telework "from a place of understanding the full spectrum of impact on employees" because "it's not just an employment situation -- it's a life or death situation for some employees."

Continued telework

Employers seem to be looking for rules that apply to everyone in the workplace and are "sometimes not as ready to recognize the obligation to have an interactive dialogue" when faced with a request for telework as a reasonable accommodation. When everyone is teleworking, the issue "fixes itself," but workplaces will begin reopening.

"COVID-19 changes the way we look at work and makes the interactive process somewhat different but does not negate the obligation to engage with the employee," she said.

When engaging in the interactive process, agencies may discover that individuals with disabilities who pose a high risk for severe illness due to COVID-19 "may be entitled to telework for much longer" than the rest of the workforce, she said. However, they also may discover that other effective accommodations can help the employee perform the essential functions at the work site without placing the employee at risk of infection.

On a case-by-case basis, consider how the disability could increase their risk of severe illness from COVID-19, the likelihood they could be exposed, and their physician's assessment of the need for reasonable accommodation, she said. But remember that "no one size fits all" and rely on that interactive dialogue to find a safe and workable solution, Baker-Pham emphasized.

Also, even if the risk of exposure can be minimized at the work site, agencies should consider whether the commute to the site would expose the person to the virus considering the Equal Employment Opportunity Commission has said that an employee's commute is relevant to the conversation about reasonable accommodation, she explained. So, the agency may grant continued telework to a high-risk employee who does not have a car and needs to take mass transit, as opposed to an employee who can drive to work and be safe at the workplace, she added.

Plus, "if an employer thinks that something has changed that warrants changing the reasonable accommodation based on pandemic circumstances, give the employee the opportunity to engage in the interactive dialogue [and] go through the normal process for assessing reasonable accommodations," she advised.

"Especially while COVID-19 is looming over everyone's head, there is no black and white line for granting or denying continued telework as reasonable accommodation requests," she added.

Possible increase in self-reporting

Practitioners also may see an increase in self-reporting of individuals with disabilities at workplaces if they haven't already, Baker-Pham said.

As people are ordered to return to the work site, people who have never requested an accommodation but have an underlying high-risk condition will be making requests for continued telework out of fear of contracting the virus at the workplace or even while commuting, she explained.

For example, an employee with a lung condition who sits in an office may not have needed an accommodation previously but may feel unsafe coming to work now and request continued telework, she said.

Regarded as

"The EEOC has not taken a position on whether a COVID-19 infection alone qualifies as a disability, but standing alone that seems unlikely," Baker-Pham said.

Longer-term impacts of a COVID-19 infection, however, such as deteriorated lung function, may be a disability under the Americans with Disabilities Act and the Rehabilitation Act, she explained. In this situation, if an employer assumes that an employee has lung disease because of a known COVID-19 infection and is discriminating against that employee on that basis, "that would fall more squarely into the 'regarded as' category," she added.

Direct threat concerns

If an employee with a high-risk underlying condition wants to return to the site but the manager is concerned the person might catch COVID-19, agencies must conduct a [direct threat](#) assessment, Baker-Pham said. This requires an "individualized analysis," taking into consideration a number of factors, not a general conclusion based on the underlying condition itself, she said. "Be sure not to make any broad-brush conclusions."

If a manager is concerned that an employee may have COVID-19, because this is a pandemic, the EEOC has said that employers can test and screen employees for COVID-19 to determine if they should be excluded from the workplace, she said.

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