

Remote Work: The Americans with Disabilities Act
and Other Considerations
ISB Employment and Labor Law Section
Lunch Meeting Presentation
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By John E. Rumel

Professor of Law

University of Idaho College of Law

General Overview

- **Introduction and Triggering Events**
- **Remote Work – Employer Prerogative and Legal Issues Generally**
- **Remote Work under the Americans with Disabilities Act**
- **Tax Considerations**
- **Strategy and Choice of Law/Forum Selection Issues**

Remote Work – Employer Discretion and Non-ADA Claims

- **General Rule – Absent a Contractual or Legal Requirement, Employers have Near Unfettered Discretion in Deciding Whether or Not to Allow Employees to Work Remotely or Off-Site**
- **But cf. possible contractual obligations and statutory law**
 - Individual employment contracts
 - Employer policies and handbooks
 - Collective bargaining agreements
 - Federal and state anti-discrimination statutes

Remote Work Under the ADA

Under the Americans with Disability Act, 42 U.S.C. Sec. 12101, a qualified individual with a disability may not be discriminated against by an employer if that applicant or employee is able to perform the essential functions of the position that they hold or seek, with or without a reasonable accommodation

- Essential functions of a position have been characterized as the core or fundamental requirements of a job; as such, they do not extend to marginal or tangential features of a position
- An employer is under no obligation to eliminate, reallocate or modify the essential functions of a job to accommodate an individual with a disability

Remote Work Under the ADA (cont.'d)

- Related, an accommodation will be reasonable – and, therefore, required under the ADA – only if it enables an employee to perform the essential functions of the job
- The employee bears the burden of identifying an accommodation, and of demonstrating that the accommodation allows him to perform the job's essential
- Although an employer is not obligated to grant the specific accommodation requested by a disabled employee, the employer must engage in an interactive process with the employee to identify a reasonable accommodation.

Remote Work Under the ADA (cont.'d)

- Within the past six years, but prior to the COVID pandemic, one federal Court of Appeal stated that “there is a general consensus among courts ... that regular work-site attendance is an essential function of most jobs.” *Credeur v. Louisiana*, 860 F.3d 785, 793 (7th Cir. 2017)
- Indeed, one early ADA case held that “[a]n employer is not required to allow disabled workers to work at home, where their productivity would inevitably be reduced [I]t would take a very extraordinary case for the employee to be able to create a triable issue of the employer’s failure to allow the employee to work at home.” *Vande Zande v. State of Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995)

Remote Work Under the ADA (cont.'d)

- *Hostettler v. College of Wooster*, 895 F.3d 844 (6th Cir. 2018) illustrates the current view of most courts regarding the essential function and reasonable accommodation issues under ADA as they relate to an employee request to work remotely.
- Facts: Plaintiff Hostettler was disabled because she suffered from post-partum depression and separation anxiety. Defendant Wooster College fired Hostettler from her Human Resources position when she failed to return to on-site work after requesting, but being denied, permission to work from home.

Remote Work Under the ADA (cont.'d)

- **District Court Decision:** Summary judgment granted in favor of Wooster College on ADA claims on grounds that Hostetler was not an otherwise qualified employee because on-site work was an essential function of her HR job and Wooster had no duty to provide her with a reasonable accommodation allowing her to work from home.
- **Holding:** Sixth Circuit reversed, holding that there were genuine issues of material fact on Hostetler's failure-to-accommodate and failure to engage in an interactive process claims under the ADA

Remote Work Under the ADA (cont.'d)

- **Governing Legal Principles:**
 - “Although this court has stated that ‘[r]egular, in-person attendance is an essential function’ of most jobs,...it is not automatically so; courts must perform a fact-intensive analysis. In determining what functions are essential, courts may consider as evidence – among other things – the amount of time spent on a particular function; the employer’s judgment; ‘written job descriptions prepared before advertising or interviewing’ for the position; and the consequences of not requiring the employee to perform the particular function ... Although the employer’s judgment receives some weight in the analysis, ... it is not the end-all – especially when an employee puts forth competing evidence.”

Remote Work Under the ADA (cont.'d)

- **Governing Legal Principles (cont.'d):**
 - “On its own ... full-time presence at work is not an essential function. An employer must tie time-and-presence requirements to some other job requirement.”
 - “In sum, full-time presence at work is not an essential function of a job simply because an employer says that it is. If it were otherwise, employers could refuse *any* accommodation that left an employee at work for fewer than 40 hours per week.”
 - “Wooster may have preferred that Hostettler be in the office 40 hours a week. And it may have been more efficient and easier on the department if she were. But those are not the concerns of the ADA: Congress decided that the benefits of gainful employment for individuals with disabilities—dignity, financial independence, and self-sufficiency, among others—outweigh simple calculations of ease or efficiency. To that end, the ADA requires that employers reasonably accommodate employees with disabilities, including allowing modified work schedules. An employer cannot deny a modified work schedule as unreasonable unless the employer can show *why* the employee is needed on a full-time schedule; merely stating that anything less than full-time employment is *per se* unreasonable will not relieve an employer of its ADA responsibilities.”

Remote Work Under the ADA (cont.'d)

- Based on the sentiments expressed in *Hostetler*, that same Court of Appeal which expressed skepticism about employers being required to allow off-site work as a reasonable accommodation under the ADA has stated, “[l]itigants (and courts) in ADA case would do well to assess what’s reasonable under the statute under current technological capabilities, not what was possible years ago.” *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019)

Remote Work -- Takeaways

- **Takeaways**
 - As a general matter, and absent a contractual or statutory obligation limiting an employer's discretion, employers continue to have near unfettered discretion in addressing requesting employee requests for off-site work
 - Likewise, the essential function of many positions will require physical attendance at work and, as such, remote work will not be a reasonable accommodation
 - Under the ADA, however, an employer's prerogative to define the essential functions of a position and deny a disabled employee's request for a reasonable accommodation permitting off-site work is more limited than it once was

Remote Work – Tax Implications

- Employers with employees working remotely from out of state may incur tax obligations (unemployment and workers compensation obligations, etc.) in the out-of-state location
- Employees working remotely from an out-of-state location may have income tax and other tax obligations in the state from which they are working
- Like most tax questions concerning employment law matters, enlist the advice of tax experts

Remote Work – Strategic and Choice of Forum and Law Issues

- **Return to Opening Factual Scenario**
- **As part of negotiations over remote work, what are the implications of the employee offering the employer a forum-selection clause and/or a choice of law provision agreeing that issues related to the employee may be litigated or arbitrated in the employer's home state, but under employer-favoring Idaho law (or the employer's home state law)?**

Remote Work – Strategic and Choice of Forum and Law Issues (cont.'d)

- Regarding forum-selection clauses, the Idaho Supreme Court and the federal District of Idaho have held that forum selection clauses placing venue and personal jurisdiction over the defendant in a forum outside of Idaho are or may be unenforceable because they “contravene the strong public policy of Idaho” set forth in Idaho Code Section 29-110. *Off-Spec Sols., LLC v. Transportation Inv., LLC*, 168 Idaho 734, 739-740, 487 P.3d 326, 331-332 (2021); *Jimenez v. HemaTerra Technologies, LLC*, 2023 WL 2354754, *3 (D. Idaho March 3, 2023)
- As to choice of law provisions, the Idaho Supreme Cour, applying the Restatement (Second) of Conflicts Section 187, has been more favorable to the enforcement of such provisions. *Ward v. Puregro Co.*, 128 Idaho 366, 368-369, 913 P.2d 582, 584-585 (1996).
- Possible Outcomes: a remote working employee could file suit in Idaho concerning an employment-related dispute and successfully move to set aside a forum selection clause placing the proper court in the employer’s home state; however, the parties’ choice of law provision would likely be enforced.

Remote Work – Conclusion

- **Questions?**

Conclusion

