**Telecommuting and the Courts**

There are plenty of discussions concerning the costs and benefits of telecommuting (a.k.a. telework, flexiplace, or working remotely) in terms of productivity, communication, and career advancement, as well as discussions on substantive legal issues, such as whether telecommuting is a reasonable accommodation for a disability, or whether taking away permission to telework would be an adverse action. But recent cases suggest that other procedural and substantive questions also should be examined as courts apply existing law to what is still a relatively new work arrangement.

**Personal jurisdiction over telecommuters.** For example, a Delaware multi-media production service company with its principal office in New York filed suit in New York against its former chief information officer, who left to join a competitor and allegedly misappropriated the employer’s trade secrets in the process. Both the employee and the competitor, which was also a defendant, were New Jersey residents, and the question was whether they could be haled into court in New York. Finding that they could, the federal court explained that even though the employee worked from his home in New Jersey, he traveled to New York frequently, routinely accessed the New York-based employer's email and web-based software applications remotely, and had continuous communication with his New York colleagues. The court reached a similar conclusion as to the competitor, finding that constitutional due process was satisfied for personal jurisdiction (Peeq Media, LLC v. Buccheri).

**Counting employees near "worksite" to reach statutory minimum—which office?** Another threshold question that could be impacted by telecommuter status is the number of employees an employer has for purposes of being subject to a particular statute. The FMLA excludes from the definition of "eligible" employees anyone at a "worksite" at which the employer has fewer than 50 employees, also counting employees within a 75-mile radius of the "worksite." Department of Labor regulations clarify that for employees "who work at home, as under the concept of flexiplace or telecommuting," the worksite is not their personal residence. Instead, it is "the office to which they report and from which assignments are made." With this in mind, a federal court in Louisiana found that an employee who reported to a Tampa, Florida, office, which she attested had more than 50 employees, raised a triable issue on whether she was eligible for FMLA protection (Donahoe-Bohne v. Brinkmann Instruments).

**Employee versus independent contractor status.** Telecommuter status can also affect the analysis of whether someone is an "employee" under the FLSA. In some cases, the refusal to let someone work remotely could weigh in favor of finding that an individual is an "employee" rather than an independent contractor under a right-to-control analysis. For example, a federal court in Florida denied summary judgment on the issue of employee status because it could not answer the question as a matter of law. As to the nature and degree of the defendants’ control over the manner in which he performed his work, the only relevant evidence was the defendants’ statement that he did not have to work a set schedule, and the plaintiff’s opposing statement that he was forbidden from working remotely and had to work during store hours. The record also showed the defendants set his hourly wage and commission, and provided his equipment (Bourhis v. My Trade LLC). (Note the jury later returned a verdict finding the plaintiff was not an employee, so judgment was entered for the defendants).

**Blurring lines between personal and work equipment.** What happens if a telecommuting employee is given the choice to use his home computer, which may be a lot nicer than, for example, a cost-effective employer-provided laptop? In such cases, employers need to make it very clear that being able to use your own computer does not mean putting confidential information at risk. For example, a federal court in Michigan recently held that Quicken Loans had a legitimate reason to fire a telecommuting employee who was allowed to work from home using the company’s secure network. He had violated company policy by sending over 900 company emails to personal email accounts, including over 100 containing confidential client information. Though an NLRB law judge had found some of the employer’s confidentiality rules overbroad, the court found that of "no moment" to the question of whether the reason for firing him was discriminatory. Summary judgment was granted against his federal and state-law discrimination claims (MacEachern v. Quicken Loans, Inc.).

**Adverse actions and accommodations—the typical cases.** Based on the foregoing, it is clear that telecommuting arrangements present a wide variety of legal issues that employers must consider. That said, it bears mentioning that telecommuting is more typically discussed in the context of deciding: (1) in discrimination or retaliation suits, whether an employee suffered an adverse employment action when denied the chance to telecommute; or (2) in an ADA case, if an employer unlawfully failed to accommodate an employee’s disability by denying an employee’s request to work remotely. In both instances, employees are usually on the losing side.

First, denying telecommuting privileges is not usually an adverse employment action. In one case, even under the more lenient pro se plaintiff standard, a federal court in Maryland dismissed an employee’s retaliation claim because suspending a telework arrangement was not a materially adverse action. It noted that other federal courts have concluded that limiting or terminating such an arrangement is not materially adverse unless an employee’s schedule is significantly modified (Dailey v. Lew). In another case, a federal court in the District of Columbia found that the denial of an EPA scientist’s "unusual and extraordinary request" to work remotely for two years to care for his mother was not an adverse action. It noted that the employer’s "Flexiplace Program" only covered certain arrangements, was not an employee "right or entitlement," and telework had only ever been granted for a maximum of six months at a time (Walker v. McCarthy).

Second, allowing an employee to work from home could be a reasonable accommodation under the ADA, but that does not mean that refusing to allow it would violate the Act. It will depend on the circumstances, including the essential functions of the job, whether there are alternative accommodations, and whether it would be an undue hardship for the employer to allow it. In a case out of Pennsylvania, an employer was denied summary judgment because a federal court found triable questions on whether it was essential for a disabled project attorney to come to the office considering project attorneys usually worked on teams and reviewed documents that were often accessible online, and they rarely had face-to-face contact with clients (Fischer v. Pepper Hamilton LLP). Likewise, a federal court in Massachusetts found triable questions on whether a senior network engineer suffering from severe depression could perform his duties at home and whether that would have been a reasonable accommodation (Moebius v. TharpeRobbins Co.).

**A final thought.** Having covered the typical bases, here’s a bit of food for thought. What is the effect of having a formal telecommuting policy and/or telecommuter agreement versus informal arrangements? It would seem that having a neutral policy and applying it fairly would make sense, in particular: Having an employee acknowledge that workplace policies apply even when working from home, including those requiring that confidential information be kept secure and private, that the employer’s equipment be used only for work purposes, that working hours be spent actually working, and that hours be accurately reported. But some agreements go further.

Having come across a "telecommuter agreement" that reserved to an employer the right to enter an employee’s house and inspect his or her workspace and equipment, I wondered if that wasn’t a little risky. Would a court, for example, find that employers who require access to the homes of telecommuters find that the employer could be liable, say, for failing to provide a safe working environment if it didn’t inspect for smoke detectors and the equipment (e.g., smart phone or computer) it provided started a fire? Is there an argument in a premises liability scenario that an employer exerted enough control to be liable? And what about privacy considerations? Given that this is still an emerging area of law, employers are well-advised to tread carefully in crafting telecommuter agreements. Seeking the advice of experienced employment lawyers is a good idea.

As always, call CAI's Advice & Resolution team for assistance with telecommuting at your workplace.

Written by a Catapult Advisor