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Lisa Nagele-Piazza (00:00)

Welcome to The FP5: Five Things for Your 9-to-5. We help employers make sense of the fast-moving world of workplace law and compliance by breaking down topics into five parts. I'm Lisa Nagele-Piazza from the Fisher Phillips Content Team.

Today, we're sharing five things you need to know about remote work accommodation policies. Joining me is Raeann Burgo, who's a partner at Fisher Phillips in the Pittsburgh office and a member of both our Labor Relations Practice Group and our Employee Leaves and Accommodations Group. Thanks for being on the show, Raeann.

Raeann Burgo (00:36)

Thanks Lisa, it's great to be here. I appreciate you inviting me on.

Lisa Nagele-Piazza (00:39)

So, Raeann, why don't you tell us a little bit more about your practice in the leaves and accommodations area?

Raeann Burgo (00:46)

Absolutely. So I have been practicing, dare I say, for 25 years and always in employment law, started out right out of law school and employment law. You know, a lot of my work is related to day-to-day counseling. And one of the questions I get the most or the issues that I get the most are really around leaves and accommodations.

And during the pandemic, I did a lot of work focused on ADA accommodations and then religious accommodations. So I know we're talking about telework, but also religious accommodations. And I still do that. Actually, last week just did a presentation on trends and what's happening in the ADA and religious accommodation space, and we did talk about this federal guidance on telework. So it is a topic that is coming up; people are interested in what's coming out of this guidance.

Lisa Nagele-Piazza (01:54)

Yeah, absolutely. I know it's been a hot topic since 2020 and it continues to be today. Employers are still trying to figure out how to navigate through hybrid work, remote work, and in-office requirements. It's amazing, six years later here we are still talking about it and still trying to figure it out. And it's evolving too.

Let's get into our questions here. Our first thing for the day: so the EEOC recently updated telework guidance that builds on pandemic era workplace shifts. And I know this guidance is meant for federal agencies, right, and their policies for their own employees?

Raeann Burgo (02:33)

Correct. It is particularly related to the federal agencies.

Lisa Nagele-Piazza (02:37)

Okay. And my understanding is this is in response to a Trump order saying that we're going to prioritize at the federal government level, getting employees back into the office and all of that, right?

Raeann Burgo (02:50)

Yeah, that's exactly correct. So with the president's mandate to get everyone back into the office, more so now, I think that there were some outstanding issues related to that pandemic-era workplace shifts regarding telework that rightfully so needed to be addressed.

Lisa Nagele-Piazza (03:10)

Yeah, and we'll talk a little bit later about the guidance that it provides for private employers and how they can apply it as well. But first, let's kind of get into what the key elements are of this guidance and kind of how it changes things or adds clarity.

Raeann Burgo (03:27)

Sure. I think that one of the big things that the guidance did was confirmed what the three categories were of a required accommodation. So I think that when most employers--whether that's public sector, federal, private--think when are they required to make an accommodation, a lot of times they think "Oh, well, I have to provide an accommodation so somebody can perform the essential functions of their job."

But there's three categories, really. And I think this is a good reminder for all of us what those three categories are: its accommodations enabling candidates to participate in the application process. So that's the first one. Then second, what we would all think, which is performance of essential job functions. And then the third is the enjoyment of equal benefits and privileges of employment.

So, the guidance there reiterated those three categories and then hit on the fact that telework that doesn't serve one of those purposes, because that's what the guidance was focused on telework, such as telework that's really for the employees' personal benefit, and we could talk about that a little bit more. It's not a recognized reasonable accommodation under the Act. So we can focus on those three categories.

Lisa Nagele-Piazza (04:38)

Okay, yeah, so it's not like if they have a difficult commute or something like that, right? It's more like focused on the essential functions of the job.

Raeann Burgo (04:48)

Right. I mean, it's interesting that you bring up accommodating a person's commute. And so saying, well, for example, I have general anxiety disorder, and traveling to work and being on public transportation could exasperate that. And so I want to work from home. That seems like, that's like just a general example of when that might really be more for the employee's personal benefit, but the disclaimer always is "case by case basis."

So it could be sometimes that there are circumstances that were within the employer's control that they may have to consider whether or not an accommodation for a commute to work could be possible. But generally, yes, that's kind of the idea.

Lisa Nagele-Piazza (05:36)

An interesting thing that I noticed in this guidance is the discussion of pandemic-related accommodations. It seems like the EEOC is saying, well, you might have allowed employees to cut back on some of their essential functions in order to make remote work happen during the pandemic and the COVID crisis, you're not really required to do that anymore. Is that right?

Raeann Burgo (06:03)

Yes, I mean, the guidance reiterates that that time during the pandemic when we were all just trying to figure out how to keep things going and we were making exceptions in a lot of areas, and so this was no exception to that is that we were, you know, lot of employees were excusing essential functions from people's jobs so that they could continue to work during the pandemic.

And yes, now the guidance is providing employers with kind of a road map or the federal agencies, I should say a road map with “doesn't mean just because you did it before you have to do it now.” Right? But there are probably some steps that anybody would want to take federal agencies or private employers before they decide they're just going to pull back those particular accommodations that they were giving during the pandemic.

Lisa Nagele-Piazza (07:02)

Our second thing to talk about today is the considerations that employers need to make when they do receive a remote work accommodation request. I know they have to approach these carefully, as you mentioned, on a case-by-case basis. Tell me a little bit about how they have to sort of consider the request, their own operational needs, as well as the ADA and other disability laws.

Raeann Burgo (07:26)

Right. So I think it's important to know that the ADA laws and the laws that are described or mentioned in the guidance, which is the Rehabilitation Act, they don't define what telework is. So I think that that's important to note. So we're trying to decide what are the examples of what telework is and what can be inferred that a reasonable accommodation would entail to the changes in the work environment.

But I think that some of the key points here are to remember that employers have discretion. I think that's an important one. Employers have the ultimate discretion to choose between, and I think the key here is effective accommodations. So just because an employee comes forth and says, I need help performing the essential functions of my job, in whatever fashion that might be, that whatever they're proposing doesn't have to be the accommodation that's given. So if there are alternative effective accommodations, the employer does have the discretion to choose between those.

Lisa Nagele-Piazza (08:28)

Okay, so if the employee says, I want to work remotely as an accommodation for a disability-related reason, the employer can say, well, how about this? this other accommodation allow you to perform the essential functions of the job?

Raeann Burgo (08:44)

That's exactly right. So for example, maybe even talking about the example that you raised at the beginning with commuting to work. So if an employee is suggesting that I need to work from home because my commute exasperates my anxiety, one of the alternatives could be, okay, well, how about if you don't travel during rush hour when maybe there's less people on public transportation? Or for example maybe there is some kind of assistive device that would allow that person to perform the job at work instead of remotely.

So figuring out what in the workplace in particular, what are those alternative accommodations that could be made and at least trying them, right? Sometimes the accommodation process goes a little longer. It's not just one and done. So yeah, thinking about what are those alternatives to remote work, if possible?

Lisa Nagele-Piazza (09:42)

And that's a really good point too, that it doesn't have to be a one and done situation and probably shouldn't be. It's a matter of testing things out, seeing if they work, regrouping, talking about how things can work better for both the employee and the employee.

Raeann Burgo (09:42)

Correct. Sometimes you think an accommodation is going to work and hopefully it does, but there may be times when you have to reassess if the accommodation is being effective. And reassessment, I think, is actually one of the other key points that the guidance makes, the federal guidance makes relating to remote work, right? Is the ability for the employer to go back or going forward and reassess. Is that accommodation still working? Does it still make sense?

Lisa Nagele-Piazza (10:25)

Our third thing is about how this guidance relates to ADA case law that's applicable to all employers. Can you talk a little bit about, even though this is really based on a federal directive, why it's also important for private employers, particularly when they're dealing with ADA reasonable accommodation requests and potential claims and litigation too?

Raeann Burgo (10:55)

So as you said, although this is directed at federal agencies, a lot of these principles and concepts that we're talking about come from ADA case law. So they are already premised in our ADA analysis that when we're guiding employers, what we're looking at.

So I think we can expect that, although it's not directed to private employers, that it's a good roadmap for not just litigation, but also what we might expect if the EEOC is involved, right? If you have a charge in front of the EEOC and how they might interpret the facts and how they might analyze the facts relating to "was a reasonable accommodation given when necessary?" So I think it signals what the EEOC would expect from private sector employers as well.

Lisa Nagele-Piazza (11:47)

And that's a good point to make too, because the EEOC may be investigating a claim and they're going to look to their own guidance, of course, for that. My understanding is maybe a court wouldn't follow that guidance exactly, but it may take it as sort of instructive or an employer could show, I was following this guideline to the best of my ability and maybe that could help them potentially show that they were engaging in the interactive process to the best of their ability.

Raeann Burgo (12:16)

Right, so as we know this, and just to reiterate if we haven't said it, that this guidance isn't law, right? We know that it's not law, but it's something that a lot of EEOC guidance employers look at to determine maybe even what are best practices or what they can expect to be scrutinized. But state law does vary, right? So we say that there's some states who have different requirements when you're analyzing a reasonable accommodation. But I think overall it is a good roadmap for private employers.

Lisa Nagele-Piazza (12:49)

That's a really important point to make too, that states could have their own standards that could be more stringent on employers than the federal law.

Raeann Burgo (12:58)

Exactly.

Lisa Nagele-Piazza (13:05)

This is the FP5. I'm Lisa Nagele-Piazza, and we're here with Raeann Burgo. Raeann is a partner at Fisher Phillips in the Pittsburgh office, and she's a member of our Labor Relations Practice Group and our Employee Leaves and Accommodations Group. For more on the EEOC's new telework guidance, check out the Insight linked in our show notes.

Moving to our fourth topic, even though the EEOC's guidance appears to be giving employers some leeway here, particularly stemming from pandemic practices for remote work, it still appears to be cautioning against overly rigid return-to-office policies. What are some of the common pitfalls or legal risks that employers are facing?

Raeann Burgo (13:49)

So I think I kind of hit on one earlier, which is when an employer may be, for example, providing that in-person work is now going to be the norm, right? Like we're bringing everybody back in. That having this blanket rescission of telework accommodations without looking at that individualized case is going to be a big pitfall.

So we know even just on our basic premise and principles for ADA accommodations that it needs to be made on a case-by-case, fact-sensitive basis. So even though maybe you having a blanket policy to return everybody to work, that doesn't mean that that should apply to the accommodations you've been given. So you would want to make sure that you are assessing each particular case on its own facts before you do that.

Lisa Nagele-Piazza (14:44)

Yeah, and so when denying a request, so let's say an employer says, "I think that either this accommodation isn't reasonable, or there's another alternative that we think will work." Before denying the telework request, what should an employer do?

Raeann Burgo (15:01)

Well, I mean, they want to make sure that they're fully engaged in the interactive process, right? So they want to make sure that they're one, having that full-blown conversation with the employee. They want to make sure they're documenting the conversation with the employee. They want to make sure that they're looking at what documentation did they rely on to begin with? You know, when we were in the pandemic, it wasn't really easy to get medical certifications or doctor's notes. It was really hard at times to get that information. And I think a lot of employers could have just gone by what the employees saying they needed, right? We were all doing the best we could at that time. So now maybe reassessing that and going back and looking and saying, "Well, maybe the original documentation I have wasn't really enough. It was enough then, but maybe it's not enough now. And so maybe I need to make a new inquiry about updated medical documentation to make sure I have the current facts before I'm making any decisions." So I think that that would be one of the bigger things to look at.

And then you want to make sure that you're not treating employees in a different way just because they made the request or because they had previously received the accommodation, even if you're going to no longer continue that accommodation.

Lisa Nagele-Piazza (16:16)

And you've mentioned a few times about an individualized assessment and case-by-case basis. Why is that so important?

Raeann Burgo (16:24)

It's important because everyone is different, right? And every situation is different, and everybody's position is different. So what might work for an employee in an office space setting is not going to work for an employee who's on a manufacturing floor and everybody's need for what help they need or what accommodation they need is going to be different. So just because two people, for example, have some kind of general anxiety disorder doesn't mean that they need the same accommodation. And so you don't want to make assumptions about what accommodation they need.

Lisa Nagele-Piazza (17:02)

Absolutely. Here we are at our fifth and final thing for this episode. Employers are always trying to strike the right balance between their own operational needs, employee relations and morale, as well as legal compliance. And it can get quite complicated.

So with this guidance offering a bit of a roadmap, what are the practical steps that employers can take now to update their policies and ensure their practices are aligned with the government's, with the EEOCs recommendations?

Raeann Burgo (17:40)

Well, think the first one we can build off of what we were just talking about regarding the individualized assessment and making sure that you're not rescinding through this blanket rescission of all accommodations. And that's to make sure that as an employer, you're reviewing and revising your existing telework accommodations on an individualized basis.

So the guidance in particular, like if we're talking about the guidance that we're discussing today, recommends that organizations re-evaluate maybe based on geographic location or organizational unit, take those particular tranches and look at each individual in there with their accommodations to see if they're working and if the decision still holds true.

And that flows into the second is making sure you are conducting that individualized assessment, making sure that you are requesting and evaluating the medical documentation thoroughly and that you are proactively considering other in-office alternatives, which is what we already talked about, right? So maybe it's allowing somebody to come in late, come in early, restructure their job in some way, something else that's gonna help them perform their job without having to do it remotely.

Lisa Nagele-Piazza (19:01)

Now we have a quick five questions to ask you so our listeners can get to know you a little better. Are you ready?

Raeann Burgo (19:07)  
I am ready, shoot away.

Lisa Nagele-Piazza (19:09)  
What movie can you re-watch anytime?

Raeann Burgo (19:12)  
When Harry Met Sally.

Lisa Nagele-Piazza (19:14)  
That's a good one. Are you more into sweet or savory foods?

Raeann Burgo (19:20)  
Sweet for sure, chocolate for sure.

Lisa Nagele-Piazza (19:23)  
Can't argue with chocolate. I'm more savory, but I love chocolate too. Do you have any hobbies to share?

Raeann Burgo (19:30)  
If I had to define my hobbies, I would say they're pickleball and puzzles. So that's what I do a lot in my spare time. Winter it's probably more puzzles, although now that all of these indoor pickleball courts have arisen in the Northeast, I get to do that year-round too.

Lisa Nagele-Piazza (19:46)  
I see them everywhere now. That's great. Any particular type of puzzle that you like best?

Raeann Burgo (19:52)  
Really, I think that I'm gonna tempt myself with a 2,000 piece puzzle coming up. Those take a long time, but I think I'm gonna do it. Maybe next winter.

Lisa Nagele-Piazza (20:03)  
Yeah I was going to say, that sounds like a January, February activity. What is your favorite daytime beverage?

Raeann Burgo (20:10)  
Coffee.

Lisa Nagele-Piazza (20:12)  
Yeah, me too.

Raeann Burgo (20:14)  
Is that a typical lawyer answer?

Lisa Nagele-Piazza (20:16)  
Probably, but I agree. Now this question is completely unfair, but Pittsburgh or Philadelphia?

Raeann Burgo (20:24)

Of course, Pittsburgh. Although I do love Philly, I do, but born and raised in Southwestern PA, always been a Pittsburgh girl at heart. So, Pittsburgh.

Lisa Nagele-Piazza (20:35)

Yep. And I'm actually a Philly girl. But I too love Pittsburgh. I love them both. And we'll save the Sheetz or Wawa debate for another time.

Raeann Burgo (20:45)

That's right, that's right.

Lisa Nagele-Piazza (20:49)

Well, that's all the time we have for now. Thanks again for joining me, Raeann.

Raeann Burgo (20:51)

It was my pleasure, I really enjoyed it. Thanks, Lisa.

Lisa Nagele-Piazza (20:55)

And as always, thank you for listening to the FP5. For other insights from Fisher Phillips, visit [fisherphillips.com](https://fisherphillips.com). For more on remote work accommodations and return to work policies, check out the Insight linked in our show notes.

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