First Shot Fired: EEOC Files First Pandemic-Related Remote Work Discrimination Lawsuit

Insights
9.13.21

After the COVID-19 pandemic required many employers to implement remote work arrangements (both to continue their operations and to comply with new state and federal regulations), many employers – and employment lawyers – have wondered how this development would impact businesses' obligation to allow employees to work from home as an accommodation to a disability in the future. As a result of a first-of-its-kind case filed last week by the U.S. Equal Employment Opportunity Commission, employers may soon get a glimpse at the administrative body's attitude toward the future of work-from-home arrangements. What lessons can employers learn from the September 7 lawsuit?

Alleged Denial of WFH Request Leads to Litigation

The case, which was filed in federal court in Georgia, involves Ronisha Moncrief, a former health and safety manager for ISS Facility Services. In March 2020, at the outset of the pandemic, she says she requested an accommodation to work from home two days a week as an accommodation for her chronic obstructive lung disease and hypertension. Shortly after her request, the lawsuit alleges that ISS placed its staff on modified work schedules where employees worked from home four days per week. However, in June 2020, ISS required all staff to return to in-person work at its facility five days per week.

After the company required employees to return to work, Moncrief says she renewed her request to the human resources department that she be allowed to work from home two days per week as an accommodation pursuant to the Americans with Disabilities Act (ADA). The EEOC alleges that Moncrief provided ISS with documentation indicating that her history of heart conditions increased her COVID-19 risk. The EEOC further alleges that her job duties generally required her to be in close contact with other employees and that other employees had been allowed to work from home following the June 2020 return-to-work.

According to the lawsuit, ISS denied Moncrief's request to work from home in July 2020. Thereafter, in August 2020, her supervisor then allegedly recommended her for termination based on performance. In September 2020, the lawsuit alleges that ISS terminated Moncrief for performance-related issues. The EEOC alleges that she had not been advised that her performance was grounds for termination at any time prior to her termination.

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What Does it Mean to Your Operations?

Even before the pandemic, the EEOC historically advocated that work-from-home requests be granted as an accommodation under the ADA. As expected, the EEOC is now attempting to use an employers' previous remote working arrangements during the COVID-19 pandemic as evidence that employees should have been permitted to continue to accomplish the essential functions of their employment in a remote capacity. This provides perspective on likely attack vectors that will be used against employers who deny remote work requests.

What Should You Do?

In addition to following regular interactive process protocols, you should give special consideration to remote work requests. It is possible that workplaces that have been able to operate efficiently under remote arrangements will be expected to make remote work available as an accommodation going forward. The arguments adopted by the EEOC will no doubt be used by the agency and enterprising plaintiffs' attorneys across the country to undermine the credibility of employers who argue that remote work requests cannot be accommodated. If you determine that continued remote work will create an undue burden for your operations, you must be able to articulate how that burden should be understood.

Although this lawsuit is in its infancy, and ISS has not even yet had an opportunity to respond to the EEOC's allegations, you can still learn some lessons from the claims in order to minimize risk at your organization. Here are three tips for employers to consider in light of this litigation:

1. **Review existing accommodation requests.** While the lawsuit does not provide details about the employer's response to the employee's initial request for an accommodation, you would be wise to review any pending requests for remote work as an accommodation. Granting an accommodation to work remotely, like any request for an accommodation, should be considered on a case-by-case basis. The EEOC's position in this case indicates that an employer's denial of such a request will be scrutinized more closely going forward – especially if the employee in question worked remotely for some period of time or if others have been allowed to continue to work remotely.
2. **Review job duties and position descriptions.** The first step in determining whether an employee can perform their job duties with an accommodation such as remote work is to know precisely what the employee's essential job duties are and how often they perform those tasks. Outdated job descriptions or understandings of an employee's actual job duties can hinder this analysis. For example, a job that requires frequent or daily face-to-face customer or client interaction may no longer be the expectation. Instead, the prevalence of meeting through any one of the many videoconference platforms that have flourished over the past year may be a more acceptable means of communication for many clients or customers. Further, many employers have had to provide employees with the equipment and access needed to work remotely undermining in many cases any argument that doing so would pose an undue burden.

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3. **Ensure that requests are being handled consistently**. As demonstrated by the EEOC's allegations in this case, evidence that other employees – especially those in the same or similar positions – have been allowed to work remotely or continue to work remotely may be considerable evidence that an employer has violated its obligations under the ADA. If you are faced with more than one request for remote work as an accommodation, you must be able to adequately articulate why it can accommodate some employees and not others. This may be for legitimate reasons such as data security or to be physically present to access or use equipment or products. Whatever the reason, it seems clear that, in most instances, you should no longer take a blanket approach to work-from-home requests and instead engage in a case-by-case assessment of each employee's request in light of what was done during the COVID-19 pandemic.

Conclusion

Employers should also continue to monitor the developing legal landscape around COVID-19-based discrimination lawsuits. The oldest of the COVID-19 inspired litigation is only recently starting to yield judicial precedent that you can use to inform your decisions.

We will continue to monitor developments in COVID-19 discrimination litigation nationwide and related workplace questions that arise. For further information about COVID-19-related litigation being filed across the country, and to run your own analyses of our litigation data, you can visit Fisher Phillips' COVID-19 Employment Litigation Tracker. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Employee Leaves and Accommodations Practice Group.

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