

EEOC'S NEW TELEWORK GUIDANCE FOR FEDERAL AGENCIES OFFERS ROADMAP FOR PRIVATE EMPLOYERS: KEY TAKEAWAYS ON ACCOMMODATION COMPLIANCE

Insights
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EEOC's New Telework Guidance for Federal Agencies Offers Roadmap for Private Employers: Key Takeaways on Accommodation Compliance

As employers increasingly require remote workers to return to the office, many aren't sure how to handle telework accommodation requests – but new federal guidance could start providing welcome clarity for employers. The guidance is meant to help agencies determine whether remote work is a reasonable accommodation in light of President Trump's directive for federal employees to return to the office. Although the guidance is directed toward the federal workforce, the principles align with the Americans with Disabilities Act (ADA), which applies to private employers. Here is what employers can learn from the new guidance – and five steps you can take to strengthen your disability accommodation practices related to remote work.

What Happened?

The Equal Employment Opportunity Commission (EEOC) and Office of Personnel Management (OPM) issued a [joint technical assistance document](#) on February 11 with FAQs addressing telework as a disability-related accommodation for federal workers. The guidance discusses when an employer must provide an accommodation, when an accommodation can be modified or ended, and best practices for exploring reasonable accommodations and engaging in the interactive process.

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Impact on Employers

- Notably, the technical assistance document is not binding, but it's a good indicator of the EEOC's current enforcement position.
- The technical assistance discusses disability-related accommodations under the Rehabilitation Act, but the principles stem from ADA case law and the EEOC's existing ADA guidance.
- Therefore, it offers a compliance roadmap for employers in the public and private sectors alike.

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5 Key Takeaways for Employers

The technical assistance does the following:

- 1. Explains when telework may qualify** as a reasonable accommodation and narrows that down to three categories focused on participation in the application process, performing essential job functions, and enjoying equal benefits and privileges of employment.
- 2. Confirms that presence in the workplace can be an essential function for some jobs**, such as those where some essential functions cannot be performed remotely, jobs with interactive requirements, or jobs where supervision and teamwork are needed.
- 3. Encourages agencies to annually reassess** the effectiveness and necessity for the accommodation or to do so when circumstances change, such as new operational needs, changes in the employee's condition, or updated job requirements. Additionally, telework accommodation may be reassessed now that COVID-19-related special circumstances no longer apply.
- 4. Discusses how to navigate common issues**, like when an employee:
 - provides inconsistent medical documentation;
 - posts social media content that may contradict their claims;
 - refuses to try in-office alternatives;

- requests anxiety-based telework; or
- cites difficult or lengthy commutes.

5. Telework accommodations do not need to be granted to help employees mitigate symptoms, manage their condition, or improve quality of life.

Reviewing and Approving Telework Accommodations

The employer is the ultimate decision-maker when it comes to the reasonable accommodation offered, especially when telework is one of several effective accommodations, according to the technical assistance. But the employer needs to engage in a good-faith interactive process.

The EEOC clarified the following key aspects of the accommodation review and approval process:

- **Individualized assessment:** Employers should conduct an individualized assessment rather than take a blanket approach to employee accommodation requests.
- **Flexibility to reassess prior accommodation grants:** Even if a telework accommodation was previously granted to an employee with insufficient documentation, federal agencies may revisit their previous decision and make a new decision based on a full evaluation. They may also ask a healthcare professional whether there are mitigating measures the employee could or does utilize that would enable them to work in the office or whether alternative in-office accommodations would enable the employee to work in the office. Each decision is case specific.
- **Essential functions:** The EEOC noted that many employees stopped performing essential job functions when their worksites were closed during the COVID-19 pandemic and they started working remotely. But agencies don't have to continue allowing workers to skip essential functions, even if they have permitted the employees to do so.

The guidance says: "The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the

employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship."

- **Employee documentation:** Employees should be given an opportunity to explain why an in-office accommodation will be ineffective and to provide related medical documentation to support their explanation. But it's not enough for the employee to simply say the in-office accommodation won't work. "As at every point in the interactive process, the focus is on evidence-based decision making," the EEOC said.
- **Anti-retaliation:** Employers may not treat an employee unfavorably because they requested or previously received an accommodation, regardless of whether an accommodation is approved or continued.

5 Compliance Steps for Employers

Private employers should consider taking the following steps in light of the new guidance:

1. Review and potentially revise current telework accommodation arrangements. Telework accommodations may be required in certain circumstances, but employers are permitted to reevaluate when there are changed circumstances. As the EEOC said, employers may find it helpful to annually reevaluate significant accommodations to ensure they are still effective and necessary.

2. Conduct an individualized assessment. This is a critical part of the interactive process and key to compliance. Don't assume a particular request is unreasonable. Disability-related accommodation requests should be evaluated in good faith and on a case-by-case basis. Indeed, a good faith effort to reasonably accommodate is a defense to compensatory and punitive damages claims in lawsuits alleging failure to accommodate.

3. Document the process. Have employees put their requests in writing and have their treatment providers respond in writing to an inquiry concerning the basis and necessity of the employee's request, as well as alternatives.

4. Don't forget about state law requirements. Many states have their own disability-related workplace laws which may

be stricter than federal law. Be sure to review the nuances.

5. Consult an attorney. Before denying significant accommodation requests, it's a good idea to discuss your options with experienced legal counsel to ensure compliance.

Conclusion

We will continue to monitor these developments and provide the most up-to-date information directly to your inbox, so make sure you are subscribed to [Fisher Phillips' Insight System](#). If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Employee Leaves and Accommodations Practice Group](#).