

## On the Horizon: Telework as a Reasonable Accommodation under the New Jersey Law Against Discrimination

11/02/23

Telework – a work arrangement that allows people to do all, or some, of their jobs from home – has become popular in the workforce since the COVID-19 pandemic began. As the world transitions back to normalcy, employers have gradually called for the return of their teleworking employees. However, many employees have grown accustomed to working from home and do not want to return to the workplace. Employees with qualified disabilities may be able to continue working from home by requesting telework as a reasonable accommodation under the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -50.

As a refresher, the NJLAD ensures that employers provide reasonable accommodations to employees with disabilities, unless those accommodations cause undue hardship. Reasonable accommodations are changes to workplace environments that allow employees to complete essential job tasks. The phrase “undue hardship” refers to a significant difficulty or expense on the side of the employer, which is determined on an individual basis.

Although no court has addressed telework as a reasonable accommodation under the NJLAD, some courts have considered this issue in the context of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 to § 12213, which is the federal version of the NJLAD.<sup>[1]</sup> Employers in New Jersey should be aware of those ADA decisions because they provide valuable guidance that is often indicative of how similar state statutes, like the NJLAD, will be applied by other courts. See *Johnson v. Thru Point, Inc.*, 160 F. App’x 159, 161-62 (3d Cir. 2005) (explaining that “[c]ourts considering claims under the NJLAD... look to the case law interpreting the [ADA] for guidance”). Accordingly, New Jersey employers should consider the following principles as guidance for preventing reasonable accommodation liability and assessing such a request:

### **Review Job Descriptions for Accuracy and Completeness**

In *Montague v. United States Postal Service*, 2023 WL 4235552 (5th Cir. June 28, 2023), the United States Court of Appeal for the Fifth Circuit found in-person attendance in the workplace was not an essential job function of the employee because that requirement was not listed in the job description. The *Montague* decision sheds light on the importance of job descriptions. Prior to the COVID-19 pandemic, employers may not have identified in-person attendance as essential because it was arguably implied. Post-pandemic, however, employers might consider evaluating whether in-person attendance is essential and, if so, include this information in job descriptions.

### **Promptly Document and Accurately Maintain Performance Evaluations**

In *Mobley v. St. Luke’s Health System, Inc.*, 2022 WL 16955465 (8th Cir. Nov. 16, 2022), the United States Court of Appeals for the Eighth Circuit found the employee capable of proving he was able to perform the essential functions of his job with the accommodation because he “continued to receive position performance reviews, reflecting that he was able to effectively supervise his employees despite not being on site.” The

*Mobley* decision highlights the importance of promptly documenting and accurately maintaining performance evaluations of employees. Records of poor performance while an employee is working from home is strong evidence that such accommodation would not be reasonable. Therefore, employers should be in a good position to prevent ADA liability and/or assess such accommodation if they have records of performance evaluations both from before employees began teleworking and while employees were teleworking.

## Assess Accommodation Requests on a Case-By-Case Basis

The United States Court of Appeals for the Seventh Circuit recently found the employee's request for telework was unreasonable because it would have to require some other employee to perform her own essential job functions. *Kinney v. St. Mary's Health, Inc.*, 76 F.4th 635 (7th Cir. Aug. 7, 2023). (“[d]etermining whether a specific job has essential functions that require in-person work has become much more of a case-specific inquiry”). The *Kinney* decision cautions employers to avoid a bright-line rule to granting or rejecting telework as an accommodation request. Such an accommodation may allow an employee with a disability to perform the essential job functions, but it may not benefit another employee. Therefore, employers should conduct an individualized assessment of each accommodation request.

**TAKEAWAY:** Based on those recent decisions, New Jersey employers can implement certain tactics to avoid failure-to-accommodate claims brought by disabled employees seeking to remain working from home. Those tactics include reviewing job descriptions for accuracy and completeness, promptly documenting and accurately maintaining performance evaluations, and assessing accommodation requests on a case-by-case basis. By implementing those tactics, New Jersey employers are better suited to return to their normal in-person workplace.

[1] Despite “[b]oth the ADA and the [NJLAD] require[ing]... employer[s]... to provide reasonable accommodation to qualified individuals with disabilities,” *Hwaga v. RWJ Univ. Hosp.*, 2019 WL 13277388, at \*5 (D.N.J. Oct. 16, 2019), there are some noteworthy differences between the statutes. Whereas the ADA applies to private employers with fifteen or more employees, the NJLAD has no such requirement. 42 U.S.C. § 12111(5)(A). Also, the NJLAD’s definition of “disability” is much broader than the ADA, imposing no “substantially limit[s]” a “major life activity,” or beyond “transitory and minor,” restrictions on its scope. N.J.S.A. 10:5-5; 42 U.S.C. § 12102(1)(A), (3)(B). Those are just some differences for New Jersey employers to consider when considering the recent ADA decisions.

### Attorney

- Nicholas Rollo

### Practice

- Employment Law