



## Legal Alert

### **The Reluctant Return of Remote Workers: When Remote Work is a Requested Accommodation**

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As of the summer of 2023, the state of California and the federal government have declared an end to the public health emergency associated with the coronavirus pandemic. As a result, many public employers are considering directing employees who have been out of the office during the pandemic to return to full-time, in-person work, with concerns about employee productivity and inferior service to the public partially driving these decisions. However, many employees in the private and public sector have pursued legal claims after being directed to return to the office, and employers should be aware of, and attempt to mitigate, these risks.

Since 2021, multiple public employers have had to grapple with requiring employees to be vaccinated against the coronavirus. Nonetheless, as of 2023, many public employers are either no longer requiring employees to be vaccinated or effectively not enforcing their nominal vaccine policies. This has, in turn, led to some employees returning to the office to complain that they do not “feel safe” until and unless everyone around them is vaccinated for COVID. While these conversations may be uncomfortable and employee safety complaints should be taken seriously, there is currently no federal or state law requiring that an employer must ensure that its employees are vaccinated. As a result, employees do not have the legal right to refuse to return to the office due to fear of unvaccinated coworkers.

On a related point, employers should be prepared to address accommodation requests from employees who are unable to return to the office due to claimed physical or mental disabilities. Under federal and state law, an employer must provide reasonable accommodations to disabled employees to allow them to perform the essential functions of their jobs. However, employers are not required to accommodate employees when the requested accommodation would impose an undue burden on employer operations. While this is typically a highly fact-specific inquiry, employers who insists on directing an employee to return to in-person work despite an employee’s accommodation request should be prepared to explain why it is an undue burden on employer operations to permit an employee to remain on a remote work schedule. Potential explanations could include a demonstration that remote work has had a sustained and material

impact on employee productivity and/or that remote work has resulted in dissatisfactory service to the public.

In addition, simply directing an employee to report to work in person could be viewed as an adverse employment action that could support a discrimination or retaliation claim or potential employee grievance. Before taking any potential adverse employment action, an employer should be able to specifically articulate – ideally with documentary support – the legitimate, non-discriminatory, and non-retaliatory reasons for its actions. In these circumstances, employees frequently attempt to argue that being directed to perform in-person work is discriminatory or otherwise improper by pointing to other employees who remain on a full- or part-time remote work schedule. In response, a public employer should be prepared to demonstrate that the comparators identified by the employee are not similarly situated.

Finally, employers should be aware that an employees' ability and willingness to interact in person with coworkers has very likely atrophied over time, and that employees returning to the office after an extended period may simply be less willing or able to deal with routine annoyances or disagreements at work. Public employer HR and Equal Employment Opportunity representatives must be prepared to receive, address, and investigate even minor or negligible complaints of alleged harassment by coworkers as the failure to investigate such complaints promptly and fully can lead to independent legal liability.