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The more varied and flexible ways in which people work create benefits for employers and employees alike, but they also entail legal and HR challenges. A few best practices will help keep employers compliant.

Fights over who gets the plum corner office have plagued employers for as long as there have been office assignments, but they face new HR and legal troubles when an employee has a less traditional work arrangement. Open-office layouts, telecommuting, and assignments to other work locations often give rise to specific kinds of employee complaints and legal compliance challenges.

Open-Office Layouts

Open-plan offices have proliferated over the last decade, touted as promoting collaboration and efficiency while optimizing use of space. These layouts, however, can be a trap for unwary employers that fail to reasonably accommodate the disabilities of qualified employees, which can be exacerbated by the open environment.

For example, employees with ADHD may find it difficult, if not impossible, to focus in an open-environment filled with distractions. Employees with anxiety disorders may be increasingly anxious due to the higher noise levels and public scrutiny that can accompany open workspaces. Employees with allergies may be unable to withstand increased exposure to their colleagues’ cologne or perfume.
Simple and inexpensive accommodations can address many of these issues. For example:

- Employers can provide employees with noise-cancelling headphones or permit them to wear their own headphones and listen to music while they work. If this causes confusion because colleagues do not know whether they can interrupt someone wearing headphones, employees can use shared calendars, signs, or cue cards to note when they cannot be disturbed and when they are available to talk.
- Employers may move employees to a workstation that faces a wall or put up simple partitions, such as screens or curtains, between workspaces to help minimize distractions and the sense of being overly exposed.
- Employers can adopt fragrance-free workplace policies.

The key is to listen to employees to understand what they require and why and then determine the appropriate accommodation, as required by the Americans With Disabilities Act (ADA). In addition, employers should ensure that adequate private spaces are available for special situations, whether the need is to maintain the confidentiality of a sensitive business discussion or to provide privacy for an employee using a breast pump.

**Telecommuting**

The number of employers permitting their employees to work from home is on the rise. Many employers have embraced telecommuting as a cost-savings measure, recruiting tool, and means to expand the available pool of skilled talent, no matter their location.

Courts have long been skeptical that working from home is a reasonable accommodation under the ADA for many positions, due to the assumption that physical presence at work is essential to most jobs. That tide may be changing, however.

Last year, for example, the U.S. Court of Appeals for the Sixth Circuit upheld a jury verdict in favor of an in-house attorney who was denied her requested accommodation of telecommuting for 10 weeks after being placed on modified bed rest during her pregnancy. Notably, while the employer did not have a formal telecommuting policy, employees had sometimes been permitted to work from home. In fact, the plaintiff employee herself had been permitted to telecommute for two weeks the previous year while she was recovering from surgery. There was also evidence that the employer had failed to properly engage her in an “interactive process” to determine what accommodation she needed, as required by the ADA, due to a mandate from the company’s president that no one be permitted to telecommute, no matter the circumstance.

**Assignments to Other Locations**

Although less common than open offices or telecommuting, an employer may in some circumstances assign an employee to work in another organization’s office (for instance, a legislative liaison from an
association based outside Washington, DC, may be assigned to work in the DC office of an affiliated organization). If an employee is assigned to another location, the employer must work with the other organization to address any employee concerns.

If a concern relates to a legal issue—for example, protection from unwelcome harassment by an employee of the other organization or the need for special equipment due to a disability—the employer needs to be prepared to advocate for its employee or to provide a new assignment that does not disadvantage him or her in location, compensation, or career advancement.

**Best Practices**

As workplace dynamics continue to change, employers will be wise to adhere to the following best practices.

**Adopt and maintain clear written policies.** Employers should have clear written policies in place informing employees of their right to request a reasonable accommodation and how to do so. They should also have clear policies and written job descriptions reflecting the organization’s needs and delineating requirements and expectations for employees. For example, employers that allow members of their staff to work from home should have telework policies or use telework agreements making clear when employees are eligible for this benefit and preserving the employer’s right to revoke it.

**Explore accommodation options with an open mind and be prepared to make exceptions.** Employers must engage in the ADA’s “interactive process” with an employee who has disclosed a medical condition that requires a change in how the job is done before deciding what accommodation it is willing to offer. While employers are not obligated to provide an employee’s preferred accommodation, they should consider the employee’s request and obtain medical documentation of his or her limitations and needs. Employees and their healthcare providers may have creative solutions to perceived problems with preferred accommodations.

Exceptions to policies are often necessary accommodations. For example, while employers are free to adopt policies prohibiting telecommuting, they may need to permit an employee with a disability to work from home if he or she can successfully complete essential duties working remotely.

**Enforce policies consistently.** Employers should follow their policies and procedures and should do so consistently (unless, as noted above, an exception is required as an accommodation). For example, if an organization does not allow telecommuting, it cannot look the other way when some employees work from home but then prohibit a similarly situated employee with a disability from doing so.