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- Provide students with substantive opportunities to perform and observe the practice of law
- Placements are made in October for Spring semester
- If interested in hosting a student, contact

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**EMPLOYERS AND LAWYERS,  
WORKING TOGETHER**

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**Remote Work in the Age of  
COVID-19 and its Ethical  
Implications for In-House Counsel**

ACC Association of Corporate Counsel

Gregg M. Lemley  
and James M. Paul

SAINT LOUIS UNIVERSITY  
SCHOOL OF LAW

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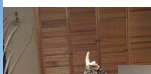
## Today's Agenda

- Working Remotely
- Inequality and Bias
- Workplace Policies
- Ethical implications

RE **OPEN** MISSOURI



What comes to mind when you think of  
telecommuting and remote working  
arrangements?



### ADA and Reasonable Accommodations



- Telecommuting/remote work may be a reasonable accommodation under the ADA.
- It's guaranteed to become a more popular accommodation now!

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### Reasonable Accommodation



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### The Employer's "Affirmative Duty"

- Failing to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability is discrimination under the ADA.
- Employers have a "duty to accommodate"
- A reasonable accommodation is a change in the work environment or the way things are customarily done that enables the employee to perform the essential functions of the job

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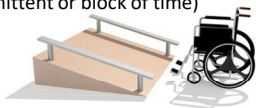
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### The Employer's "Affirmative Duty"

- No duty to eliminate an essential function
- Basic examples:
  - Making facilities accessible (ramp)
  - Modified work schedule (put feet up every two hours)
  - Modifying equipment (hoist, cart, conveyor, etc.)
  - Providing a screen reader or larger computer screen
  - Reassignment to a vacant position
  - Provide leave of absence (intermittent or block of time)



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### Interactive Process

- After a request for an accommodation, the interactive process is the investigation to determine whether employee has a disability
- It's a two-way conversation between company and employee with the objective of identifying a reasonable accommodation, if any, that will permit employee to perform essential job functions without causing an undue hardship to the employer or posing a direct threat



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### Use Your Reasonable Accommodation Forms!

- Provide employee with request form and medical certification form if he/she says cannot or should not be forced to come to work



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### Legal Considerations for Virtual Workplaces

- Workplace Safety and Health
- FMLA and Other Leaves of Absence
- ADA and Reasonable Accommodations
- Wage and Hour Considerations
- Data Integrity and Confidentiality
- Communication and Accountability
- Performance Management and Terminations
- Payroll and Tax Considerations



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### Policies to Revisit

- Remote work/flex time
- Leave of Absence
- Sick leave and attendance
- Workplace safety
- Layoff/furlough/recall
- Disability Accommodations
- Drug Testing
- Expense reimbursement
- Social Media

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### Social Media Policies and Procedures

- Do you have a social media use policy?
  - Need to explain what employees can and cannot do on their personal social media accounts.
  - Supervisors should be held to higher/different standards
- However, off-duty conduct can't and shouldn't be regulated with a heavy hand!



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#### Attendance/Scheduling Accommodations

- Shift change/flexible work times
- Start or end times
- More frequent breaks
- No overtime
- Remote workers
- Virtual workspaces
- Shared workspaces



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#### Effective Use of Job Descriptions

- Sample language to explain temperament requirements:
  - “Must interact well with others”
  - “Work in a high stress environment”
  - “Work in a fast-pace environment”
  - “Ability to prioritize and multi-task”
  - “Be able to resolve interpersonal conflicts”
  - “Work with difficult customers”

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**Importance of Job Descriptions for  
ADA Accommodations**

- Identifies essential job functions
- Strengthens arguments about which accommodations are unreasonable
- Should define attendance and worksite requirements



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**Best Practices for Drafting Job Descriptions**

- Seek input from manager or incumbents of job
- Review draft with HR/Legal
- Conduct annual review of job descriptions



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**Workplace Safety and Health**

- OSHA rules may apply to virtual work locations!



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### Mitigating Workplace Safety and Health Risks

- In addition to identifying hazards, employer has a duty to provide the necessary training, personal protective equipment, or other appropriate controls for the employee's protection.
- Inspect premises in advance to evaluate whether it is a safe workplace free from recognized hazards.
- Designate specific work area and restrict work to that area.
- Designate specific work hours.



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### Wage and Hour Considerations

- Timekeeping/Clocking In and Out
- Meal and Rest Breaks
- Off Duty and On Call Time
- Travel Time
- Recordkeeping/Posting Requirements
- Deductions



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### Wage and Hour Considerations

- If a non-exempt employee remotely accesses work voice mail or work email during off-duty hours (via phone, cell phone, smartphone, or computer), is it "hours worked"?



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### Data Integrity and Confidentiality

- To what type of confidential information will remote worker have access?
- Limit access to highly sensitive information (e.g., password protection, encryption, etc.)?
- Company issued device vs. employee's own device?
- Ensure employee has signed a confidentiality agreement!



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### Communication and Accountability

- Beware that "out of sight" can mean "out of mind".
- Maintain a high level of contact by encouraging a two-way flow of communication between management and the off-site worker.
- Promote team building between on-site and off-site employees.
- Hold off-site workers to expectations ***in writing*** when entering into remote work arrangement.



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### Performance Management for Remote Employees

- Use periodic performance reviews to assess performance.
- Engage in informal performance counseling.
- Engage in formal performance management.
- If employee fails to perform after being informally and formally informed of deficiencies and given an opportunity to correct them, termination may be appropriate.
- Utilize surveillance tools?



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**Possible Benefits of Remote Work Arrangements**

- Improves attraction and retention of employees
- Increases employee engagement
- Improves morale and job satisfaction
- Enhances productivity for some tasks



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**Possible Benefits of Remote Work Arrangements**

- Encourages a results-driven work environment
- Reduces business expense
- Reduces stress and burnout
- Enhances business continuity (coverage, extended hours, peak & valley staffing needs, customer service)



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**Possible Challenges of Remote Work Arrangements**

- May not be feasible for all jobs
- Not all employees thrive in a telecommuting work environment
- Achieving fairness for all staff
- May create logistical difficulties in coordination
- Possible liability issues regarding at-home sites



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## Model Rules of Professional Conduct

### Rule 1.6: Confidentiality of Information

CONFIDENTIAL



(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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## Confidentiality & Privilege



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## Waiver of Privilege



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BUSINESS NEWS AUGUST 20, 2020 / 4:58 PM / 6 DAYS AGO

## Working from home raises questions about U.S. inequality: Fed panel

Ann Saphir

2 MIN READ



SAN FRANCISCO (Reuters) - In a shift that some experts believe exacerbates already deep inequalities in the U.S. economy, more Americans than ever are working from home, and many are likely to continue to do so even after the health threat from COVID-19 has abated.

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### THE CONVERSATION

Academic report, commentary, blog

Q Search analysis, research, academics...

COVID-19 Arts • Culture Economy • Business Education Environment • Energy Ethics • Religion Health Politics/Election '20 Science • Technology



Remote work worsens inequality by mostly helping high-income earners

May 19, 2020 7:58am EDT

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### The Washington Post

*Democracy Dies in Darkness*

Coronavirus Latest news U.S. map World map Reopening tracker FAQ Vaccine tracker Life at Home Extraordinary People

Business

## Working from home reveals another fault line in America's racial and educational divide

While many are hunkered down with laptops at home, others must show up for work. The difference splits starkly along race and educational level.

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## Remote Learning

- Who can juggle these responsibilities?
- Who can afford to outsource this responsibility?
- Responsibilities shared equally by each parent?



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## Equipment and Expenses

- Who pays for equipment?
- Who pays for phone line?
- Who pays for Wi-Fi?
- Unfair advantages?
- Discriminatory impact based on who can afford these expenses?

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## Any Questions?



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