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INSIGHTS INTO

# TELEWORKING AND THE COLLEGE DYNAMIC

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## MICHAEL E. GINSBERG, ESQ.

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Michael E. Ginsberg is the managing partner at Pattison, Sampson, Ginsberg & Griffin, PLLC. One of the oldest law firms in the U.S. dating back to 1813. The Pattison Firm has been instrumental in developing and implementing H.R. policies for its clients for more than 75 years. For 25 years Mr. Ginsberg has been developing ADA policies and defending ADA based claims. Michael has handled ADA cases in all courts including the U.S. Supreme Court.

The Pattison team has also won countless trial victories including the recent successful defense of a \$27.5 Million college-based claim and the successful defense of a \$30 Million municipal claim. Michael and the Firm also handle corporate defense matters relating to discrimination, sexual harassment, employee claims, and most other litigation matters before both courts and administrative agencies.

Mr. Ginsberg has served as Interim General Counsel for RPI and has served as External and Chief Litigation Counsel since 2003. He has also served as External and Chief Litigation Counsel for the City of Troy since 2004.

Mr. Ginsberg was recently honored as a 2023 Super Lawyer and in 2021 was named to The National Trial Lawyers Top 100 as well as U.S. Lawyers of Distinction.

Since COVID19 teleworking has become much more prevalent within our country's workforce. During the early days of the pandemic when non-essential workplaces were closed telework became a necessary function for the performance of work duties. It appears that since COVID19 teleworking has grown in popularity with employers and especially employees.

### Q. What is teleworking?

**A.** Teleworking is defined as an alternative workplace arrangement beyond the traditional office setting that provides employees the opportunity to work at a place other than the regularly assigned location.

### Q. Does a university have to offer teleworking to its employees?

**A.** No. There is no requirement that teleworking be offered as an employment

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option. However, if it is offered, employees with disabilities must be given an equal opportunity to participate. They cannot be held to a different standard.

### Q. Is teleworking available as an accommodation under the Americans with Disabilities Act ("the ADA.")

**A.** Yes. In 1999 the EEOC opined that providing for teleworking may constitute a reasonable accommodation to a disabled employee.

Among other things, the ADA prohibits discrimination against employees and applicants with disabilities. It applies to colleges since they are considered places of public accommodation.

Some of the more common requests for teleworking as a disability accommodation are for workplace related stress, difficulty commuting, accessibility on campus and at the workstation, lack of privacy, environmental factors and exposure to viruses and bacteria.

Under the ADA a disabled employee must be provided with a reasonable accommodation allowing them to perform the essential functions of the job if it would not cause an undue hardship ("action requiring significant difficulty or expense") to the university.

Essential function refers to the tasks that are fundamental to performing that specific job. Some job duties cannot be performed remotely, such as food service, lab research, property maintenance and a host of others.

Often considerations include whether the employee has the necessary equipment off site, how the employee

will be supervised, how performance is measured, is in-person interaction necessary, and how frequently telework will be required by the employee's condition.

Once a disability has been established the employer is obligated to engage in an interactive process to identify whether a reasonable accommodation exists.

Sometimes accommodation consists of providing equipment or quiet space.

Of great importance is the notion that the employee must be able to perform the essential functions of the job with or without accommodation. Sometimes there is no available reasonable accommodation that would permit such performance. Often it is too costly or doesn't allow the employee to perform such as a request to telework when the job requires on-site personal interactions.

### Q. What are the benefits of teleworking?

**A.** Some studies indicate that employees are more productive teleworking because it allows them to work at different times of the day (or night) which aligns with their individual rhythms.

Teleworking can also remove workplace distractions.

There is no commute and thus no delays or stress caused by travel, and more time allocated to work activities.

Some argue that teleworking leads to a healthier work-life balance because the employee can take a few hours out of the day for personal time.

There is also an increase in the value of compensation received since certain expenses, such as travel, lunches and wardrobe are reduced.

The college may also benefit from greater employee satisfaction, happiness and retention.

### Q. What are the drawbacks of teleworking?

**A.** Many colleges frown upon teleworking as they want employees who are working off site to keep regular business hours and be accessible to other employees and management. University administrators often complain that they are unable to immediately reach an employee.

There is less personal interaction and thus an inability to develop an organic set of relationships which fosters sharing of information and teamwork.

Space on a college campus is also much less transient than in the corporate world. The school cannot simply abandon its premises as business entities do with leases. Many buildings on campus have been dedicated to donors.

It may also be difficult to manage employees if they are not physically on campus.

For employees they sometimes feel isolated and have concerns about job security since their "face time" with superiors is greatly reduced.

University administrators also express concerns regarding employee oversight and the ability to accurately evaluate employees.

### Q. How can colleges limit their exposure to teleworking related claims by employees.

**A.** Maintain a strong policy that is equally applied to all and comply with the ADA.