

WORKPLACE FLEXIBILITY 2010

Georgetown University Law Center

Memo

Telecommuting: A Case Study in Public Policy Approaches Spring 2006

Telecommuting, also called telework, refers to a flexible work arrangement (FWA) that alters the place that work is performed. Typically, work will be performed at home or at a satellite work center set up as an alternative to the employer's usual worksite. Telecommuting technically refers to work performed with the use of a telecommunications connection to the workplace (e.g., computer, telephone), but the term is often used more generally to describe any type of work done at a remote location. Telecommuting may be used in conjunction with other forms of FWAs, such as flextime or part-time work.

Telecommuting is a well-recognized form of flexibility and cuts across a range of worker needs –for example, balancing work and family, accommodations for disabilities, and alleviation of significant commuting/transportation challenges. Telecommuting also addresses a number of employer needs, including reduced real estate costs and improved employee recruitment and retention.

The federal government has employed a range of public policy approaches to increase access to telecommuting (particularly for federal workers). State legislatures have explored a range of approaches as well. The results have been decidedly mixed, with access to telecommuting having increased, but not as much as legislators have wished. As such, telecommuting provides an important case study of the pros and cons of using different public policy approaches to increase access to FWAs.

This memo reviews the history of telecommuting in the federal workforce, and the different approaches – including pilot projects, presidential memoranda, norm-setting mandates, and positive and negative incentives – the government has used to increase telecommuting. It then discusses efforts to increase telecommuting in state agencies. Finally, the memo discusses congressional and state legislative attempts at increasing access to telecommuting in both the public and private sector.

I. Telecommuting for the Federal Workforce

A. Initial Efforts to Introduce Telecommuting to the Federal Workforce

1. FLEXIPLACE PILOT PROJECTS

In 1990, the Office of Personnel Management (OPM), in conjunction with the General Services Administration (GSA), initiated the Federal Flexible Workplace Pilot Project to assess the benefits and challenges of allowing employees to work at locations other than their government office base (so-called "flexiplace").¹ According to OPM and GSA, the administrative rationales behind sponsoring flexiplace programs were to improve the retention and recruitment of employees, increase productivity, and reduce the expanding needs for office space.²

Early monitoring of the pilot indicated both difficulties in facilitating flexiplace participation as well as some preliminary benefits:

Originally, about 2,000 federal workers were expected to be involved in the pilot project, however, as of February 1992 only about 550 employees were participating and most were from the Environmental Protection Agency, the Equal Employment Opportunity Commission, and the Departments of Health and Human Services and Agriculture. Still, despite this low level of utilization, initial evidence suggested that flexiplace initiatives can improve productivity and lower costs. For example, the Equal Employment Opportunity Commission found that productivity among investigators who were participating in the flexiplace pilot program improved as the number of interviews they conducted while participating in this trial increased. In addition, allowing Defense Investigative Service special agents and industrial security specialists to work out of their homes has eliminated office space at government facilities, consequently producing cost savings.³

A July 1997 Government Accountability Office (GAO) evaluation of employees' experiences with "flexiplace" policies revealed many of the anticipated benefits: reduced commuting time; lowered personal costs for transportation, parking, food and wardrobe; and improvement in the quality of work-life and morale accruing from the opportunity to better balance work and family demands.⁴ Similarly, a 1998 OPM assessment of the implementation and utilization of various flexible work programs found substantial uptake — 73% of the surveyed agencies reported implementing flexiplace programs.⁵

2. INFRASTRUCTURE FUNDING

Based on the early successes of the OPM pilot project, Congress used appropriations bills throughout the 1990s to enable federal agencies to fund the extra phone lines and equipment, computer connection fees and telecommuting centers needed to support "flexiplace" workers. A 1990 Treasury, Postal Service, and General Government appropriations act initially appropriated funding for "flexiplace" arrangements.⁶ This appropriation was continued annually for several years and made permanent in 1995.⁷

This permanent funding, as part of the Treasury, Postal Service, and General Government Appropriations Act of 1996, provided that any federal employer may use federal funds to install telephone lines and other equipment and to pay monthly service charges in the homes of federal employees authorized to use telework.⁸ Before funds could be used for those purposes, the agency head was required to certify that: 1) the agency has implemented adequate measures against misuse of funds and 2) the "service" is necessary to directly support the agency's mission.⁹ The Omnibus Consolidated Appropriations Act of 1997 also authorized the General Services Administration (GSA) to create telecommuting centers for use by federal, state, and private sector employees (with priority for federal employees).¹⁰ When contemplating acquiring more physical workspace for the agency, executive agency heads also were required to consider whether telework centers would satisfy the need for more space.¹¹ Finally, beginning in fiscal year 1999, Congress has set aside \$50,000 of the funds annually appropriated to executive agencies for agencies to spend on usage of federal telework centers by their employees.¹²

3. PRESIDENTIAL DIRECTIVES

While OPM was conducting its pilot “flexiplace” projects and Congress was allocating some funding for telecommuting infrastructure during the 1990s, President Clinton was also emphasizing flexible working arrangements, including telecommuting, as a component of his Administration’s employment policy. A September 1993 report by Vice President Gore and the National Performance Review (NPR) first expressed concern about the federal government’s limited use of family-friendly workplace options and urged President Clinton to use his office to encourage the expanded use of these options within the executive branch.¹³ Specifically, the NPR Report recommended that, “[t]he President should issue a directive requiring that all agencies adopt compressed/flexible time, part-time, and job-sharing work schedules. Agencies will also be asked to implement flexiplace and telecommuting policies, where appropriate.”

Accordingly, in a Presidential Memorandum issued in 1994, President Clinton directed executive agencies “...to establish a program to encourage and support the expansion of flexible family-friendly work arrangements” including both telecommuting and satellite work locations.¹⁴ He encouraged agency heads to identify positions suitable for flexible work arrangements, adopt relevant employment policies, provide training to support employees’ use of those arrangements, identify barriers to implementation, and recommend solutions to the President.¹⁵ In a follow-up memorandum issued in 1996, President Clinton reemphasized the utilization of telecommuting as a means to create family-friendly work arrangements, and directed agencies to report on the results of a review of their policies within 120 days of issuance of the memorandum.¹⁶

B. The 2000 Telework Mandate for Executive Agency Employees

After these initial experiments, telework for federal workers became more formalized in the year 2000 when Representative Frank R. Wolf (R-VA) added a “light touch” telecommuting mandate to a Department of Transportation appropriations bill. Under the 2000 Department of Transportation and Related Agencies Act (DOT Appropriations Act), all executive agencies were required to establish policies that allow “eligible employees” to telecommute (called “telework” in federal law) “to the maximum extent possible without diminished employee performance.”¹⁷ The mandate was phased in over four years – within six months of enactment (by April 23, 2001), OPM was to ensure that the telework mandate was applied to 25% of the “federal workforce,” and each year thereafter OPM was to ensure that the mandate was applied to an additional 25% of employees.¹⁸ In other words, by 2004, all federal employees were to be permitted to telecommute as long as they could do so “without diminished employee performance.”

Congress added this telework provision in conference at the behest of Representative Wolf, primarily to alleviate traffic congestion.¹⁹ The conference report instructs each executive agency to develop a telework policy, remove any barriers to its implementation and application, and provide adequate support for its use.²⁰ It defines telework as “any arrangement in which an employee regularly performs ... duties at home or other work sites geographically convenient to the residence of the employee,” and defines “eligible employee” as “any satisfactorily performing employee of the agency whose job may typically be performed (away from the office) at least one day per week.”²¹ The statutory provision created no individual, enforceable right by an employee to telecommute, but rather, put an obligation on agencies to offer and support telecommuting by employees who

could do so without diminished work performance.

OPM did not issue regulations to implement this provision; rather, it issued a telework manual for executive agencies.²² In this manual, OPM provides general guidelines, processes to follow and technical support (e.g. information technology and worker safety information), but offers few hard-and-fast rules as to what specific policies should be adopted by each agency.²³

For example, the OPM telework manual directs supervisors to "as a starting point ... view all positions and employees as eligible for telework,"²⁴ and to review each position individually (i.e., automatically classifying a position as ineligible for telework is prohibited).²⁵ The OPM manual provides some guidance to supervisors for determining both employee eligibility and position eligibility for telework.²⁶ For example, in determining employee eligibility for telework, OPM suggests that agencies assess the employee's organizational and communication skills.²⁷ With respect to position eligibility for telework, OPM suggests that eligible positions include those that require significant thinking, writing, or telephone calls or that are computer-oriented and suggests that ineligible positions include those that require an employee's physical presence on the job, face-to-face contact with colleagues or constituents, or access to materials that cannot be removed from the regular work site, or that pose security risks when completed at alternate work sites.²⁸ In addition, if an entire position is not telework-eligible, OPM suggests that it may be broken down into individual tasks, some of which may be eligible for telework.²⁹ Ultimately, however, OPM leaves the decision about eligibility for telework to the discretion of each agency supervisor.³⁰

C. Funding Incentives/Penalties

After issuing the telework mandate in 2000, but failing to see sufficient progress, Congress began using funding as an incentive to encourage more telecommuting by federal employees.³¹ For example, as noted above, federal law requires that in each fiscal year, a minimum of \$50,000 be made available to each of 20 federal departments and agencies for flexiplace work telecommuting programs.³²

In 2003, Congress also used appropriations legislation to set aside \$100,000 in each of the budgets for the Departments of Commerce, Justice, and State; the Judiciary; and the Small Business Administration to "implement telecommuting programs."³³ These entities also were required to appoint a telework coordinator and to report the status of their telework programs to Congress every six months.³⁴ In 2004, Congress again set aside \$200,000 of each of these federal entities' budgets to "implement telecommuting programs."³⁵ Congress gave these entities six months to establish telework policies that complied with the existing telecommuting standards set forth in the 2000 DOT Appropriations Act to which they were already subject.³⁶ As in 2003, Congress required the agencies to appoint a telework coordinator and to provide biannual congressional reports on the status of their telework programs.³⁷

A 2003 report on "flexiplace" suggested that by 2002 only approximately 35% of the federal workforce was actually *eligible* to telecommute, and only 5% of the federal workforce was actually *working* at alternative sites.³⁸ An eligible employee was defined in the report as "any satisfactorily performing employee...whose job may typically be performed (away from the office) at least one day per week."³⁹

In 2004, after realizing that implementation of telecommuting continued to be slow, Congress began to withhold funds from specific agencies in order to more forcefully encourage full implementation of telecommuting policies.⁴⁰ Appropriations legislation in 2005 withheld \$5 million of the budgets of the Departments of Commerce, Justice, and State; the Judiciary; the Small Business Administration, and the Securities and Exchange Commission until they certified that "telecommuting opportunities [were] made available to 100% of the eligible workforce."⁴¹ Congress again required the agencies to appoint a telework coordinator, and imposed quarterly Congressional reports on the status of their telework programs.⁴²

D. The Effect of Various Policy Approaches on Telecommuting by the Federal Workforce

The experience of federal employees with telework may serve as an example of using various policy approaches to increase access to telecommuting, as well as an example of the potential limitations in each approach.

For example, the federal telework law included in the 2000 DOT Appropriations Act sets forth a required procedure — that executive agencies develop *policies* that provide federal workers with access to telecommuting—but does not require an outcome, for example that a certain percentage of employees actually *be* telecommuting. The law also gives agencies significant discretion in how to increase telework — that is, each specific telework policy is to be designed by the individual agency.

The law also presumes that employees who meet the eligibility standards set by their agency and supervisor for telework may request such an arrangement, and the law further seemed to presume that such a request will be granted if the telework arrangement does not result in "diminished employee performance."⁴³

Other efforts by Congress, in which money is provided for telecommuting equipment and for agencies to implement their telecommuting policies, include withholding money from agencies that do not comply with the telework requirement and an executive order that directs agencies to implement family-friendly policies, including telecommuting.

This current mix of public policy approaches has not necessarily resulted in huge successes. Many executive agencies report to Congress that they are in compliance with the telework requirement and funding incentives.⁴⁴ Likewise, at least some federal employees are taking advantage of their access to telecommuting.⁴⁵

Agencies, however, also report that, while they *offer* telecommuting to their employees, many of these employees are *ineligible* to take advantage of the policy.⁴⁶ For example, based on the most recent data available (2003), only approximately 35% of the federal workforce has been deemed eligible to telecommute, and only 5% of the federal workforce actually works from alternative sites.⁴⁷ Reported barriers to telework include management resistance (which may make the availability of telework depend on the particular agency, particular job or particular manager an employee has), employee concerns and information technology/data security issues.⁴⁸

Interestingly, none of the efforts to increase telecommuting options for federal workers has included an explicit enforcement mechanism or other mechanism to ensure compliance.⁴⁹ Lack of such a mechanism may be one of the reasons that telework has not been implemented more broadly.

II. Telecommuting for Employees of State Agencies

A number of states have enacted legislation that permits telecommuting by state agency employees. States have used the full spectrum of public policy approaches to increase access to telecommuting. For example, Oregon law gives employees a “right to ask” to telecommute by requiring state agencies to develop policies that “[require] the agency, in exercising its discretion, to consider an employee request to telecommute in relation to the agency’s operating and customer needs.”⁵⁰ Several states encourage or provide positive incentives for the development of telecommuting programs, particularly where they lead to cost savings or other efficiencies.⁵¹ For example, North Dakota implemented a program (which expired in 2005) that allowed a state agency to receive 10% of any cost savings due to implementation of a telecommuting program up to a maximum of \$2,000.⁵² Similarly, in 2005 Montana enacted a law that allows state agencies to authorize telework for specified employees when it is in the state’s best interest as determined and documented by the agency, and requires the state Department of Administration to adopt policies to encourage agencies to authorize telework and to provide for the uniform implementation of telework by agencies.⁵³ Finally, several states mandate the development of telecommuting policies by state agencies⁵⁴ and at least one state reimburses 100% of the cost of telecommuting connectivity for state employees.⁵⁵

III. Telecommuting in the Private Sector

In contrast to the public sector, few federal laws provide access to telecommuting for private sector employees. Those laws that do exist generally target specific populations — e.g., federal contractors, people with disabilities, and those with religious needs. Most of the policy for private sector employees is still in the form of legislative proposals. These proposals generally offer incentives to encourage greater access to telecommuting for private sector employees.

A. Encouraging Telecommuting for Private Sector Employees

As noted, earlier, The Omnibus Consolidated Appropriations Act of 1997 authorized the General Services Administration (GSA) to create telecommuting centers that could be used by private sector employees (although priority was given to federal employees).⁵⁶ This law supports telecommuting by private sector employees at least in theory (with practical impact dependent on whether these centers have been created and the extent to which they are available to private sector employees).

B. Encouraging (or at least not discouraging) Telecommuting by Federal Contractor Employees

Section 1428 of the 2004 defense authorization act requires the Federal Acquisition Regulatory Council to issue procurement regulations prohibiting discrimination against potential executive agency contractors who allow their employees to telecommute.⁵⁷ Under this provision, the new regulations must, at a minimum, prohibit executive agency procurement officers from: 1) refusing to consider a potential contractor based on the contractor’s intent to allow its employees to telecommute while performing work under the federal contract,

or 2) reducing a bid's score based on the potential contractor's intent to allow its employees to telecommute while performing work under the federal contract. The prohibitions do not apply if the procurement officer determines and documents that allowing telecommuting would adversely impact the agency's ability to meet its requirements.⁵⁸

Interim rules promulgated under Section 1428 in October 2004 provide that agencies "shall generally not discourage a contractor from allowing its employees to telecommute in the performance of Government contracts."⁵⁹ These rules also protect telecommuting plans during both the solicitation and evaluation of offer phases.⁶⁰ These interim rules were made final on June 8, 2005.⁶¹

C. Telecommuting by Persons with Disabilities or with Religious Needs

1. "RIGHT TO ASK" LAWS

While no federal law explicitly provides an employee with a "right to ask" to telecommute, various laws may effectively create such a right.⁶² For example, the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 each provide employees with a right to seek a "reasonable accommodation" for their disability or religious need, respectively, subject to an "undue hardship" defense for their employers. This "reasonable accommodation" may include the ability to telecommute.

For example, the Equal Employment Opportunity Commission (EEOC) has issued guidance indicating that telecommuting may be considered a "reasonable accommodation" under the ADA.⁶³ The EEOC has stated:

An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship. Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home...employees may be able to perform the essential functions of certain types of jobs at home (e.g., telemarketer, proofreader).⁶⁴

Courts interpreting the law, however, have not yet settled the question of whether telecommuting is always a "reasonable accommodation."⁶⁵

2. PRESIDENTIAL INITIATIVES

President George W. Bush's employment policy includes the integration of persons with disabilities into employment markets and considers telecommuting to be a means to do so.⁶⁶ The New Freedom Initiative, introduced in 2001, encourages use of "assistive and universally designed technologies" and initiates federal studies of telecommuting's benefits for people with disabilities, among other things.⁶⁷ One component of the Initiative was to "expand the avenue of teleworking, so that individuals with mobility impairments can work from their homes if they choose."⁶⁸ In order to accomplish this, President Bush sought, for example, to:

- create a federal matching fund for states to guarantee loans to low-income people with disabilities to purchase equipment to telecommute from home; and
- make a company's contribution of a computer and Internet access for home use by employees with disabilities a tax-free benefit.

According to a 2004 report reviewing the success of the Initiative, the President was able to accomplish his first goal of securing \$20 million for a fund to help individuals with disabilities purchase technology needed for telecommuting.⁶⁹ Federal agencies have also taken actions such as studying the effect of telecommuting on Americans with disabilities and producing fact sheets and videos promoting telecommuting as a flexibility option for employees with disabilities.⁷⁰

Finally, the Equal Employment Opportunity Commission guidance clarifying the status of telecommuting as a "reasonable accommodation" under the Americans with Disabilities Act of 1990 (discussed above) was issued during President Bush's tenure.⁷¹

D. Removing Potential Legal Obstacles to Telecommuting

While at least a few federal laws support telecommuting, others might act to impede it. For example, in the late 1990s and early 2000s, some employers suggested that the Occupational Safety and Health Act of 1970 (the OSH Act) could require that worker safety laws be applied to home offices of telecommuting employees and put onerous obligations on employers with respect to home offices.⁷² The Occupational Safety and Health Administration (OSHA), however, has issued regulations to relax two of the provisions of the OSH Act as applied to telecommuters' home offices.⁷³ Specifically, the regulations explicitly state that a telecommuter's home is not a business establishment, "for employees who telecommute from home, the employee's home is not a business establishment and a separate 300 Log is not required."⁷⁴ In addition, the regulations provide that, unlike worker injuries that occur during work performed at an employer's regular place of business, OSHA does not presume that injuries sustained during telecommuting are work-related.⁷⁵ OSHA also stated in testimony before Congress that the agency will not conduct inspections of home offices, nor does it expect employers to do so.⁷⁶ These policies lift a potential barrier to telecommuting by relieving employers of presumptive responsibility for injuries that occur in environments that they do not control and for liability for unforeseeable unsafe conditions. However, employers still must report injuries of telecommuting employees and may be liable for those injuries if they are work-related.⁷⁷

Another law that has been questioned as potentially impeding telecommuting is the Electronic Communications Privacy Act of 1986 (ECPA), which prohibits unauthorized interception of or access to electronic communications. Employers who monitor telecommuters' electronic communications, such as e-mails sent from their home office, could technically be liable for ECPA's civil and criminal penalties. The ECPA, however, provides exceptions for electronic communications service providers, business use, and consent, which may limit this liability.⁷⁸

In addition, state income tax and workers' compensation laws may serve as legal obstacles to telecommuting. States typically decide whether and how to tax those who live and work within their borders. Employees who do not live in the state in which their employer is located could be subject to taxation of income earned via telecommuting under more than one state's tax laws. For example, New York taxes the income of all workers employed by a company located in New York, regardless of where the work is actually performed, except for days worked at an out of state location that is deemed a "bona fide employer office."⁷⁹ Connecticut also taxes income for work performed within the state.⁸⁰ Thus, a telecommuter who lives in (and thus telecommutes from)

Connecticut for a company that is located in New York will pay state income tax in both New York and Connecticut (i.e., double taxation).

Bills introduced in the 108th and 109th Congresses seek to remove this impediment by prohibiting taxation of telecommuters' income in more than one state.⁸¹ None of these bills has moved significantly forward in the legislative process.

Similarly, state workers' compensation laws typically compensate employees for work-related injuries. Blurring the boundaries between employment and private settings through telecommuting raises questions about how state workers' compensation laws will apply to injured telecommuters.⁸²

These potential legal obstacles may create uncertainty for employers who wish to offer telecommuting to their employees.

IV. Legislative Proposals

Congressional members have introduced a number of legislative proposals to increase telecommuting for public and private sector employees. For example, the Reduce Government Fuel Consumption Act of 2005 would amend the National Energy Conservation Policy Act to require federal agencies to take certain actions (including offering telecommuting as an option) to reduce employee vehicle fuel consumption.⁸³ Another bill would allow military reservists to use telecommuting to satisfy some of their inactive duty training requirements.⁸⁴ Two other bills would authorize studies or pilot programs to increase awareness of and encourage use of telecommuting.⁸⁵ And still others would provide funding to an array of specific projects (from traffic congestion reduction to Indian tribe assistance to disaster relief) that include a telecommuting component.⁸⁶

Finally, several federal proposals would provide tax incentives related to telecommuting, including bills that:

- Provide a maximum \$500 credit (per telecommuter) to either employees or employers for the cost of telecommuting equipment;⁸⁷
- Establish a telecommuting tax credit for parents who telecommute at least 40% of the time;⁸⁸
- Provide a credit for telecommuting equal to the qualified telecommuting expenses paid/incurred by the taxpayer;⁸⁹ and
- Allow broadband Internet access expenditures to be expensed by service providers to encourage high speed Internet service to expand to rural and underserved areas.⁹⁰

None of these federal bills offering tax incentives have received committee or floor action at this time. Nonetheless, they reflect various approaches to providing more access to telecommuting.

Similar legislation has been introduced at the state level. For example,

- Some state proposals would create task forces or demonstration projects related to telecommuting.⁹¹
- Bills in Mississippi and Virginia would provide technical assistance to persons with disabilities trying to telecommute.⁹²

- Some state proposals would provide tax or other economic incentives related to the costs of telecommuting.⁹³ For example, a bill in Georgia would allow an employer a state income tax credit for converting at least 20% of its employees to telecommuting,⁹⁴ and a bill in Virginia would offer economic incentives for empty building space resulting from employees who telecommute.⁹⁵
- Several state proposals would implement telecommuting programs to improve air quality, reduce vehicle emissions, conserve energy, and/or reduce traffic.⁹⁶ For example, a Washington bill would create a telework enhancement funding board to decrease traffic congestion.⁹⁷
- Finally, many state proposals would establish and/or implement telecommuting programs for state employees (often related to traffic or environmental concerns).⁹⁸

V. Conclusion

Telecommuting may serve as a case study of the different public policy approaches that may be used to increase access to FWAs, and some of the pros and cons of each. For example, the requirement creating access to telecommuting for federal employees is effective in giving employers flexibility in how they design their program to meet their business needs and in giving at least some employees access to telecommuting arrangements. At the same time, the level of discretion given to each agency and supervisor may act to hinder access to telecommuting for those employees who are deemed ineligible to telecommute. The use of incentives — from providing funding to imposing penalties — to increase access to telecommuting also retains employer choice, but the voluntary nature of incentives does not always ensure greater access to FWAs for all employees. Likewise, removing legal obstacles may reduce some of the uncertainty employers face when seeking to offer telecommuting, but also may not ensure that telecommuting is used more often by employees without something more to push employers to offer telecommuting. Interestingly, all of the efforts discussed above lack any type of explicit enforcement mechanism.

ENDNOTES

- ¹ U.S. General Accounting Office (1997). *Report to the Ranking Minority Member, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives, Federal Workforce: Agencies' Policies and Views on Flexiplace in the Federal Government* (GAO/GGD-97-116) (hereinafter "GAO Report 1997").
- ² U.S. General Accounting Office (1997), p.5. GAO bases this finding on OPM and GSA instructional guidelines established in 1990 to assist agencies in implementing flexiplace programs.
- ³ U.S. General Accounting Office (1992). *Report to Congressional Committees, The Changing Workforce: Comparison of Federal and Nonfederal Work/Family Programs and Approaches* (GAO/GGD-92-84). Washington, D.C.: U.S. Government Printing Office, p.82.
- ⁴ GAO Report 1997, *supra* n. 1, at 12. This evaluation was based primarily on five federal departments and three independent agencies. Additionally, people with disabilities experienced some reduction in the workforce participation barriers they faced. *Id.*
- ⁵ This data is based on the response of 61 federal agencies, which collectively represent approximately 95% of the federal workforce excluding the U.S. Postal Service. See, U.S. Office of Personnel Management, *A Review of Federal Family-Friendly Workplace Arrangements* (1998).
- ⁶ Treasury, Postal Service, and General Government Appropriations Act of 1991 § 624 (enacted as Pub. L. No. 101-509, 104 Stat. 1389 (1990)).
- ⁷ Treasury, Postal Service, and General Government Appropriations Act of 1996 § 620, 31 U.S.C. § 1348 note (2000) (enacted as Pub. L. No. 104-52, 109 Stat. 468 (1995)). See *also* U.S. General Services Administration and U.S. Office of Personnel Management (2003). *The Status of Telework in the Federal Government*. Washington, D.C.: Author. Retrieved June 2006, from http://www.telework.gov/documents/tw_rpt03/status-back.asp
- ⁸ See Treasury, Postal Service, and General Government Appropriations Act of 1996 § 620, 31 U.S.C. § 1348 note (2000) (enacted as Pub. L. No. 104-52, 109 Stat. 468 (1995)).
- ⁹ *Id.*
- ¹⁰ See Omnibus Consolidated Appropriations Act of 1997, tit. IV, § 407(a), 40 U.S.C. § 587 (2000) (enacted as Pub. L. No. 104-208, 110 Stat. 3009 (1996)). GSA may also provide assistance and oversight to anyone regarding the establishment and operation of "alternative workplace arrangements," which include "telecommuting, hoteling, virtual offices, and other distributive work arrangements." *Id.*
- ¹¹ *Id.*
- ¹² See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 § 630, 40 U.S.C. § 587 note (2000) (enacted as Pub. L. No. 105-277, 112 Stat. 2681 (1998)). This statute defines executive agencies to include the Departments of State, Treasury, Defense, Justice, Interior, Labor, Health and Human Services, Agriculture, Commerce, Housing and Urban Development, Transportation, Energy, Education, and Veterans' Affairs; General Services Administration; Office of Personnel Management; Small Business Administration; Social Security Administration; Environmental Protection Agency; and U.S. Postal Service. *Id.*
- ¹³ National Performance Review (NPR), *From Red Tape to Results: Creating a Government that Works Better and Costs Less*, September 1993; General Accounting Office (GAO), *Alternative Work Schedules: Many Agencies Do Not Allow Employees the Full Flexibility Permitted by Law*, March 1994.
- ¹⁴ The memorandum indicated that it did not create "any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." See Memorandum, *Expanding Family-Friendly Work Arrangements in the Executive Branch*, 59 Fed. Reg. 36,017 (July 11, 1994).
- ¹⁵ The President also directed OPM and the GSA to "take all necessary steps to support and encourage the expanded implementation of flexible work arrangements," including reviewing existing regulations, proposing legislative changes, and assisting executive agencies in their implementation of the directive. See Memorandum, *Expanding Family-Friendly Work Arrangements in the Executive Branch*, 59 Fed. Reg. 36,017 (July 11, 1994).

- ¹⁶ William Jefferson Clinton, *Memorandum for the Heads of Executive Departments and Agencies: Implementing Federal Family Friendly Work Arrangements*, June 21, 1996 (not printed in the Federal Register) (available at <http://www.ibiblio.org/pub/archives/whitehouse-papers/1996/Jun/1996-06-21-Memorandum-on-Family-Friendly-Work-Arrangements>) (June 24, 1996). For a review of the implementation of these memoranda see, Office of Personnel Management (1998), *A Review of Federal Family-Friendly Workplace Arrangements*.
- ¹⁷ See Department of Transportation and Related Agencies Appropriations Act § 359, 5 U.S.C. § 6120 note (2000) (enacted as Pub. L. No. 106-346, 114 Stat. 1356 (2000)).
- ¹⁸ *Id.*
- ¹⁹ We found no reference to workplace flexibility as a rationale for the measure at the time. See H.R. CONF. REP. No. 106-940, at 151 (2000). Representative Frank Wolf (R-VA), an outspoken supporter of telework in the federal workforce and then-chairman of the Transportation-Treasury-HUD Appropriations subcommittee, participated as a conferee and offered the provision in conference. According to Rep. Wolf's congressional staff, Rep. Wolf's initial impetus for the provision was to reduce the number of cars on the road to improve traffic conditions (based in part on a George Mason University study on telecommuting's potential effect on traffic congestion and a National Governors' Association presentation on telework). Conversation with J.T. Griffin, Appropriations Legislative Assistant for Rep. Frank R. Wolf (R-VA), May 23, 2006. See also Letter from the Institute of Public Policy, George Mason University to the Honorable Frank R. Wolf, March 15, 2000 (describing traffic studies; on file with Workplace Flexibility 2010); Manage, "Telework: A Source of Strategic and Competitive Advantage for Your State," presented to the National Governors' Association, State College, PA, July 10, 2000 (on file with workplace Flexibility 2010). Since introduction of the law, Rep. Wolf has also emphasized the family-friendliness and positive environmental impacts that flow from telecommuting. See Frank R. Wolf, Telework, at <http://www.house.gov/wolf/issues/telework.html> (last visited Jun. 9, 2006) At about the same time as the DOT appropriations bill passed, Rep. Wolf also proposed a bill to provide tax credits for telework and investigated the possibility of using an "emissions trading" model to trade credits related to telework. These initiatives did not move forward. See Telework Tax Incentive Act, H.R. 3819 & S. 2431, 106th Cong. (2000).
- ²⁰ See Joint Explanatory Statement of the Conferees accompanying H.R. CONF. REP. No. 106-940, at 151.
- ²¹ See *id.*
- ²² See U.S. OFFICE OF PERSONNEL MANAGEMENT, TELEWORK: A MANAGEMENT PRIORITY, A GUIDE FOR MANAGERS, SUPERVISORS, AND TELEWORK COORDINATORS, http://www.telework.gov/documents/tw_man03/prnt/manual.asp (May 2003).
- ²³ *Id.* OPM advice on the practical implementation of telework policies that conform to the 2000 Congressional mandate covers initial drafting of a policy, supervisors' roles in encouraging telework while maintaining balance in their offices, performance appraisals, overcoming information technology barriers to telework, developing an appropriate telework agreement with eligible employees, and ensuring worker safety in the home office. See *id.* §§ 2-5 & apps.
- ²⁴ See *id.* § 3.
- ²⁵ See *id.*
- ²⁶ See *id.*
- ²⁷ See *id.*
- ²⁸ See *id.*
- ²⁹ See *id.*
- ³⁰ See *id.*
- ³¹ In addition to funding, Congress also required federal agencies (as defined in §630(a) of P.L. 105-277) to report to OPM on their effort to promote telework centers for federal employees, and required GSA to increase its marketing of telework centers for federal employees and to establish a business case for a pilot project to allow federal employees to try working at telework centers for 60 days. See Treasury and General Government Appropriations Act of 2002 § 638, (enacted as Pub. L. 107-67, 115 Stat. 514 (2001)); H.R. Rep. No. 107-152, at 71 (2001), see also U.S. General Services Administration and U.S. Office of Personnel Management (2003), *The Status of Telework in the Federal Government*, available at http://www.telework.gov/documents/tw_rpt03/status-toc.asp (last visited June 9, 2006). More recently, Congress enacted legislation calling on the Secretary of Energy to conduct a study of the energy conservation implications of telecommuting by federal employees in the Energy Policy Act of 2005, which became law on August 8, 2005. See Energy Policy Act of 2005, § 1803 (H.R. 6, 109th Cong. (2005)) (enacted as Pub. L. No. 109-58, 119 Stat. 594 (2005)).

- ³² 40 U.S.C. § 587(d)(2). The federal departments and agencies include the Departments of State, Treasury, Defense, Justice, Interior, Labor, Health and Human Services, Agriculture, Commerce, Housing and Urban Development, Transportation, Energy, Education, and Veterans' Affairs; General Services Administration; Office of Personnel Management; Small Business Administration; Social Security Administration; Environmental Protection Agency; and U.S. Postal Service. See also Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 § 630, 40 U.S.C. § 587 note (2000) (enacted as Pub. L. No. 105-277, 112 Stat. 2681 (1998)); see General Accounting Office (2003). *Report to the Chairman, Committee on Government Reform, House of Representatives: Further Guidance, Assistance, and Coordination Can Improve Federal Telework Efforts* (GAO-03-679), p. 13.
- ³³ See Consolidated Appropriations Resolution of 2003 § 623, 5 U.S.C. § 6120 note (Supp. III 2003) (enacted as Pub. L. No. 108-7, 117 Stat. 11 (2003)) (enacted Feb. 20, 2003). In 2003, Rep. Wolf was no longer chair of the Transportation Appropriations subcommittee and instead chaired the Science-State-Justice-Commerce Appropriations subcommittee. As a result, Rep. Wolf continued to push his telework recommendations through this particular appropriations bill.
- ³⁴ *Id.*
- ³⁵ See Consolidated Appropriations Resolution of 2004 § 627, 5 U.S.C. § 6120 note (Supp. IV 2004) (enacted as Pub. L. No. 108-199, 118 Stat. 3 (2004)).
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ See U.S. General Services Administration and U.S. Office of Personnel Management (2003), *The Status of Telework in the Federal Government*, available at http://www.telework.gov/documents/tw_rpt03/status-findings.asp (last visited June 9, 2006).
- ³⁹ *Id.*
- ⁴⁰ See Consolidated Appropriations Act of 2005 § 622, 5 U.S.C. § 6120 note (Supp. IV 2004) (enacted as Pub. L. No. 108-447, 118 Stat. 2809 (2004)).
- ⁴¹ *Id.*
- ⁴² *Id.*
- ⁴³ See Department of Transportation and Related Agencies Appropriations Act § 359, 5 U.S.C. § 6120 note (2000) (enacted as Pub. L. No. 106-346, 114 Stat. 1356 (2000)).
- ⁴⁴ See Letter from Eileen R. Larence, Director, Homeland Security and Justice, General Accountability Office (GAO), to Honorable Frank R. Wolf, Chairman, Subcommittee on Science, the Departments of State, Justice, and Commerce (Sept. 27, 2005) (available at <http://www.gao.gov/htext/d051055r.html>, last visited June 12, 2006).
- ⁴⁵ See U.S. General Services Administration and U.S. Office of Personnel Management (2003), *The Status of Telework in the Federal Government*, available at http://www.telework.gov/documents/tw_rpt03/statusss-findings.asp (last visited June 12, 2006).
- ⁴⁶ See Letter from Eileen R. Larence, Director, Homeland Security and Justice, General Accountability Office (GAO), to Honorable Frank R. Wolf, Chairman, Subcommittee on Science, the Departments of State, Justice, and Commerce (Sept. 27, 2005) (available at <http://www.gao.gov/htext/d051055r.html>, last visited June 12, 2006).
- ⁴⁷ See U.S. General Services Administration and U.S. Office of Personnel Management, *The Status of Telework in the Federal Government* (2003). Retrieved June 2006, from http://www.telework.gov/documents/tw_rpt03/status-findings.asp
- ⁴⁸ *Id.*
- ⁴⁹ We note that Congress' efforts, beginning in 2004, to withhold funds from agencies not demonstrating efforts to implement telecommuting for their workforces could be viewed as use of a penalty to enforce Congress' previous mandates and incentives related to telecommuting. These measures did not, however, give individual employees a right to enforce executive agency telecommuting policies.
- ⁵⁰ Or. Rev. Stat. § 302A-610.
- ⁵¹ See, e.g., Va. Code Ann. §15.2-1512.3 (local units of government in Virginia are authorized and encouraged to establish and implement a telecommuting policy). See also Cal. Pub. Util. Code §871.7, Conn.Gen. Stat. Ann. § 5-248i, 625 Ill. Comp. Stat. § 33/15, SC. Code Ann. § 8-11-15.
- ⁵² N.D. Cent. Code § 54-06-24.1 (expired on June 30, 2005). See also Wash. Rev. Code Ann. §70.94.996 (establishing a performance-based grant program for employers to offer financial incentives for ride-sharing or telecommuting programs).
- ⁵³ 2005 Mont. Laws ch. 56 (H.B. 112)(2005).

- ⁵⁴ See, e.g., Cal. Gov. Code § 14200 et seq., N.C. Gen. Stat. Ann. § 143-215.107C, Va. Code Ann. § 2.2-2817.1.
- ⁵⁵ Ariz. Rev. Stat. Ann. § 41-786.
- ⁵⁶ See Omnibus Consolidated Appropriations Act of 1997, tit. IV, § 407(a), 40 U.S.C. § 587 (2000) (enacted as Pub. L. No. 104-208, 110 Stat. 3009 (1996)). GSA may also provide assistance and oversight to anyone regarding the establishment and operation of "alternative workplace arrangements," which include "telecommuting, hoteling, virtual offices, and other distributive work arrangements." *Id.*
- ⁵⁷ National Defense Authorization Act for Fiscal Year 2004, § 1428, (enacted as Pub. L. No. 108-136, 117 Stat. 1392 (2003)) (enacted Nov. 24, 2003). For the purposes of this statute, the term "executive agency" is defined by reference to the definition of the term in the Office of Federal Procurement Policy Act. See 41 U.S.C. § 403(1). That statute defines executive agencies to include specified executive and military departments and certain independent establishments defined under 5 U.S.C. §§ 101, 102, 104.1, and wholly owned Government corporations fully subject to 31 U.S.C. § 9101. *Id.* A 2005 appropriations proviso restricts telecommuting for contractors operating the National Recreation Reservation Service (prohibiting reservation agents from telecommuting from outside the United States). See Consolidated Appropriations Act of 2005 § 622, 5 U.S.C. § 6120 note (Supp. IV 2004) (enacted as Pub. L. No. 108-447, 118 Stat. 2809 (2004)).
- ⁵⁸ *Id.*
- ⁵⁹ 69 Fed. Reg. 59,701 (Oct. 5, 2004) (codified at 48 C.F.R. §§ 7.108, 11.002, 13.106-2, and 15.304).
- ⁶⁰ See, e.g., 48 C.F.R. §§ 7.108(a)&(b), 11.002, 13.106-2(b)(2), and 15.304(c)(6).
- ⁶¹ 70 Fed. Reg. 33,656 (Jun. 8, 2005).
- ⁶² See Workplace Flexibility 2010, *Creating an Enforceable Right to Ask for Flexible Work Arrangements Memo* (2006).
- ⁶³ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATIONS AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, Notice No. 915.002 (Oct. 17, 2002).
- ⁶⁴ *Id.* See also 29 C.F.R. § 1630.2(o)(1)(ii), (2)(ii) (1997) (modifications or adjustments to the manner or circumstances under which the position held or desired is customarily performed that enable a qualified individual with a disability to perform the essential functions).
- ⁶⁵ See *Mason v. Avaya Communs, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (service coordinator's request for at-home accommodation unreasonable where essential function of position would be eliminated, namely plaintiff's physical attendance at employer's administration center); *Rauen v. United States Tobacco Mfg.*, 319 F.3d 891, 897 (7th Cir. 2003) (software engineer's request to work from home office unreasonable where job required teamwork, interaction and coordination within the workplace); *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997) (work from home accommodation objectively unreasonable where employee failed to present facts indicating that situation was "one of those exceptional cases" where job could have been performed at home without a "substantial reduction in quality of performance"). *Contra* *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001) (summary judgment denied where triable issue of fact existed as to whether medical transcriptionist could perform essential duties of job from home, and employer's denial of plaintiff's otherwise reasonable request for accommodation, based on plaintiff's disciplinary record, was inconsistent with the purposes of the ADA). See generally Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 Am. Bus. L.J. 857, 891-98 (2001); Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working At Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309 (1997).
- ⁶⁶ This employment policy applies to both public *and* private sector employees.
- ⁶⁷ See Exec. Order No. 13,217, 66 Fed. Reg. 33,155 (June 18, 2001); see also Office of the President, New Freedom Initiative: Americans with Disabilities, at <http://www.whitehouse.gov/infocus/newfreedom> (last visited February 8, 2006).
- ⁶⁸ *Id.*
- ⁶⁹ White House Domestic Policy Council, New Freedom Initiative: A Progress Report, March 2004, available at <http://www.whitehouse.gov/infocus/newfreedom/newfreedom-report-2004.pdf>
- ⁷⁰ *Id.*
- ⁷¹ See OFFICE OF THE PRESIDENT, NEW FREEDOM INITIATIVE: A PROGRESS REPORT § 3, at 19, at <http://www.whitehouse.gov/infocus/newfreedom/newfreedom-report-2004.pdf> (Mar. 2004).

- ⁷² See, e.g., Press Release, U.S. Chamber of Commerce, U.S. Chamber Criticizes 'Outrageous' OSHA Policy On Telecommuting, (January 4, 2000) at <http://www.uschamber.com/press/releases/2000/january/00-01.htm>.
- ⁷³ Two bills from the 106th Congress would have clarified the application of the OSH Act to home workers; they did not move after referral to committee. H.R. 4080, 106th Cong. (2000); H.R. 4098, 106th Cong. (2000).
- ⁷⁴ 29 C.F.R. § 1904.46 (2005).
- ⁷⁵ 29 C.F.R. § 1904.5 (2005).
- ⁷⁶ See U.S. Department of Labor, OSHA's Assistant Secretary clarifies agency policy concerning home inspections, Jan. 25, 2000, http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=123; see also SWINK, *supra* note 64, at 870-72.
- ⁷⁷ See SWINK, *supra* note 64, at 870-72.
- ⁷⁸ See, e.g., Jennifer C. Dombrow, Note, *Electronic Communications and the Law: Help or Hindrance to Telecommuting?*, 50 Fed. Comm. L.J. 685, 697-703 (1998). Common law principles prohibiting invasions of privacy may also limit employers' legal authority to monitor telecommuters' electronic communications. See *id.* at 705-07.
- ⁷⁹ See Tom Herman, "New York State Alters Its Stance On Rule Affecting Telecommuters," Wall Street Journal, May 31, 2006, at D2.
- ⁸⁰ See generally Press Release, Senator Christopher Dodd, Dodd to Introduce the Telecommuter Tax Fairness Act, (Aug. 2, 2004), at <http://dodd.senate.gov/press/Releases/04/0802.htm>.
- ⁸¹ See Telecommuter Tax Fairness Act, S.2785 & H.R. 5067, 108th Cong. (2004); Telecommuter Tax Fairness Act, S. 1097 & H.R. 2558, 109th Cong. (2005).
- ⁸² See SWINK, *supra* note 64, at 873-90.
- ⁸³ Reduce Government Fuel Consumption Act of 2005, S. 1853, 109th Cong. (2005).
- ⁸⁴ See Enhancing America's Guard and Reserve Act, H.R. 4468, 109th Cong. (2005)(allows limited use of telecommuting to satisfy inactive duty training required for reservists).
- ⁸⁵ See Balancing Act of 2005, Subtitle B United States Business Telework Act, H.R. 1589, 109th Cong. (2005)(authorizes the Secretary of Labor to conduct a pilot program, lasting no more than 5 years, to raise awareness and encourage employers to offer telework options to employees); Federal Energy Management Improvement Act of 2005, H.R. 1533 (2005)(Secretary of Energy is to conduct a study of the energy conservation implications of widespread adoption of telecommuting by federal employees). As noted above, while the House of Representatives has not acted on H.R. 1533 in the 109th Congress, identical language calling on the Secretary of Energy to conduct a study of the energy conservation implications of telecommuting by federal employees was inserted into the Energy Policy Act of 2005 which became law on August 8, 2005. See Energy Policy Act of 2005, § 1803 (H.R. 6, 109th Cong. (2005)) (enacted as Pub. L. No. 109-58, 119 Stat. 594 (2005)).
- ⁸⁶ See Workforce Investment Act Amendments of 2005: Subtitle C – Professional Development and Special Projects Demonstrations, S. 1021, 109th Cong. (2005)(authorizes grants to States and Indian tribes to pay for the federal share of the cost of establishing or expanding telework programs, including providing assistance to persons with disabilities; this bill has been marked up and reported on by the Senate Health, Education, Labor and Pension (HELP) Committee and is currently on the Senate Legislative Calendar under General Orders; the reported version still contains the telecommuting language); End D.C. Regional Traffic Gridlock Act, H.R. 1347, 109th Cong. (2005)(provides funding for projects to reduce traffic congestion in the metropolitan Washington, D.C. region including by promoting telecommuting); Louisiana Katrina Reconstruction Act, S. 1766, 109th Cong. (2005)(allocates funds to cover telecommuting expenses of federal contractors as part of disaster relief).
- ⁸⁷ Telework Tax Incentive Act, S. 1292, 109th Cong. (2005).
- ⁸⁸ Parents Tax Relief Act, S. 1305 & H.R. 3080, 109th Cong. (2005).
- ⁸⁹ GAS Act, S. 1868, 109th Cong. (2005).
- ⁹⁰ Broadband Internet Access Bill, S. 1147, 109th Cong (2005).
- ⁹¹ See Telework 2005 Act, A.B. 2041, 228th Ann. Leg. Sess. (N.Y. 2005)(creating a demonstration project and task force on telework); H.B. 2893, 2005 Sess. (Va. 2005)(establishing the Commonwealth Telework Council to advise the Governor on telecommuting guidelines).

⁹² See H.B. 1204, 2006 Leg., Reg. Sess. (Miss. 2006); H.B. 1803, 2005 Sess. (Va. 2005).

⁹³ See, e.g., H.B. 194, 148th Gen. Assem., Reg. Sess. (Ga. 2006).

⁹⁴ H.B. 393, 148th Gen. Assem., Reg. Sess. (Ga. 2005).

⁹⁵ H.B. 2614, 2005 Sess. (Va. 2005).

⁹⁶ See, e.g., A.B. 694, 2005-06 Sess. (Cal. 2005); S.B. 1006, 2005 Gen. Assem., 2005 Sess. (N.C. 2005); S.B. 1123, 2005 Gen. Assem., 2005 Sess. (N.C. 2005); H.B. 1095, 2005 Gen. Assem., 2005 Sess. (N.C. 2005); H.B. 1460, 2005 Gen. Assem., 2005 Sess. (N.C. 2005).

⁹⁷ S.B. 5063, 59th Leg., Reg. Sess. (Wash. 2005).

⁹⁸ See, e.g., H.B. 312, 148th Gen. Assem., Reg. Sess. (Ga. 2005); S.B. 33, 23d State Leg. (Haw. 2005); and HB 320; H.B. 2612, 2005 Sess. (Va. 2005); S.B. 1006, 2005 Gen. Assem., 2005 Sess. (N.C. 2005); S.B. 1123, 2005 Gen. Assem., 2005 Sess. (N.C. 2005); H.B. 1095, 2005 Gen. Assem., 2005 Sess. (N.C. 2005); H.B. 1460, 2005 Gen. Assem., 2005 Sess. (N.C. 2005).