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TELECOMMUTING

The trend to allow employees to telecommute is increasing and both employers and employees can benefit from the practice, Dechert attorney Linda Dwoskin and labor and employment specialist Jane Patullo say in this BNA Insights article. However, they point out that employers confront a host of legal issues when employees work at home, including wage and hour, workplace safety, workers' compensation, and privacy and data protection issues.

The authors suggest that employers that proactively consider the pros and cons of work-at-home arrangements and draft comprehensive policies and procedures in anticipation of managing a telecommuting workforce will be in the best position to adapt to this expanding sector of the workforce. They also provide practical advice in deciding whether to allow telecommuting, and if so, how to manage the day-to-day implications of allowing employees to work at home.

It's 9:00 A.M. Do You Know Where Your Employees Are? The Legal Implications of Telecommuting

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With the improvement in computer technology, voice and email communications, and remote connectivity, and the need/desire for flexible work arrangements, employers are increasingly permitting employees to “work from home” or telecommute.

According to the Census Bureau, about 13.4 million Americans worked from home at least one day per week in 2010, an increase of approximately 18 percent from 2005. The current figures account for almost 10 percent of the workforce. This trend is expected to continue for obvious reasons: the practice allows employers to hire talented staff from far and wide; companies can decrease overhead costs with the use of less office space; employees save time and money by eliminating a commute; and they have greater satisfaction and less absenteeism with a more flexible work arrangement.

That said, not all employers have enthusiastically embraced the idea of telecommuting. In the last few weeks, first Yahoo! and then Best Buy announced that they were banning all off-site work arrangements. The asserted reasons were the need to increase productivity, the alleged abuse of the work-from-home policy, and the belief that working in the same physical space increases collaboration and creativity. Given the buzz generated by these pronouncements and the irony that it was a technology company that was the first to do away with a practice made possible by technological innovation, many organizations have begun to examine whether telecommuting makes sense for them.

Whether telecommuting is the right choice for any employer depends upon many factors, including the nature of the business/industry, whether the work performed can be done outside the office, whether the staff can be managed remotely, and whether collaboration between employees requires “face time.” Moreover, employers confront a host of legal issues when employees work at home, including whether telecommuting is required for a particular employee as a “reasonable accommodation” under the Americans with Disabilities Act, wage and hour issues, workplace safety and workers’ compensation issues, privacy and data protection issues, and others.

This article addresses the various legal implications of telecommuting and then provides practical advice in deciding whether to allow telecommuting and if so, how to manage the day-to-day implications of permitting employees to work at home.

I. LEGAL CONSIDERATIONS

A. The Americans with Disabilities Act

Under the ADA, an employer must offer reasonable accommodation to qualified individuals with a disability. An accommodation is broadly defined as “any change” in the work environment or in the way things are customarily done that enables a disabled individual to enjoy equal employment opportunities. *See* 42 U.S.C. § 12119(9); 29 C.F.R. § 1630.2(o).

According to the Equal Employment Opportunity Commission, reasonable accommodation includes allowing an employee to work at home. In its 2005 guidance, which is still in effect today, the commission recognized that “not all persons with disabilities need—or want—to work at home. And not all jobs can be performed at home. But, allowing an employee to work at home may be a reasonable accommodation if the person’s disability prevents successfully performing the job on-site and the job, or parts of the job, can be performed at home without causing significant difficulty or expense.” EEOC Guidance on Work At Home/Telework as a Reasonable Accommodation, p. 1, <http://www.eeoc.gov/facts/telework.html> (Work at Home Guidance).

The commission listed several factors an employer should consider in assessing the reasonableness of the requested accommodation, including “the employer’s ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other

employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace.”

EEOC cautioned that an employer should not deny a request to work at home solely because a job involves some contact and coordination with colleagues. “Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.” Work at Home Guidance, Ques. 4.

The case of *EEOC v. Ford Motor Co.*, 26 AD Cases 1457 (E.D. Mich. Sept. 10, 2012) (177 DLR A-3, 9/12/12), demonstrates the application of these factors. According to the opinion, plaintiff Jane Harris was a resale buyer in the Vehicle Production Purchasing Department of Ford Motor Co. As a resale buyer, Harris purchased steel and resold it to entities known as stampers that manufactured and supplied vehicle parts to Ford’s assembly plants. Not only did the resale buyer select a steel source for the stampers, but she ensured that there was no gap in the steel supply, responded to supply issues such as shortages or changes in specifications, and facilitated quality or pricing disputes. There were only five to seven resale buyers.

Harris suffered from irritable bowel syndrome and was frequently and unpredictably absent from work, the opinion said. In addition to her attendance problems, she had difficulties with work performance as well.

Harris requested that she be permitted to telecommute as an accommodation for up to four days per week from home. Her supervisor denied the request. “Ms. Harris’ job required regular interactions with her team and with a number of contacts both inside and outside of Ford, and these interactions could not be adequately handled over the phone or via email,” the opinion said. “While occasional matters can be dealt with in that fashion, the spontaneous flow and exchange of information, which is critical to the group problem-solving component of her job, would be compromised if issues had to be put on hold until a conference call could be scheduled.”

The supervisor proposed two other accommodations: moving the plaintiff’s office closer to the restroom and helping her locate another job at Ford that was more amenable to telecommuting. Harris rejected these proposals, the opinion said.

The plaintiff filed a charge of discrimination when her requested accommodation was denied, and a subsequent charge of retaliation when Ford terminated her employment. EEOC found cause to credit the allegations of discrimination/retaliation and subsequently sued Ford for violations of the ADA. The court granted Ford’s motion for summary judgment, finding as an initial matter that plaintiff was not qualified because of her high level of absenteeism.

It is likely that more and more courts will consider a request to work at home a reasonable accommodation, the authors say, and employers should be ready and willing to discuss this option, particularly if remote access is afforded to nondisabled employees in certain circumstances.

EEOC argued, however, that “regular attendance was not an essential function of the resale buyer position” because Harris could perform her duties at home, the opinion said. The court rejected this position and declined to “second-guess an employer’s business judgment regarding the essential functions.” Ford’s management team testified that plaintiff’s position was highly interactive and required group problem-solving with other members of the resale team and suppliers. The court noted that while a few other buyers were permitted to telecommute, they did so on a much more limited basis—approximately one day a week—and only on a scheduled day. No one had ever been permitted to telecommute up to four days whenever she determined that she was unable to be physically present in the office.

The court noted that “in general courts have found that working at home is rarely a reasonable accommodation.” *Id.*; see also *Valdez v. McGill*, 462 Fed. App’x 814 (10th Cir. 2012) (30 DLR A-13, 2/14/12) (affirming summary judgment for employer in ADA claim. Request by warehouse manager with cancer to work at home was not reasonable accommodation since “physical attendance in the workplace is itself an essential function.”); *Core v. Champaign Cnty. Bd. of Cnty. Comm’rs*, 26 AD Cases 1786 (S.D. Ohio 2012) (209 DLR A-5, 10/29/12) (granting summary judgment to employer in ADA claim. Plaintiff, with chemical sensitivity to perfume, requested work-at-home accommodation. Court upheld employer’s denial of request as unreasonable: “an employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced.”)

The “rarity” of working at home as a reasonable accommodation may be changing. In *Bixby v. JP Morgan Chase Bank*, 25 AD Cases 1745 (N.D. Ill. 2012) (52 DLR A-10, 3/16/12), the plaintiff was a project manager in the bank’s Onboarding Department, a group whose functions were never defined by the court. The plaintiff suffered from panic and generalized anxiety disorders which were exacerbated by a change in his supervisor. As an accommodation, he initially requested a reduced workload and a leave of absence. The leave was granted, but upon Bixby’s return to work, his new supervisor gave him a performance rating of “low meets” trending towards “needs improvement.”

Approximately one month later, Bixby was to receive a written performance warning. Instead, he took another leave of absence and before his return, requested permission to work at home as a reasonable accommodation for 90 days. The request was denied, Bixby re-

fused to return, and Chase deemed Bixby to have resigned his position. Bixby brought a claim under the ADA.

The crux of the matter before the court was whether working at home was a reasonable accommodation. Chase argued that it was not and cited long-standing precedent that “most jobs involve team work under supervision rather than solitary unsupervised work, and teamwork under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee’s performance. *Id.* at *10 (citing *Vande Zande v. Wisc. Dept. of Admin.*, 44 F.3d 538, 3 AD Cases 1636 (7th Cir. 1995)).

The court rejected this argument, explaining that the *Vande Zande* opinion was decided 17 years ago, when remote access technology was in its infancy. Given the improvements in technology, the court was far more willing to consider the reasonableness of the request.

In this case, there were meetings among staff, but these often were conducted by teleconference, and Bixby did direct activities and people, but this was often done through email. Moreover, the record contained evidence that Chase allowed as many as three other project managers to work from home on a full-time, permanent basis because they lived at great distance from the central office. Bixby had only requested permission to work at home for 90 days. The court found that a fact dispute existed as to the reasonableness of the requested accommodation. Chase’s motion for summary judgment was denied.

It is likely that more and more courts will consider a request to work at home a reasonable accommodation, and employers should be ready and willing to discuss this option, particularly if remote access is afforded to nondisabled employees in certain circumstances.

B. Wage and Hour Issues

The Fair Labor Standards Act establishes minimum wage and overtime requirements for nonexempt employees regardless of where employees perform their jobs. The act requires that employers pay employees for all hours worked. Generally hours worked consist of all time an employee is required or permitted to work for an employer, including all time spent by an employee during the continuous workday (i.e., which begins with the employee’s first principal activity and ends with the last), including rest breaks. Meal periods of at least 30 minutes during which an employee is relieved of all duty may be excluded.

An employer must pay time and one-half for all hours worked over 40 in a workweek, and keep accurate information regarding hours worked. The FLSA explicitly applies this rule “to work performed away from the premises or the job site, or even at home” and requires employers to count the time as hours worked “if the employer knows or has reason to believe that the work is being performed.” 29 C.F.R. § 785.12.

An employer that permits telecommuting by nonexempt employees should institute policies and procedures in order to avoid common problems associated with employees' working off-the-clock, the authors say, including any unapproved overtime, and/or failing to accurately record actual time worked.

Some states, such as California, also require payment of premiums for daily and weekly overtime. And, several states (e.g., California and Illinois) also mandate meal periods and/or rest breaks and their timing during the workday, and impose related recordkeeping requirements on employers.

Telecommuting arrangements, in which an employer's ability to monitor an employee's activity is limited, present special challenges. While arguably paternalistic, the FLSA and analogous state laws impose on the employer a duty to exercise control to ensure that work is not performed unless the employer desires it, and requires that the employer pay for all time it knows or should have known that work was being performed.

Thus, employers are deemed on-notice of time worked by telecommuters who are emailing, texting, or communicating with remote managers during off-hours, as is often discernible from the employer's various operating systems and records. Lawsuits by remote employees often allege a failure of their employer to properly capture and pay for all time worked. See, e.g., *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 15 WH Cases2d 1569 (9th Cir. 2010) (43 DLR A-7, 3/8/10); *Jankuski v. Health Consultants, Inc.*, (N.D. Ill. 2012); *Brand v. Comcast*, 19 WH Cases2d 1833 (N.D. Ill. 2012) (188 DLR AA-1, 9/27/12); *Mitchell v. Acosta Sales, LLC*, 841 F. Supp. 2d 1105, 2011 BL 324135 (C.D. Cal. 2011).

An employer that permits telecommuting by nonexempt employees should institute policies and procedures in order to avoid common problems associated with employees' working off-the-clock, including any unapproved overtime, and/or failing to accurately record actual time worked. These procedures should be in writing and signed by the employee, and should detail the obligations to accurately record time, the method by which time should be recorded and the obligation to work only approved hours. Finally, the employer should routinely and carefully audit employees' work schedules, reported meal periods, and overtime requests/approvals against computer logs and other electronic records in order to identify and correct any inconsistencies or problems.

C. Workplace Safety Issues and Liabilities

Although by definition telecommuters work remotely and not at the office, employers still must be concerned with workplace safety issues. An employer has responsibilities under the Occupational Safety and Health Act

of 1970 (OSH Act) and under state workers' compensation laws.

1. OSH Act

Under the OSH Act an employer must provide a workplace free from recognized hazards that are likely to cause death or serious injury, and this duty applies even if employees work remotely. In its "Home-Based Worksites" directive (CPL2-0.125, available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_2-0_125.pdf and <http://op.bna.com/dlrcases.nsf/r?Open=smgk-985tat>), however, the agency announced that it will not conduct inspections of employees' home offices, it will not hold employers liable for employees' home offices, and it does not expect employers to inspect the home offices of their employees. If the agency receives a complaint, it will inform the complaining employee about the "no inspections" policy and, if an employee makes a specific request, the agency may informally let employers know of complaints about home office conditions, but will not follow-up with the employer or employee.

In the case of a home-based worksite other than a home office (e.g., manufacturing operation), OSHA will conduct an inspection when it receives a complaint of a violation of a standard that threatens physical harm or presents an imminent danger, but will limit it to the employee's work activities. The agency will hold an employer responsible in a home worksite for any hazard caused by materials, equipment, or work processes that the employer provided or required to be used in an employee's home, and still requires the employer to keep records of work-related injury or illness.

While safety-related injury claims do not frequently arise under the OSH Act, they often are pursued by telecommuters under state workers' compensation laws or by third parties under tort laws. Thus, employers have a vested interest in ensuring safe working conditions in employees' homes.

2. State Workers' Compensation Laws and General Liability Issues

When a person is injured in a telecommuter's home, determining whether the homeowner/renter or the employer is responsible for the injury can be complicated. State workers' compensation insurance laws provide wage replacement and medical benefits for employee injuries and illnesses sustained or developed in the course of employment, while limiting employer liability to such benefits. Although they vary somewhat by state, these laws uniformly cover telecommuters in the same manner as employees working in a more traditional environment and do not limit coverage to accidents occurring on the employer's premises.

A key requirement for coverage is that the employee's injury/illness must have occurred as a result of some work-related factor. Generally, if an injury occurs while performing work tasks, it is covered. If a worker is injured while tending to personal business, it is not. This distinction seems simple but as the following cases demonstrate, it is not.

For example, in *Sandberg v. J.C. Penney Co., Inc.*, 260 P.3d 495, 2011 BL 144987 (Or. App. 2011), an Oregon appeals court found that a home decorator who tripped over her dog while walking from her garage to her home work studio had sustained a compensable injury because her employer had control over whether

she worked away from its studio and, as a condition of employment, exposed her to risks outside the employer's control, including the dog. Similarly, in *Ae Cleviste, Inc. and Liberty Mutual v. Labor Commissioner*, 996 P.2d 1072 (Utah App. 2000) (48 DLR A-11, 3/10/00), the state court determined that an employee who was injured while salting his driveway sustained a compensable injury. The employee, who worked from a home office and made sales calls, had returned home from a customer visit, loaded his car with material for an upcoming sales trip, and waited for the delivery of a package needed for that trip. When he saw the mailman approaching, the employee decided to salt his driveway so that the delivery could be made safely.

Nor do an employee's carelessness or personal attributes appear to impact compensability decisions. In *Renner v. AT&T*, 2011 BL 338673 (N.J. Super. A.D. 2011), an obese salaried manager who died as a result of a pulmonary embolism following a long overnight work session at home was found to have incurred a compensable injury. The employee routinely worked long hours at her home computer in order to meet various deadlines imposed by AT&T. The court concluded that her prolonged inactivity while working caused the embolism, her work inactivity was greater than her nonwork inactivity, and that her injury was work-related.

Of course, injuries in and around home office(s) are not limited to employees, and may affect others. Employees generally bear responsibility in tort for injuries to third parties and damage to property caused by employee negligence. This is clearly so if the injury or damage occurs on the employer's property, but can extend to remote worksites. An injury to a third person or damage to a telecommuter's home office during the course of telecommuting work raises complicated questions as to whether the employer or employee is liable.

Thus, employers are advised to require that telecommuters include liability insurance coverage for injuries to third parties under their homeowners' or renters' policies. Employees should also ensure that their own directors' and officers' liability and commercial general liability insurance policies cover injuries that occur at telecommuters' homes.

Most experts agree that in order to properly manage claims and minimize the risk of fraud, an employer should indicate in its telecommuting policy that in the event of an accident (whether or not it resulted in injury) or an injury in the home which may be work-related, the employee must report it to his/her manager immediately, and also to human resources within a short time frame after the occurrence (e.g., within 24 hours). Employers should also have telecommuters agree in advance to cooperate in the investigation of a workers' compensation claim and to permit inspection of the home workplace by the employer and/or its agents, including its worker's compensation carrier.

D. Privacy and Data Security Issues

Telecommuting is made possible by employees' remote access to an employer's computer systems and the confidential, proprietary, and other sensitive information contained therein. While necessary, such access raises a host of privacy and security concerns.

Problems may include: security breaches of information in transit and malicious hacking; improper access

to data by nonemployees in the home (e.g., spouses, housemates) or to other third parties resulting from lax procedures, improper data-sharing, or careless use of portable media, such as thumb drives (which may trigger employer obligations under state data breach notification laws if covered personal information is involved); unauthorized release by the employee of information; and, worst of all, misappropriation of the employer's confidential and proprietary information resulting in great harm to the employer's business.

A comprehensive program involving administrative/managerial and technological controls developed by an employer's human resources, legal, and information technology staff can reduce these risks. Elements of a program should include the following:

- *Policy/individual nondisclosure and confidentiality agreements.* Any employee with access to confidential and proprietary information should be required to execute an agreement requiring him/her to safeguard and protect it, and to return to the employer all such information/material at any time upon the employer's request and at termination. If an employer permits use of an employee's personal electronic device for work-related tasks, a separate agreement concerning its use and allowing the employer to inspect it and delete company information, particularly at termination, is advisable. In a BYOD (bring your own device) environment, the employer should emphasize that its business information does not lose protection just because it might reside on the employee's device. Policies provided to employees should reinforce these employee obligations, and make clear that they apply to the employer's business information, wherever located.

- *Monitoring electronic equipment.* Generally, an individual has a right to privacy only where he/she has a reasonable expectation of privacy. Accordingly, in order to remove a telecommuter's reasonable expectation, an employer should issue a notice that, as a condition of telecommuters' employment, the employer reserves the right to monitor and inspect, without notice, their use of the employer's computer, telephone lines, other equipment and systems, and any documents prepared/used in connection with work. An employer may also wish to consider having the employee sign an acknowledgment of the policy.

Finally, technological safeguards are vital to protecting business information. An employer's IT staff can set up safeguards to ensure firewalls, and may be sent to telecommuters' homes to install company computers in a manner that maximizes security. An employer should also consider providing remote access only via a secure connection or other encrypted access, requiring that work be performed only on company-owned equipment; and permit data transfer only via a secure network rather than any portable media.

E. Zoning

Zoning laws in many cities limit or restrict the operation of home-based businesses, and in some cases may prohibit a telecommuter from working at home. At a minimum, these laws often require that an individual obtain a license or permit before engaging in work at home. When considering a work-at-home request, employers should ascertain whether zoning requirements

may apply, and should clarify whether the company or the employee will be responsible for compliance.

II. DECIDING WHETHER TELECOMMUTING IS RIGHT FOR YOUR COMPANY

Despite the media frenzy occasioned by the Yahoo! and Best Buy announcements, it appears that the trend favoring telecommuting will continue. While recognizing the many benefits of the practice—a wider talent pool from which to hire; decreased overhead costs; decreased carbon footprint; better work/life balance for employees; savings in time and money with less of a commute; improved morale—there are definite and ongoing concerns. Some are the legal issues noted above and some are the very real concerns that individuals abuse the work-at-home privilege, the company loses the creativity and innovation that is fostered by in-person collaboration and teamwork, and the difficulty supervising/managing individuals who are never present.

A. Factors to Consider in Evaluating Whether to Allow Telecommuting

1. The type of work performed. Some positions are more amenable to telecommuting than others. The employer needs to evaluate the job purpose and duties and whether those duties are location-specific. In other words, a receptionist cannot work at home, but a call-center employee can.

The essential functions of the position, set forth in a comprehensive and accurate job description, should be evaluated to determine the feasibility of telecommuting on a full-time or part-time basis. Once a decision is made, each subsequent request must be evaluated using the same/similar factors to ensure nondiscriminatory decisionmaking, and an employer must keep in mind, that even if a decision is made to disallow working at home, this policy might need to yield to the legal obligation to reasonably accommodate a disabled employee under the ADA.

2. Managing remotely. This requires giving thought both to whether the employee can be managed remotely—whether he/she has the motivation and discipline to handle work outside the office—and whether the manager can supervise adequately. Looking at the employee, those who can work remotely typically are self-starters, organized, can work well with limited supervision, have a record of strong performance, are comfortable with technology, and can accomplish tasks without the distractions that exist outside the office.

As for the manager, supervision of those working remotely is more difficult. A manager has to make the added effort to set measurable goals, establish a system to evaluate accomplishments, create and maintain a system of communication to ensure that the employee actually works and remains engaged in the business, and the manager has to ensure compliance with all company policies including time recording, overtime work, trade secret and confidentiality, safety and others.

3. The need for collaboration. Many jobs require that employees interact face-to-face, whether to problem-solve, to foster creativity, or to ensure that work gets

done. Whether the position itself requires face-time or the employee needs face-time to successfully fulfill his/her role, then telecommuting is not a viable option.

4. Whether employees want to work at home. Not all individuals want to work at home. While working remotely has its advantages, some individuals find it too distracting and want the social and intellectual interaction with others. If so, telecommuting may be offered as an option, not a requirement.

5. Understanding the law. As is obvious from the lengthy discussion above, many federal and state laws impact the telecommuting arrangement. An employer must stay abreast of these requirements to ensure compliance with all major workplace laws.

B. Implementing a Work-at-Home Policy

Once a decision is made to permit telecommuting, an employer should document its work-at-home policy. This ensures that the workforce understands the criteria by which the employer will evaluate work-at-home requests, and that the policy is uniformly applied. The telecommuting policy should emphasize that working at home is a privilege, not a right, that there are requirements to maintain this arrangement, and that an employee who does not comply will have the privilege revoked and/or receive discipline up to and including discharge.

Any telecommuting policy/procedures should deal specifically with a number of issues. First, wage and hour issues must be addressed, particularly that nonexempt workers accurately define and track hours worked, all overtime be pre-approved, and off-the-clock work is not permitted. At a minimum, a nonexempt employee should be required to clock in and out daily using the employer's computer and/or telephone system (including for noncompensable meal breaks), and the system should be used to generate logs that can be used to monitor employee activities.

Telecommuters should be instructed about what constitutes time worked (including use of BlackBerrys or other mobile technology and work email, telephone systems, etc.) and how to record time. The policy should prohibit work outside the normal schedule without written pre-approval, including working during an otherwise required meal period, and should inform employees that the company will conduct periodic audits to ensure compliance with company policy and to avoid later FLSA litigation.

Second, an employer's confidential and proprietary information can lose its trade secret status if the employer does not take affirmative steps to protect and ensure the confidentiality of such data. Thus, a company should have a confidentiality policy, as well as individual agreements, defining the types of information that should be protected and setting forth the need for and mechanism to protect confidential and proprietary data.

Third, the policy should address safety issues and require that all equipment/tools supplied by the employer, the work area, and the work processes meet applicable safety requirements. The telecommuter must set up and maintain the home worksite in suitable, safe working order that is free from all hazards and should report all work-related illness/injury immediately, and the employer should reserve the right to inspect the premises.

Finally, communication with the telecommuting employee is critical. This facilitates a common understanding of the company's policies and procedures, ensures that work is getting done, and keeps the employee engaged in the company's business. This can be accomplished by requiring periodic meetings in the office, or by frequent telephone check-ins and performance reviews. The use of internet resources such as Skype or Facetime for meetings and discussions with telecommuters is also helpful.

III. CONCLUSION

Given the obvious benefits of telecommuting, it is likely to be around for some time to come. Employers that proactively consider the pros and cons of these arrangements and draft comprehensive policies and procedures in anticipation of managing a telecommuting workforce will be in the best position to adapt to and benefit from this expanding sector of the workforce.