

This ruling places a potential burden on the employer and the Deaf employee. The ADA does not say anything about the employer must provide relay. The requirement to provide relay is in the realm of the telecommunications. If a telecommunications company is also the employer, as the ruling points out it, the employer's requirement to provide access is unchanged. The ruling goes further by imposing a requirement to provide more than access to the telephone, instead to provide the national telecommunications network.

The declaratory ruling on several occasions uses a "but for" analysis to reach determinations of when a call is or is not compensable. Stated a different way, but for the employee's disability would the call be placed made by an equally situated hearing employee? If so, then the call is compensable.

The Focus of My Comments – Providers or Employees?

My concerns are squarely on the employees that will be affected. True, there are effects on the provider; they are entitled, regardless of the past, to fair treatment by the commission. There are providers which acted ethically and should not now be punished.

I have a long history in the industry; I am the person who successfully petitioned the FCC to establish the certification program as the founder of a now certified provider telecommunications company. (See Snap filings in 2004, 2005 & part of 2006) I also introduced the first SIP based videophone to the marketplace (Ojo). (See same Snap filings) I have no sympathy for providers here. My only consideration is the negative impact employees may suffer.

Furthermore, because these two distinct responsibilities of telecommunications common carrier and employer exist the Commission may unintentionally be giving providers the proverbial "get out of jail free" card defending their employer actions on grounds of conflicting laws and regulations. U.S. 29, §1630.15(e)¹

The effect of intended consequences

My prediction is this ruling, while well intentioned, will perpetuate further discrimination against Deaf employees and applicants.

Furthermore, in the instance of a Deaf owned VRS provider, that person would not be entitled to equal access to telecommunications system. Under this regime they could only hope to one day recoup the associated costs. Comparing two Deaf business owners, one owns a telecommunications company and the other an advertising company; they would not face equal treatment.

¹ Section 1630.15(e) Defense--Conflicting Federal Laws and Regulations. There are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense. The employer's defense of a conflicting Federal requirement or regulation may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict with this part. See House Labor Report at 74.

The FCC allowed for the costs to be included in the annual data collection whereby the rate is set. That only means the costs will be aggregated with every other provider's costs. Then, and only then, if NECA approves the cost included in the rate calculation will it be considered. However, it is common knowledge this does not always lead to full reimbursement which is assumed in the ruling. There numerous factors which come into play, including the competitive marketplace, affecting the number of minutes whereby a provider could hope to recoup these costs.

Compare these two situations:

Company A, Deaf employee wants to use the phone. Company A provides an internet connection and a videophone. The employee is free to use any VRS provider they choose. The cost to the company is \$50 per month for the internet connection and \$300 for the videophone (assuming purchase in the open market not free CPE).

Company B, Deaf employee wants to use the phone. Company B provides an internet connection and a videophone. The employee is free to use any VRS provider they choose. The cost to the company is \$50 per month for the internet connection and \$300 for the videophone and an additional \$6.4352 per minute.

Company B now faces a negative economic incentive to hire Deaf employees. The Deaf employee and the employer are penalized merely because of the type of business the company it is in.

Should a Deaf business owner have their equal access to the telephone network be decided by the marketplace? That is a hefty cost placed on the person with a disability by virtue of their disability.

Business expense

"Just as a provider bears the business expense of providing telephone service for use by its employees who do not have a hearing or speech disability, it likewise bears as a business expense the costs of accommodating those employees who require relay service to use the telephone. In either case, the cost associated with providing telephone service for use by employees is properly reflected in the VRS compensation rate."

The business expense considered by the ADA for employers is the cost of the additional equipment (i.e., videophone or internet connection).

To my knowledge, no employer is required to provide relay as a whole. The employer is required to provide access to the telephone. Traditionally employers understand the requirement to mean access to a phone line, TTY or a videophone and internet connection.

The ruling appears to make the provider responsible for the entire telephone network as a workplace accommodation.

Example 1 – Company A (VRS provider) has a staff meeting at the office where deaf and hearing employees are in attendance for one hour. All people are located at the office. The ADA would require the employer to hire an interpreter (if needed, assuming all could not sign). That is a business expense considered by the ADA. (~\$120 cost of accommodation – interpreter)

Example 2 – Company B (not VRS provider) has a staff meeting by teleconference. All employees are hearing. All employees have access to the telephone network and use it to conduct the meeting for one hour. (\$0.00 cost of accommodation)
Business expense - cost of the telephone service (~\$49 per line)

Which company below, X or Y, is a VRS provider under this new regulatory regime?

Does the cost of the accommodation to the employee give any clue?

Example 3 – Company X has a staff meeting by teleconference where some employees (Deaf or Hearing) are in attendance by telephone and others in person. All employees have access to the telephone network and use it to conduct the meeting for one hour. (~\$120 cost of accommodation)

Business expense - cost of the telephone service (~\$49 per line) plus cost of accommodation.

Example 4 – Company Y has a staff meeting by teleconference where some employees (Deaf or Hearing) are in attendance by telephone and others in person. All employees have access to the telephone network and use it to conduct the meeting (~\$480 cost of accommodation)

Business expense - cost of the telephone service (~\$49 per line) plus cost of accommodation.

Company Y is the VRS provider in this scenario.

How is the situation of Y any different from X; there is no difference.

In example X & Y one Deaf employee attended in person and one by teleconference. However, the employer paid for the on-site interpreter in examples 1 & 3 and the telephone network (example 4) at \$6.4352 a minute.

Double Dipping

The declaratory ruling makes it abundantly clear “calls made by or to a VRS provider’s employee, or the employee of a provider’s subcontractor, are not eligible for compensation from the TRS Fund on a per-minute basis from the Fund, but rather as business expenses.” The ruling states, “providers already are able to include the costs of providing telephone and telecommunications services for use by employees in their annual submissions.” Upon review of the annual data collection instructions there is no indication these costs are attributed to employees.²

² “4. **Telecommunications Expenses:** Expenses associated with inspecting, testing, analyzing and correcting trouble; repairing or reporting on telecommunications plant (switching, transmission, operator, cable and wire) to determine need for repairs,

A more detailed explanation of how permitting providers to be compensated from the Fund for employee calls on a per-minute basis would result in double recovery from the Fund is needed.

The reimbursement of these costs is based on conversation minutes not a flat fee. For double recovery to result there would have to be some other reimbursement prior to the provision of conversation minutes. I can find no other reimbursement in addition to the conversation minutes.

“We address here only how providers recoup the costs of such calls from the Fund, which is through the rate base used to determine the per-minute compensation rates that compensate providers for their reasonable actual costs of providing service consistent with the TRS rules, and not on a per-minute basis.”

“We stress that VRS may continue to be used by a provider’s employees to make or receive telephone calls, and compensation for such use is provided through Fund mechanisms.”

That may be so, however this approach strips every Deaf person who happens to also work for a VRS provider in any capacity of an uninhibited right to use the telephone.

Furthermore, this also appears to strip the right of any Deaf employee of an interpreting agency that is contractors to a provider of their uninhibited right to the use the telephone. The right is inhibited because usage of the telephone system for any purpose would necessarily be tracked, documented and could then be made dependent on the employer’s discretion.

When cash flow is thin the first “expense” to be cut may be this burdensome one. In no other instance is a Deaf person or hearing person forced to depend on their employer’s discretion for the right to use private telephone use or even work related use

Unfortunately, using the employee/employer relationship as a proxy for reducing the fund size is not a new strategy. The Commission first used this tactic by attacking the profit margin of sign language interpreting agency vendors hired by the providers. The vendors are third parties, unrelated to the FCC.

The rationale espoused by NECA, that vendor’s profit was not taken, only that the providers could not claim it in their costs. This slaps against the very definition of reimbursement for reasonable costs. Applying this rationale all profit margins of all vendors would be fair game. The Commission, through NECA, took aim squarely on the largest line item.

In the situation of unreasonable profits the Commission would rightly encourage the provider to seek a better deal by disallowing the unreasonable profits. However, the blanket approach used

replacements, rearrangements, and changes; expenses for activities, such as controlling traffic flow, administering traffic measuring and monitoring devices, assigning equipment and load balancing, collecting and summarizing traffic data, administering trunking, and assigning interoffice facilities and circuit layout work.” <https://www.neca.org/cms400min/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2684>

encouraged a sinister spiral of trickle down cost reductions. The ultimate reduction coming out of the salaries of individual sign language interpreters as providers forced the profit disallowances down to the agencies as cost reductions. A reported example in New York of an agency sliced interpreter pay by 30%.

Determination of Call Type

Lastly, how is the Commission determining which calls are made by employees and of those calls which are personal?

On what basis does the FCC have enough information to identify that a call is or is not that of an employee?

Is the TDN used to identify the caller by name?

An employer does not use employee's phone numbers for that purpose (when at home/mobile). A Deaf employee should enjoy the same right regardless of their employer.

TRS calls are not recorded, how is a call determined personal or work related?