



EMPLOYERS AND LAWYERS,

WORKING TOGETHER



Ogletree
Deakins

ACC St. Louis: Friday, August 26, 2022

EVERYONE'S FAVORITE NEW ACCOMMODATION:
WORKING FROM HOME

Presented by: Burton D. Garland, Jr. and Gregg M. Lemley



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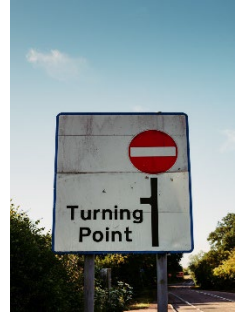
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Presentation Overview

- What changed?
- Reasonable Accommodation Primer
- Remote Work
 - Then
 - Now
- Some Hypotheticals
- Tips Moving Forward

What Changed?



The virtualization of work is here. The virtualization of careers is here. Without reconciling this tension, the risk will be losing excellent talent who are looking for flexibility from their employers.

Tsedal Neeley, Naylor Fitzhugh Professor of Business Administration at Harvard Business School

Question

Question 1: What percentage of your workforce was fully or partially remote in 2019?

- A. Less than 25%
- B. 25% - 50%
- C. 50% - 75%
- D. 75% - 100%

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What percentage of your workforce was fully or partially remote in 2019?

Less than 25%

25% - 50%

50% - 75%

75% - 100%

Question

Question 2: What percentage of your workforce was fully or partially remote during the pandemic?

- A. Less than 25%
- B. 25% - 50%
- C. 50% - 75%
- D. 75% - 100%

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What percentage of your workforce was fully or partially remote during the pandemic?

Less than 25%

25% - 50%

50% - 75%

75% - 100%

Question

Question 3: What percentage of your workforce is fully or partially remote today?

- A. Less than 25%
- B. 25% - 50%
- C. 50% - 75%
- D. 75% - 100%

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What percentage of your workforce is fully or partially remote today?

Less than 25%

25% - 50%

50% - 75%

75% - 100%

Question

Question 4: Which of the following best reflects your philosophy on remote work going forward?

- A. We expect all workers to return to the office fulltime
- B. A good portion of our non-essential workforce is fully remote
- C. We have a hybrid workforce where people are expected to be in the office some percentage of the week, but are allowed to work remotely some percentage of the week

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What Changed?

Remote Work Pre-Pandemic –

- About 25% of Workers in 2017-2018

Remote Work Pandemic –

- At its peak about 70% of Workers
- This Fell to 45% as of September 2021, but has remained stable

- 91% Say they Want to Keep it this Way

What Changed?

Growing thought is that the pandemic forced employers to participate in a remote work pilot program ... that worked



What Changed?

This was not a surprise really –

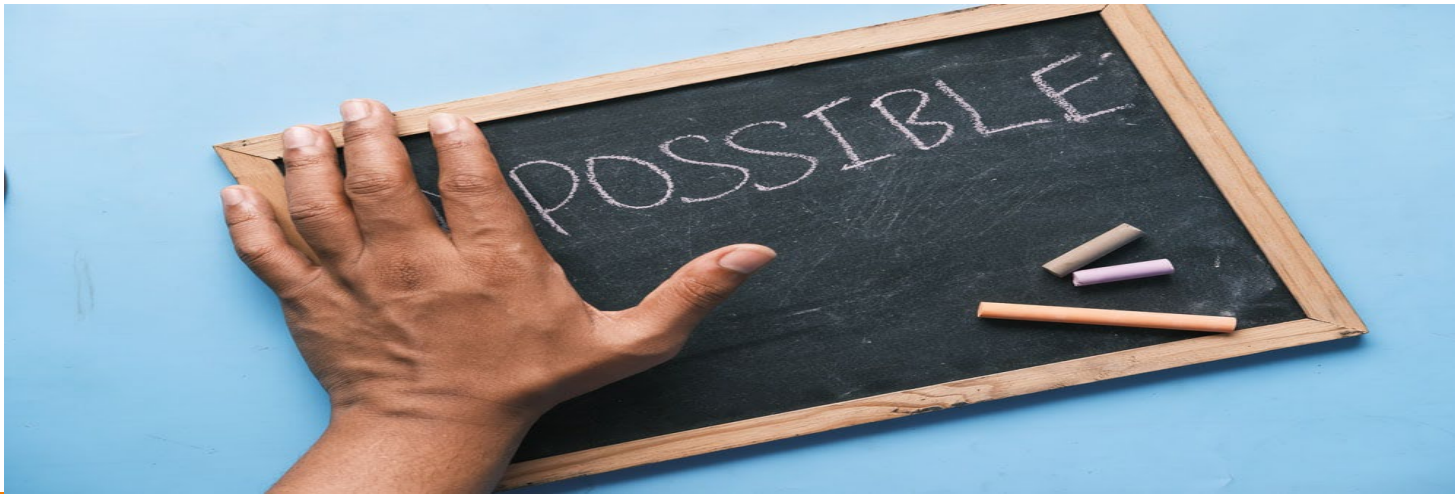
But *how* this would change remote work as a reasonable accommodation under the Americans with Disabilities Act Amendments Act was not what the world was thinking about in lockdown

ADAAA Reasonable Accommodation



ADAAA Reasonable Accommodation

The ADAAA is a landmark piece of legislation, but its central innovation is the reasonable accommodation process –



ADAAA Reasonable Accommodation

Equal Employment Opportunity

Commission Statistics Bear this Out –

- Aside from Retaliation, Disability related claims are the most commonly filed
- Within Disability related claims, aside from discharge, failure to accommodate is the most common issue raised

ADAAA Reasonable Accommodation

Employers must provide *reasonable accommodations* to *qualified individuals* with disabilities, unless to do so would cause an *undue hardship*.

ADAAA Reasonable Accommodations

KEY CONCEPTS –

- What are “essential functions” of a job?
- Who is a “qualified individual?”
- What does it mean to make a “reasonable accommodation?”
- What is an “undue hardship?”
- What is an “interactive process?”

What Are Essential Functions?

Essential functions are fundamental job duties of the position.

Evidence of whether a particular function is essential:

- Employer's judgment as to which functions are essential;
- Written job descriptions;
- Amount of time spent on the job performing the function;
- Consequences of not requiring incumbent to perform the function;
- Terms of a collective bargaining agreement;
- Work experience of past incumbents in the job; and/or
- Work experience of incumbents in similar jobs

What Is a Reasonable Accommodation?

A reasonable accommodation is a modification or adaptation that allows an employee to perform the **essential functions** of the job

May include:

- Giving additional leave
- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Modifying company policies

What Is a Reasonable Accommodation?

A reasonable accommodation does not include:

- Creating a new job
- Eliminating or reassigning essential functions
- Promotions
- Bumping another employee
- Changing employee's supervisor, unless employee is assigned to a different department as accommodation and would naturally have different supervisor as a result
- Indefinite leave

What Is An Undue Hardship?

An Undue Hardship is a substantial burden to operations (either through cost, production, or coworker duties), i.e. it is likely something you will never see...

Factors To Consider:

1. Nature & Cost of Accommodation Needed
2. Overall Financial Resources of Employer & Facility Involved
3. Size, Organization & Function of Employer's Workforce
4. Impact of Accommodation on Facility, Department, and Other Employees
5. Can you clearly explain why it is an undue hardship?

The Interactive Process is Your Friend!

The ADAAA requires that the parties engage in an informal process to gather information about the impairment, the job, and how the impairment creates hurdles in performing the essential duties in order to find or not find a reasonable accommodation

The Interactive Process is Your Friend!

Focus on the following questions –

- Can the individual perform the essential functions of their position while working remotely, i.e. are they a qualified individual with a disability?;
- Are the essential functions of the position able to be performed remotely, i.e. is remote work a reasonable accommodation?;
- Can remote work for this employee be effectuated without creating an undue hardship, i.e. how much will it cost to set them up at home and what effect will this have on operations and coworkers?;
- Are other employees in the same or similar position performing these essential job functions remotely?; and
- Are there any other reasonable accommodations available that are better suited for the employer?

ADAAA Reasonable Accommodations

Caveats –

- Employer need not provide the employee's accommodation of choice
- To get an accommodation an employee has to ask for it (beware of being too strict about this)
- Do not get bogged down in whether an employee has a disability under the ADAAA (they likely do)

Remote Work



Remote Work

The primary change the pandemic has created under ADAAA cases was to hand nearly every employee evidence that, on some level, their jobs can be performed at home (or at least that perception)

Remote Work -- Then

- Many employers had very little remote work history, if any at all
 - As a result, often times, it was an easy defense to assert that work had to be done onsite as there was no way to prove otherwise
 - It was also easy to speculate about the cost and burden to set up computer applications and other business systems
 - The emphasis was on the employer's account of the job, not the employee's

Remote Work -- Then

Employer Deference on essential functions is codified into the statute –

Consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. 42 U.S.C. § 12111(8)

Remote Work -- Then

A Case



Remote Work -- Then

Frantti v. New York, 850 F. App'x 17 (2d Cir. 2021). The lower court granted summary judgment and the 2nd Circuit affirmed. The events of the case take place before the pandemic, but the case was decided during the pandemic. Plaintiff requested remote work for his gastrointestinal issues. The court found that he was not a qualified individual and remote work was not reasonable since some of his essential duties required onsite work.

Continued

Remote Work -- Then

Defendant submitted vague job descriptions that merely mentioned having to analyze complex data and work corroboratively, testifying that this meant onsite work. Plaintiff had no facts to rebut since he had never remotely worked. In addition, Defendant alleged that it did not have the technology to allow his to remotely work. The court found for defendant, pointing out that these arguments are now “quaint” given the pandemic.

Remote Work -- Then

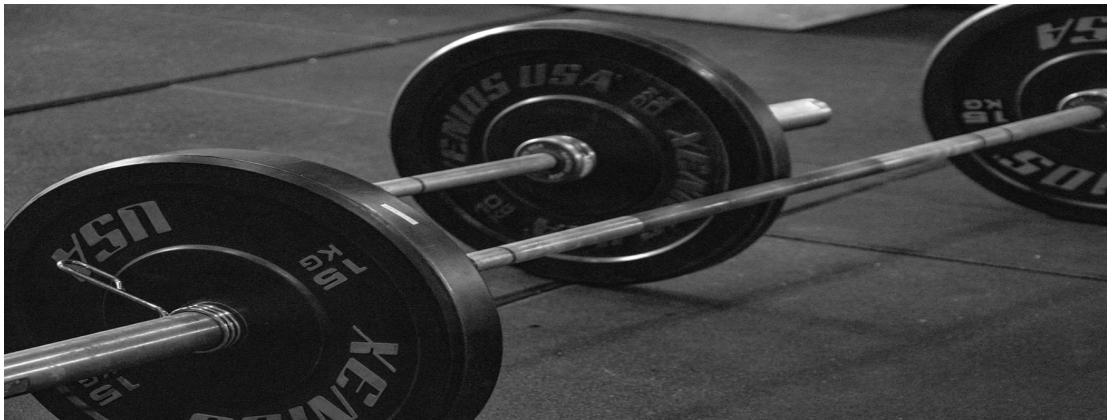
- *Frantti* underscores the disadvantage employees had in remote work accommodation cases since they had no evidence of performing their jobs while working remotely
 - As a result of this lack of evidence, deference was generally given to employer accounts of essential functions
- Even the Judge in *Frantti* recognized that the case may be much different if the facts arose mid-pandemic

Remote Work -- Now

The issue is virtually every employee now has a history of remote work they can rely on, either through the employee themselves or through coworkers

Remote Work -- Now

But all that really means is that
employer evidence needs to be
that much stronger



Remote Work -- Now

The EEOC recognizes this in its pandemic guidance in two question and answer exchanges –

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, EEOC, D15-16 (March 29, 2022) <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Remote Work -- Now

The EEOC D15—

- On the one hand, “To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function”

Remote Work -- Now

The EEOC D16—

- On the other hand, “the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.”

Remote Work -- Now

A Case



Remote Work -- Now

Gentile v. Cty. of DuPage, No. 21-CV-673, 2022 WL 345078, at *6 (N.D. Ill. Feb. 4, 2022). Plaintiff alleged he requested remote work as a reasonable accommodation, was denied and then terminated. Defendant filed a motion to dismiss since plaintiff as part of his allegations indicated that field work and office collaboration were essential parts of his job. Plaintiff also admitted that defendant thought onsite work was essential.

Continued

Remote Work -- Now

Defendant's motion was denied since plaintiff also alleged that he performed the essential functions of his job while remote working during the pandemic. In making his finding, the Judge also warned defendant that the statute says their documents and testimony will be 'considered' and not dispositive

Remote Work – Hypothetical #1

- Accounts Payable employee
- 7 year employee with good performance
- Prior to pandemic, worked in the office
- Worked successfully from home during the pandemic
- Returned to work with all workers, as required following the end of the pandemic
- Now requesting to work from home as an accommodation for a physical/mental disability

Question

Question: How do you respond?

- A. Grant the accommodation and allow the employee to work from home notwithstanding lessened performance
- B. Deny the accommodation and require the employee to return to work without accommodation
- C. Offer alternative accommodations and require the employee to return to work
- D. Offer the employee an alternative position that accommodates work from home

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How do you respond?

Grant the accommodation and allow the employee to work from home notwithstanding lessened performance

Deny the accommodation and require the employee to return to work without accommodation

Offer alternative accommodations and require the employee to return to work

Offer the employee an alternative position that accommodates work from home

None of the above

Remote Work – Hypothetical #2

- Company allowed remote work during the pandemic.
- Company has approved a hybrid work environment moving forward – 3 days in the office, two days remote – with the idea that **in-office presence is an essential function of the job.**
- Newly hired sales employee suffered two seizures (in the office) during her first week of work.
- Employee went to healthcare provider and healthcare provider called employer and said employee could not drive for 3 months after the last seizure.
- Company placed employee on a discretionary leave of absence to further engage in the reasonable accommodation/interactive process.
- Employee disregarded the leave of absence and drove to work the very next day.
- Healthcare provider (“HCP”), and the law in this state, restrict employee from driving for 3 months.
- Employee has no other way to work (other than for a fee) and cannot travel for work.
- Employee stated she is willing to drive to work in disregard of her HCP’s (and the law’s) restriction.
- Alternatively, she wants to work remotely on a full time basis for 3 months.

Question

Question: How do you respond?

- A. Grant the accommodation and allow the employee to work from home for the first three months of her employment (and possibly longer if she has another intervening seizure).
- B. Deny the accommodation and require the employee to return to work without accommodation.
- C. Terminate the employee for disregarding her HCP's and the law's prohibition on driving as well as for disregarding the Company placing her on a discretionary leave of absence.
- D. Offer the employee an alternative position that accommodates work from home.

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How do you respond?

Grant the accommodation and allow the employee to work from home for the first three months of her employment (and possibly longer if she has another intervening seizure).

Deny the accommodation and require the employee to return to work without accommodation.

Terminate the employee for disregarding her HCP's and the law's prohibition on driving as well as for disregarding the Company placing her on a discretionary leave of absence.

Offer the employee an alternative position that accommodates work from home.

None of the above

TIPS

Drawing from the case law and EEOC guidance, employers can take a number of steps now to limit their exposure:

- **Check your accommodation policy. Is it compliant? More importantly, does it take full advantage of the interactive process;**
- **Train HR on applying the accommodation policy and train management on knowing when to involve HR;**
- **Re-evaluate and update your job descriptions. Interview workers and front line supervisors regarding essential job duties; Ask yourself, do the job descriptions explicitly reference, if necessary, physical presence onsite? Do they call this physical presence an essential job function? Do they explain why;**

Continued

TIPS

- If collaboration or inter-office meetings or in-person projects are an essential job function, why? Be ready to articulate why they are essential job functions for this job position.
- Do not make exceptions to true essential functions, they can be used against you;
- Know the cost of remote work, both in terms of having to purchase or loan out work at home equipment, but also how it harms or helps operations and coworker duties;
- Think now about what potential essential job functions were temporarily suspended due to the pandemic and the necessity of working at home and make a note of them; and
- As always, document everything.

Thank You For Attending!

