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**Remote Working, Vaccines, COVID-19 and Employer Obligations
Under the ADA and State Equivalents**

Summary/Description:

Prior to the COVID-19 pandemic, requiring full-time in-office attendance was seen as an “essential function” of many jobs. There was often resistance to accommodations which departed from this norm and employers often took the position that accommodating a disability with remote work was “unreasonable”. Now, in light of the heavy focus on remote work during the pandemic, more employees are likely to also request remote work as an accommodation for a disability or simply as a benefit or “perk”, putting a spotlight on the varying approaches to office life. As many employers are either back in the office, in the process of returning to the office, or considering next steps, issues such as culture, generational differences, work-life balance, and what the work-place should look like come to the fore. With technological advancements making work more efficient in many fields, remote work has become easier and more attractive for tech-natives. There is no one-size-fits-all policy for remote work, especially when dealing with ADA (and its state-and-local corollaries). The combination of employee accommodation requests and “personal” or non-ADA requests for remote work can create further tension and opens up the potential for claims. We discuss accommodations, shifting approaches to remote work, and remote work as an accommodation. This course will provide an overview of the cases that are beginning to be reported in this area as well as some historical precedents.

I. ADA Accommodations and Remote Work Generally

a. Reasonable Accommodations and the Interactive Process

Under the Americans with Disabilities Act (as Amended) (“ADA”), “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S. Code § 12112. This includes a requirement to make a “reasonable

accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.” 29 CFR § 1630.9. The Equal Employment Opportunity Commission, which enforces the ADA, looks to whether the employer engaged with the employee in an interactive process with respect to their request for an accommodation.

The interactive process begins with a request. Requests may not always need to be formal or in writing, but it is advisable for employers to maintain policies and procedures regarding the form and process for accommodation requests to ensure that employee requests are handled in a neutral and consistent manner. While failure to request a reasonable accommodation may complicate an employee’s failure to accommodate claim, if an employer is aware of or put on notice that a medical condition interferes with the employee’s ability to perform the essential functions of their job, they must engage in the interactive process with that employee. See Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC, October 17, 2002, available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>.

During the interactive process, the employer must determine whether there is a “reasonable accommodation” which can permit the employee to perform the essential functions of their job. This can be complicated if the employer fails to maintain job descriptions or a consistent definition of which job functions are, in fact, essential. Accordingly, it is a best practice for employers to maintain job descriptions which identify all essential job functions.

Case Studies and Examples:

Across jurisdictions, Courts have defined the contours of accommodations, including accommodations which relate to leave, absenteeism, lateness, and remote work. With respect to requests for indefinite leave, in Wood v. Green, 323 F.3d 1309, 1314 (11th Cir. 2003), the Court held that indefinite leave for cluster headaches is not a reasonable accommodation where prior accommodations including leave and changes to the employee’s position were provided and the employee’s absenteeism had been increasing. With respect to lateness and presence in the office at a specific time, the Court in McMillan v. City of New York, 711 F.3d 120, 126 (2d Cir. 2013) stated:

“Physical presence at or by a specific time is not, as a matter of law, an essential function of all employment. While a timely arrival is normally an essential function, a court must still conduct a fact-specific inquiry, drawing all inferences in favor of the non-moving party.”

In Carmona v. Sw. Airlines Co., 604 F.3d 848, 859–61 (5th Cir. 2010), the Court held that a jury could reasonably find that plaintiff is a qualified person with a disability and that poor attendance did not make plaintiff unqualified for the job where he managed to comply with attendance policy

for seven years and other employees had exceeded the attendance policy without being terminated. These “pre-pandemic” decisions regarding absenteeism and attendance in the workplace demonstrate various courts’ approaches to attendance policies and accommodations. What is clear is that the Courts do not regard attendance policies as a hard and fast rule which cannot be overcome by some level of accommodation.

Courts have likewise ruled that requests for remote work can be reasonable accommodations. Further, Courts have ruled that the accommodations cannot be conditioned on improved performance. In Goonan v. FRB of N.Y., 916 F. Supp. 2d 470, 484 (S.D.N.Y. 2013), the Court considered a situation in which an employee experiencing PTSD from his experience on 9/11 was located in an office in lower Manhattan near the 9/11 Memorial Site. The employee struggled with the proximity and commuting past the site on a daily basis and made a request to work remotely. Other employees at the employer were permitted to work remotely and the employee was advised that his performance was poor and remote work was a privilege and that she would not be permitted to work remotely absent improvement in his performance. The Court held that “where an employer indicates that it is willing to consider an accommodation, but impliedly conditions any sort of reasonable accommodation on improved performance, that employer has acted in precisely the sort of bad faith the ADA prohibits.” Id. This case is an important consideration for those considering requests for accommodations with concerns regarding work performance.

As an example of a case that has arisen during the COVID-19 Pandemic, the Court in Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 65 (D. Mass. 2020) granted a preliminary injunction requiring the employer to permit plaintiff to continue to telework as a reasonable accommodation for asthma during COVID-19 pandemic where the plaintiff demonstrated that they performed the same duties on-site that they performed at home. Interestingly, the employee in this case alleged that the employer indicated that managers with children could request to work remotely for up to two days per week. Id.

b. Remote work may be an effective accommodation for many employees.

As with any discussion of essential job functions, for remote work it is key to determine which job functions can be performed outside of the workplace and which must be performed in the workplace. If a marginal function needs to be performed by an in-office employee and is the only obstacle to permitting an employee to work at home, such marginal functions may be reassigned and an employer may substitute another minor task to be performed remotely. See Work at Home/Telework as a Reasonable Accommodation, EEOC, February 3, 2003, available at <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>. While the EEOC has consistently provided for remote work as an accommodation, prior to the COVID-19 Pandemic, many employers took the position that in-person interaction was an “essential function” of the job. For example, for employers who did not already offer a remote work program, the EEOC’s guidance stated that, with respect to remote work as an accommodation, “an employer is not obligated to adopt an employee’s preferred or requested accommodation and may instead offer alternative accommodations as long as they would be effective.” Id. In the EEOC’s guidance, it is also stated that:

“Several factors should be considered in determining the feasibility of working at home, 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. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.” Id.

Additionally, as we have all experienced, in light of the technological advancements, meetings and supervision has been conducted for many effectively remotely and via other electronic means.

Employees may require remote work to varying extents dependent upon their disability. For example, remote work may mean one or two days per week or for a period of time such as after treatment or surgery or it may be full-time. Remote work may also be episodic or on an “as needed” basis, such as when the employee experiences a “flare-up” that may prevent them from going in to work. Employers should discuss what the employee’s needs are and how the employee can successfully work from home while meeting the employer’s needs.

II. The Rise of Remote and Hybrid Work Arrangements, Generally

a. The COVID-19 pandemic brought down many of the barriers preventing remote work.

Technologically, in March 2020, many companies needed to quickly adapt and adopt an infrastructure to support remote work. Meanwhile, many who already had the infrastructure in place for some or all employees had an easier time transitioning. During the course of the pandemic, many companies adopted new technologies, including video conference technologies and software to better track tasks.

Culturally, in establishing remote work as a “norm” during the pandemic, there were fewer barriers to seeking remote work at all levels. For example, with the majority or all of an employer’s workforce working remotely, many employers saw employees working from home who never had been permitted to do so before. Employers also found ways of managing tasks traditionally performed in-person and of permitting remote work for employees whose job duties may have traditionally required them to be in the office. This was, of course, facilitated by technology. For example, with video conferencing and Voice-Over IP or other similar call software, employees could be present from anywhere they had an internet connection.

b. Companies may use their experience during the pandemic to reimagine their workforce and deployment of talent.

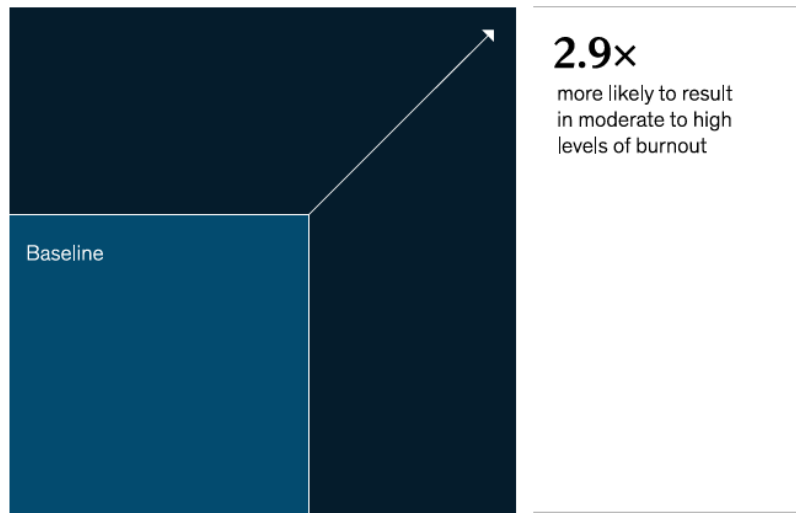
While many companies are returning to their offices either full-time or on a hybrid model, many are also keeping or hiring more remote workers. This has some benefits in recruitment and finding talent across the country. This is especially true because there has never been higher interest in remote work.

With employees in a mixed hybrid or with some employees full-time “in office” and others full-time “remote”, employers need to reimagine interaction and advancement to ensure that all employees have an opportunity to succeed. The first key to successfully managing a remote program is communication and transparency. Without adequate communication, there will inevitably be instances of confusion which can also lead to employee claims (whether accommodation claims or discrimination/retaliation claims).

A study by McKinsey & Company found that workers who are feeling anxious due to a lack of organizational communication about the future are more likely to feel burned out.

Individuals who are feeling anxious due to a lack of organizational communication about the future are more likely to feel burned out.

Lack of clear vision as a factor in causing anxiety, multiples



2.9x
more likely to result in moderate to high levels of burnout

Note: n = 4,854–5,043. All analyses conducted while controlling for feelings of support and inclusion, policy communication, region, industry, company size, job level, age, gender, and parental status.
Source: Reimagine Work: Employee Survey (Dec 2020–Jan 2021, n = 5,043 full-time employees who work in corporate or government settings)

<https://www.mckinsey.com/business-functions/organization/our-insights/what-employees-are-saying-about-the-future-of-remote-work>

It is important to maintain neutral policies which are applied to employees regardless of their protected categories. Further, as stated above, if an employer maintains a remote work policy, such policy must equally apply to disabled employees. Disabled employees may require additional accommodations beyond the existing policy to perform the essential functions of their job. However, such policies should not be applied unequally to employees based upon other protected characteristics, such as race, sex, gender, gender-identity, age, marital status, familial status, etc.

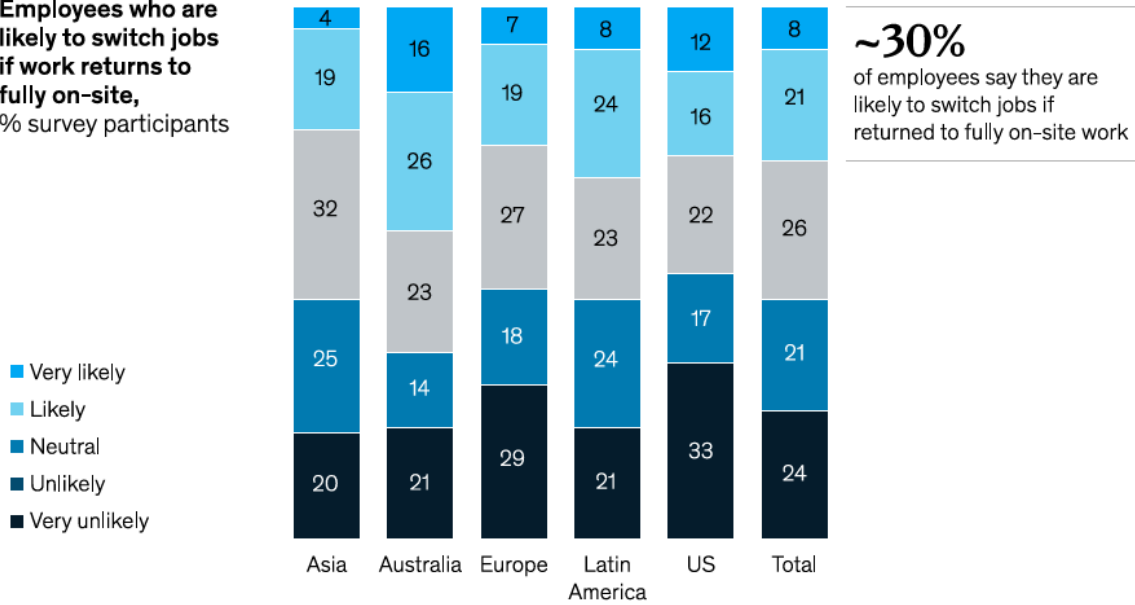
Employers with varying levels of remote workers need to learn to leverage that talent remotely. This may include providing additional training to managers regarding software needed to interact with remote employees efficiently or finding ways to better connect employees who are outside the office with employees who are in the office. This may also mean embracing the digitation of records, scanning mail, and maintaining records in a manner that they may be accessed by employees in and out of the office.

c. Generational differences, flexibility and work-life balance.

Attracting talent through remote and/or flexible work policies may also play a role in employer's Diversity and Inclusion initiatives. Surveys performed by McKinsey & Company have demonstrated that workers are more likely to switch jobs if their employers returned to fully on-site work.

Going back to a fully on-site model might have significant talent implications.

Employees who are likely to switch jobs if work returns to fully on-site,
% survey participants



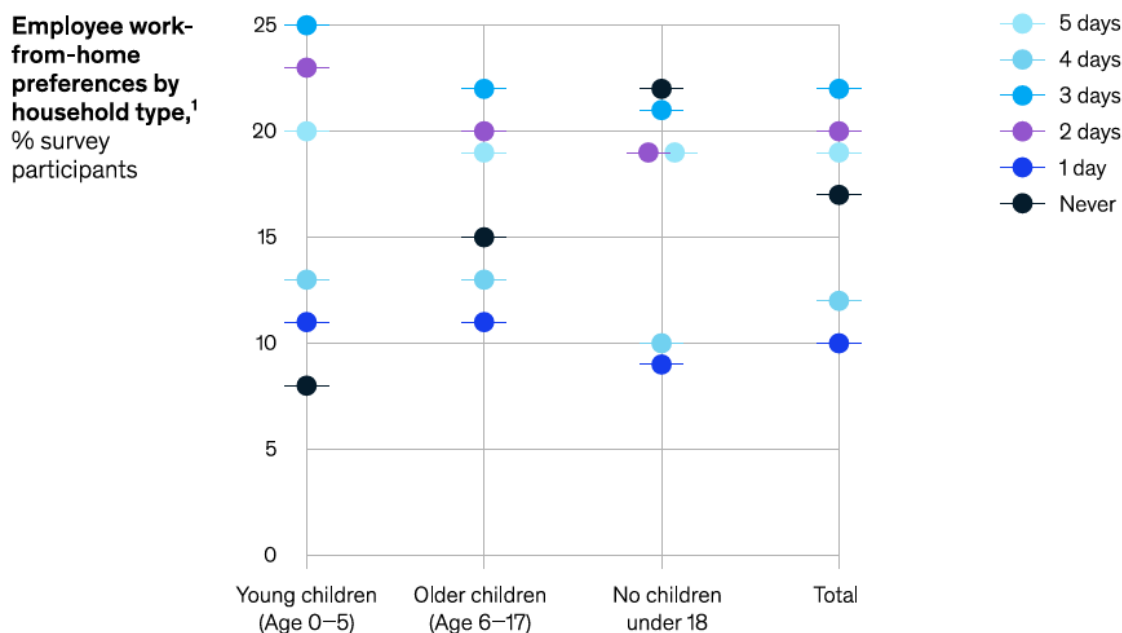
Source: Reimagine Work: Employee Survey (Dec 2020–Jan 2021, n = 5,043 full-time employees who work in corporate or government settings)

McKinsey
& Company

<https://www.mckinsey.com/business-functions/organization/our-insights/what-employees-are-saying-about-the-future-of-remote-work>

Employees with young children are similarly more likely to prefer a primarily remote working model.

Employees with young children are more likely to prefer primarily remote working models.



¹Question: How often would you prefer to work from home in the future?

Source: Reimagine Work: Employee Survey (Dec 2020–Jan 2021, n = 5,043 full-time employees who work in corporate or government settings)

McKinsey
& Company

<https://www.mckinsey.com/business-functions/organization/our-insights/what-employees-are-saying-about-the-future-of-remote-work>

During the pandemic, anecdotal evidence shows that women with children saw additional strain from working remotely along with household and child-care responsibilities, especially with children schooling from home. However, at first blush, the relaxation of strict in-office work policies would appear to alleviate common concerns of parents balancing work and family responsibilities. For example, by reducing or eliminating commuting times, parents may have more time to spend with their families. Further, allowing for remote attendance at meetings and networking opportunities, it can provide opportunities to bring employees who were previously unable to attend certain meetings and/or events to engage.

There have been arguments, and studies, that have found that flexible work schedules in certain industries, especially business and law, have historically resulted in a lower hourly pay rate than non-flexible schedules. See Goldin C. "How to Achieve Gender Equality". Milken Institute Review. 2015;July (Q3) :24-33. This commentary reflects concerns that remote work may be a double-edged sword. There has also been some concern and reporting of concerns regarding remote employees becoming akin to "second-class citizens" and/or being denied advancement

opportunities provided to “in-office” employees. Remote Work Study Shows The Possibility Of A New Corporate Two-Class System, Jack Kelly, Forbes, April 26, 2021, available at <https://www.forbes.com/sites/jackkelly/2021/04/26/remote-work-study-shows-the-possibility-of-a-new-corporate---two-class-system/?sh=61af8378173e>.

There is also some reporting on men and women being viewed differently in their requests for flexibility. See Write a Book? Sure, Work From Home. Care for a Child? Nope., Bryce Covert, New York Times, June 25, 2020, available at <https://www.nytimes.com/2020/06/25/opinion/coronavirus-remote-work-gender-gap.html?smid=url-share>.

The BBC reports similar issues and concerns about return to work after the pandemic and the potential for worsening the gender gap. Are men-dominated offices the future of the workplace?, Hannah Kickok, BBC, May 6, 2021, available at <https://www.bbc.com/worklife/article/20210503-are-men-dominated-offices-the-future-of-the-workplace>.

This is where the cultural approach to remote work plays a major role. Companies are affirmatively adopting policies and procedures to prevent this concern from becoming a reality. However, certain industries are already so ingrained with the culture of “face time” that employees will continue to come into work even if not required out of fear of losing out on advancement opportunities. Cultures that emphasize “face time” to that degree or which stigmatize remote work can be harmful not only to the employees who choose it for the sake of work-life balance or other obligations, but also for those who require remote work as an accommodation to perform the essential functions of their job. Other employees within the organization may or may not know whether the employee working remotely is doing so because of their personal preference or because of a disability.

Finally, in any context where remote work is being undertaken, employers need to discuss setting clear boundaries with remote workers. One study from Microsoft found that workers are more likely to respond to after-hours messages when working remotely. Teevan, Jaime, Brent Hecht, and Sonia Jaffe, eds. *The New Future of Work: Research from Microsoft on the Impact of the Pandemic on Work Practices*. 1st ed. Microsoft, 2021. Available at <https://aka.ms/newfutureofwork>. If clear boundaries are not set with respect to remote work, employers not only risk setting up remote workers for burnout, but to the extent that remote workers are not classified as exempt employees (or not properly classified as exempt employees), it can create wage and hour claims if employers fail to appropriately track hours worked and the impact of remote work or alternative arrangements with respect to working hours on employers’ expectations.

III. The Impact of the Rise of Remote Work on Employee Accommodations under the ADA

a. Equal Employment Opportunity Commission Guidance on Remote Work and Accommodations

For employees with existing accommodations in the workplace, when employees are working remotely, they may require similar or comparable accommodations in their home office. For example, if a visually impaired employee used a screen-reader at work, they will likely require screen-reader technology on whatever other devices are provided. Employees may or may not already have whatever devices are necessary to accommodate their disability at home, depending on whether their home environment requires similar accommodations. However, if an employee with a disability who is being accommodated in the office begins working remotely, employers should again engage in the interactive process to determine if accommodations are necessary in the home environment.

The EEOC has stated that while working remotely during the pandemic does not mean that employers must “automatically” grant remote work as a reasonable accommodation, it is relevant to the consideration of new or renewed requests for remote work. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC, June 28, 2021, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> Further, the EEOC has stated that employers’ temporary excusal of performance of one or more essential job functions when they close the office does not mean that the job’s essential functions have changed. *Id.* However, this does not provide a license for employers to reject remote work as an accommodation. A determination still needs to be made that the employee can fulfill their essential job functions working remotely. The EEOC has also stated that, in determining whether remote work is a “reasonable accommodation”, remote work during the pandemic may be looked to as a “trial period” for how remote work might work for that employee. *Id.* There are already cases which have held that employers may not condition the accommodation on “improved performance”. Accordingly, employers must use caution when considering employee accommodations on this basis.

EEOC guidance states that employees may request accommodations for themselves and not because they need to care for others who are vulnerable to COVID-19. *Id.* However, there have been cases that have determined that requests for reasonable accommodation to work remotely to care for a disabled relative are protected activity. *See Castro v. Classy, Inc.*, No. 3:19-CV-02246-H-BGS, 2020 WL 996948, at *6 (S.D. Cal. Mar. 2, 2020) (“Plaintiff’s request for a reasonable accommodation to work from home and take care of her disabled child is considered a protected activity”.)

There have been multiple cases which turned on whether it was a violation of the ADA to refuse to allow teleworking:

- *Goonan v. FRB of N.Y.*, 916 F. Supp. 2d 470, 484 (S.D.N.Y. 2013): Prior to the pandemic, the Court held that a remote work accommodation cannot be conditioned on improved performance.
- *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 65 (D. Mass. 2020): During the COVID-19 Pandemic, the Court granted a preliminary injunction requiring the employer to permit plaintiff to continue to telework as a reasonable accommodation for asthma during the COVID-19 pandemic where the plaintiff demonstrated that they performed the same duties on-site that they performed at home.
- *Lesson learned*: The employer’s “mandatory” policy was only selectively enforced, with several managers being permitted to work at home to care for children.
- *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).
- “We do not write on a clean slate. Much ink has been spilled establishing a general rule that, with few exceptions, “an employee who does not come to work cannot perform any of his job functions, essential or otherwise.” We will save the reader a skim by omitting a long string-cite of opinions that agree, but they do. Our Circuit has not bucked the trend. And for good reason: “most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”
- “That general rule—that regularly attending work on-site is essential to most jobs, especially the interactive ones—aligns with the text of the ADA. Essential functions generally are those that the employer’s “judgment” and “written [job] description” prior to litigation deem essential. *See* 42 U.S.C. § 12111(8). And in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees (as evidenced by its words, policies, and practices).”

A more recent decision from the Second Circuit speaks to the requisites for getting summary judgment, even in this Covid age. *Frantti v. N.Y.*, 850 Fed. Appx. 17 (2d Cir. 2021):

- “In his brief, Frantti identifies as reasonable accommodations being allowed to work remotely from home or an alternative work schedule. Appellant’s Br. at 42-45. But, as the District Court noted, the undisputed evidence indicated that Frantti’s job required him “to perform involved analysis on complex, collaborative projects that unfolded over long periods of time.” SPA 49 (internal quotation marks omitted). He also needed to be “in the office and available on a consistent basis, for assignments” and to communicate with co-workers and other parties. *Id.* ***His employer, the Division of Criminal Justice Services, could not technically accommodate remote work—quaint as that may seem to us now during this extraordinary era of pandemic-necessitated remote work.*** Moreover, record evidence of Frantti’s extensive absences from work and his incapacitation even at home, indicates that his gastrointestinal illness was so severe that he could not work with regularity, even with his suggested accommodations.” (emphasis added).
- *Brownlow v. Alfa Vision Ins. Co.*, 527 F. Supp.3d 951 (M.D. Tenn. 2021).

- In *Brownlow v. Alfa Vision*, the employer faced a trial over an ADA claim for refusing to permit telework after its summary judgment motion was denied.
- “The world was a much different place in 2016 and 2017, particularly when it comes to employees working remotely. This case requires the Court to travel back to that pre-COVID-19 world and address Jay Brownlow's allegations that his former employer Alfa Vision Insurance Company (“Alfa”) retaliated against him and failed to accommodate his disability by not letting him work from home.”
- The employee wrote estimates for property damage claims. The employer had a job description for both inside and outside claims adjusters, but neither job description mentioned the need for a physical presence in the office.
- The employer refused to allow remote working for plaintiff, who claimed to have severe psychological problems. The absence of a written job description was critical in the denial of the motion for summary judgment.

b. A word or two about Vaccines and Long Covid.

When discussing the implementation of vaccination policies, the EEOC noted that where an employee is unable to be vaccinated due to a disability covered by the ADA, the employer should consider whether to allow that employee to telework, provided it does not constitute an undue burden on the employer.

In addition to issues surrounding vaccinations, employers must be cognizant of employees suffering from “long covid.” Because long COVID is a physiological condition affecting one or more body systems, long COVID should be evaluated for classification as a physical or mental impairment.

For example, some people with long COVID experience:

- Lung damage
 - Heart damage, including inflammation of the heart muscle
 - Kidney damage
 - Neurological damage
 - Damage to the circulatory system resulting in poor blood flow
 - Lingering emotional illness and other mental health condition
- Long COVID can be a disability under the ADA, Section 504, and Section 1557 if it substantially limits one or more major life activities.
 - A person with a disability is defined as an individual with a physical or mental impairment that substantially limits one or more of the major life activities of such individual (“actual disability”); a person with a record of such an impairment (“record of”); or a person who is regarded as having such an impairment (“regarded as”).
 - A person with long COVID has a disability if the person’s condition or any of its symptoms is a “physical or mental” impairment that “substantially limits” one or more major life activities. This definition does not address the “record of” or “regarded as” parts of the disability definition, which may also be relevant to claims regarding long COVID.

- Long COVID can substantially limit a major life activity. Among possible examples, some include:
 - Lung damage that causes shortness of breath, fatigue, and related effects is substantially limited in respiratory function, among other major life activities.
 - Symptoms of intestinal pain, vomiting, and nausea that have lingered for months is substantially limited in gastrointestinal function, among other major life activities.
 - Memory lapses and “brain fog” is substantially limited in brain function, concentrating, and/or thinking.
 - The terms “substantially limits” and “major life activities” are construed broadly under the ADA and should not demand extensive analysis
 - Even if the impairment comes and goes, it is considered a disability if it would substantially limit a major life activity when the impairment is active; however, an individualized assessment is necessary to determine whether a person’s long COVID condition or any of its symptoms substantially limits a major life activity so as to constitute a disability