

# REMOTE WORK AS A REASONABLE ACCOMMODATION: IMPLICATIONS FOR COLLEGES AND UNIVERSITIES

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## ABSTRACT

*Prior to March, 2020, individuals with disabilities faced challenges when requesting remote work as an accommodation for a physical or mental disorder. Employers were slow to agree to such requests and courts were slow to find that requested remote work accommodations were “reasonable accommodations,” even for office positions not necessarily requiring extensive in-office presence or personal interaction. Decisions frequently cited assumptions and concerns about the cost and feasibility of necessary technology, disruption of the workplace, difficulties overseeing and supervising off-site workers, and what employers and courts viewed as the inherently “in-person” nature of work.*

*The events of 2020 through the present raise timely and important questions about how courts and agencies will and should evaluate remote work accommodation requests going forward — and how employers should modify or refine their ADA accommodation processes*

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*for purposes of legal compliance and alignment to mission. This issue is important to higher education, and particularly to brick-and-mortar campuses seeking to resume in-person learning. Because of the strong strategic emphasis on a return to “in person” learning, many such institutions may find themselves having a strong preference for a full “return” on the part of employees, may view remote work as a now-withdrawn “benefit” offered on an emergency basis, and may be reluctant to consider remote work even for individuals with a disability. In simplest terms, the question raised by these situations is whether and how the status of remote work has changed because of the shifting realities of the past few years—and what campuses should do to comply with the law while balancing their significant interest and overarching need to serve students on campus.*

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## INTRODUCTION

Section 504 of the Rehabilitation Act of 1973,<sup>1</sup> was the pioneering piece of federal legislation that, among other things, prohibited discrimination against employees on the basis of physical or mental impairments (“disabilities”). Section 504 applied to organizations accepting federal funding, including federal financial aid (and therefore applied to nearly all colleges and universities). Section 504 also articulated a related and powerful additional protection, requiring that, in defined circumstances, an employer must “reasonably accommodate” a qualified employee’s disability to promote the statute’s fundamental goal of equal access and the broadening of opportunities for individuals with disabilities.

The central requirement that employers provide reasonable accommodations was codified and expanded in the provisions of the Americans with Disabilities Act (ADA).<sup>2</sup> The ADA was enacted on July 26, 1990. As has been noted, the ADA and the Rehabilitation Act are highly similar but they differ in breadth; among other things, Section 504 of the Rehabilitation Act only applies to employers that receive federal funds, while the provisions of the ADA apply without regard to acceptance of federal funding; encompassing private entities employing fifteen or more individuals (Title I); public entities (Title II);<sup>3</sup> and places of public accommodation, including private colleges and universities (Title III).<sup>4</sup> Since 1990, and particularly since the ADA was broadened through amendment in 2008,<sup>5</sup> the ADA has served as the primary mechanism by which employees sought and employers granted reasonable accommodations in most workplaces, including on most college and university campuses.

The period since the ADA took effect now spans nearly thirty-two years. This has coincided with the lightning development of global cellular, Internet, and other electronic data transmittal and processing capabilities—and with the developing ability of most individuals to access electronic communication capabilities on a cost-effective basis. The 1990s saw the rapid spread of cell service, Internet and e-mail access, and real-time messaging, including texting. More recently, communication

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1 29 U.S.C. § 794 (2000 & Supp. 2004), Pub. L. No. 93-112, 87 Stat. 355 (1973).

2 42 U.S.C. § 12101 et seq. P.L. No. 101-336, 104 Stat. 327 (1990), as amended by P.L. No. 102-166, 105 Stat. 1074 (1991) and P.L. No. 110-325, 122 Stat. 3553 (2008).

3 42 U.S.C. § 12131 et seq. Regarding the differences between the scope and remedial provisions of the statutes, see section 504, Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000 & Supp. 2004); Title I of ADA, 42 U.S.C. § 12101–12213 (1990; as amended 2008). *See also* B. Lee & K. Rinehart, “Dealing with Troublesome College Faculty and Staff: Legal and Policy Issues,” 37 J.C.U.L. 359, 363 & nn.19–21 (2011).

4 42 U.S.C. § 12181–12189 (1990; as amended 2008).

5 The ADA was amended in 2008, in response to decisions by the U.S. Supreme Court that Congress viewed as unduly narrowing statutory definitions and thus unduly limiting the population of individuals defined as “disabled” under the statute. *See* Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). Citations within this article are to the amended version of the ADA.

has come to be conducted through an ever-changing array of online, texting, social media, and other electronic communication strategies. This includes the now-familiar online platforms that allow remote, real-time video connection and are accessible through computers, tablets, or smartphones).

The online technological revolution has greatly enhanced the ability of individuals with disabilities to access workspaces and to communicate within workspaces; it has also greatly enhanced the ability of employers to provide workplace accommodations, modifications, and auxiliary aids that once were too costly or disruptive to be reasonable. Beyond this, however, the technological advances of the last few decades have also revolutionized the ability of many employees to work outside their offices. This has had vast implications not only for members of the workforce but also, most definitely, for individuals with disabilities and the institutions employing them.

Among the accommodations that began to be requested as technology advanced into the 1990s were requests for off-site work (variously termed “telework” or “remote work”), wherein an employee requested to work from home or off-site as a temporary or indefinite accommodation of a disability. As discussed in Part II below, employers were slow to agree to such requests and courts were slow to find that requested remote work accommodations were “reasonable accommodations,” even for office positions not necessarily requiring extensive in-office presence or personal interaction. Decisions frequently cited assumptions and concerns about the cost and feasibility of necessary technology, disruption of the workplace, difficulties overseeing and supervising off-site workers, and what employers and courts viewed as the inherently “in-person” nature of work.

The advent of the 2020 COVID-19 pandemic, during which many workspaces (and virtually all campuses) necessarily pivoted to remote operations, has called into question many such assumptions. In addition, unique aspects of the COVID-19 pandemic caused many institutions to adopt “Flex” work policies, sometimes operating parallel to ADA accommodation processes, in which many individuals who were not technically eligible for ADA accommodations were nonetheless permitted to work remotely to minimize COVID risk to themselves or close contacts. Employers across every industry gained a significant amount of experience and data regarding the real-world effects of remote work on the efficiency and operational effectiveness of their workplaces. The sheer number of remote work arrangements in effect during 2020 and 2021 essentially provided a “field test” of many of the assumptions and rationales that underlay employer and judicial denials of remote work as a reasonable accommodation in the pre-pandemic era.

The events of 2020 through the present raise timely and important questions about how courts and agencies will and should evaluate remote work accommodation requests going forward—and how employers should modify or refine their ADA accommodation processes for purposes of legal compliance and alignment to mission. This issue is important to higher education, and particularly to brick-and-mortar campuses seeking to resume in-person learning. Because of the strong strategic emphasis on a return to “in person” learning, many such institutions may find themselves having a strong preference for a full “return” on the part of employees. They may view remote work as a now-withdrawn “benefit” offered on an emergency basis and may be reluctant to consider remote work even for

individuals with a disability. In simplest terms, the question is whether and how the status of remote work has changed because of the shifting realities of the past few years—and how campuses should comply with the law while balancing their significant interest and overarching need to serve students on campus.

Part I of this article summarizes the history and relevant provisions of the ADA, with particular emphasis on the meaning of “reasonable accommodation” and the significance of the interactive process to a grant or denial of accommodation. Part II provides an overview of relevant agency and judicial analyses prior to the onset of the pandemic; Part III does the same for agency statements and judicial decisions since March 2020 through the present and discusses apparent trends in post-pandemic law and lessons learned to date. Finally, Part IV offers recommendations for institutions of higher education in resolving remote work requests in a “return-to-campus” world.

### I. “REASONABLE ACCOMMODATION” AND THE “INTERACTIVE PROCESS” UNDER THE ADA

The ADA requires employers with fifteen or more employees (1) not to discriminate against employees with disabilities and, furthermore, (2) to provide reasonable accommodations for qualified applicants and employees with disabilities, and (3) to make other adjustments to their facilities and workplaces to provide equal access to goods, services, activities, benefits, and programs.<sup>6</sup> For purposes of this article, the ADA’s definitions and provisions relating to employment are most directly relevant.

Under the ADA, a “disability” is defined as a “physical or mental impairment that substantially limits one or more of the major life activities” of the employee.<sup>7</sup> The ADA was amended in 2008 to broaden the definition of “disability” in response to United States Supreme Court decisions that had narrowed the definition of

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6 See 42 U.S.C. §§ 12101–12117; 29 U.S.C. §§ 793(d), 794(d). This article focuses on the reasonable accommodation provisions of the ADA and how they have applied or are likely to be applied going forward to a request for remote work as an employment accommodation.

7 29 C.F.R. § 1630.2(g)(1)(i) (2011). This definition requires that the condition in question constitute an “impairment,” involving a “major life activity,” that works a “substantial limitation” upon that activity. A physical or mental impairment is defined in the regulations as follows: “(1) [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) [a]ny mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.” *Id.* § 1630.2(h)(1), (2). Major life activities include, among many other itemized circumstances, “[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.” *Id.* § 1630.2(i)(1)(i), (ii). Finally, whether a disability “substantially limits” the ability of an individual to perform a major life activity is a case-by-case, fact-intensive assessment that involves a comparison of the individual to “most people in the general population.” *Id.* § 1630.2(j)(1)(ii). “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.” *Id.*

“disability” and therefore the protections of the ADA.<sup>8</sup> As members of Congress explained, “[t]he ADA Amendments Act rejects the high burden required [by the Supreme Court] and reiterates that Congress intends that the scope of the Americans with Disabilities Act be broad and inclusive. It is the intent of the legislation to establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress originally intended . . . .”<sup>9</sup> In light of the 2008 amendments, many if not most physiological or mental conditions will fall within the definition of “disability,” as long as the condition is not temporary or otherwise excluded by the statute. This then triggers certain nondiscrimination protections under the ADA but does not necessarily entitle an applicant or employee with a disability to a reasonable accommodation.

Simply put, a disabled applicant or employee is eligible for a reasonable accommodation if the disability in question functionally affects the employee in a manner that needs—and can be addressed through—provision of a reasonable accommodation as defined in the statute and regulations. The ADA regulations define “reasonable accommodation” as a modification or adjustment “to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enables an individual with a disability who is qualified to perform the essential functions of that position.”<sup>10</sup> The same regulation also encompasses within the definition “(iii) Modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.»<sup>11</sup>

As one of many courts has noted, “[w]hether or not something constitutes a reasonable accommodation is necessarily fact-specific. Therefore, determinations on this issue must be made on a case-by-case basis.”<sup>12</sup> Whether a contemplated accommodation is reasonable depends, among other things, on whether it allows the particular employee in question to perform the “essential functions” of the particular position. Essential functions are “the fundamental job duties of the employment position the individual with a disability holds or desires.”<sup>13</sup> The regulations set forth a nonexclusive list of reasons why a function may be viewed as essential: “(i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and /or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.”<sup>14</sup> Relevant factors include: “(i) The employer’s judgment; (ii)

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8 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

9 154 Cong. Rec. S8342, S8345 (daily ed. Sept. 11, 2008) (statement of the Managers).

10 29 C.F.R. § 1630.2(o)(1)(ii).

11 *Id.* § 1630.2(o)(1)(iii).

12 *Laguerre v. Nat’l Grid USA*, 2022 WL 728819 at \*4 (2d Cir. Mar. 11, 2022) (quoting *Wernick v. Fed. Rsrv. Bank of N.Y.*, 91 F.3d 379, 385 (2d Cir. 1996)).

13 29 C.F.R. § 1630.2(n)(1) (2011).

14 *Id.* § 1630.2(n)(2).

Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the employee to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past employees in the job; and/or (vii) The current work experience of employees in similar jobs.”<sup>15</sup>

Evaluated in light of these factors, a proposed accommodation is generally reasonable if it effectively addresses the particular manifestations of the employee’s disability while still allowing that employee to perform his or her essential job functions.<sup>16</sup> Relevant examples of reasonable accommodations may include changes in existing facilities used by employees to ensure the facilities are readily accessible to and usable by individuals with disabilities, as well as job restructuring.<sup>17</sup> Job restructuring takes a variety of forms: part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; and the provision of qualified readers or interpreters.<sup>18</sup>

In addition, even a proposed accommodation that addresses an employee’s ability to perform essential functions is not necessarily required under the ADA if it cannot be provided without “undue hardship” to the employer. The ADA defines “undue hardship” as “an action requiring significant difficulty or expense.”<sup>19</sup> Demonstrating “undue hardship” is the burden of the employer, once an otherwise “reasonable” accommodation has been identified.<sup>20</sup>

While the “undue hardship” concept is often assumed to incorporate only financial considerations, the regulations clarify that this exception is broader than assumed and encompasses significant concerns about operational effects and mission—which considerations are particularly relevant to institutions of higher learning. In fact, the ADA regulations articulate multiple considerations in evaluating whether undue hardship is demonstrated, stating,

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

- i. The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and

15 *Id.* § 1630.2(n)(3).

16 *Id.* § 1630.2(n), (o)(1)(ii).

17 *Id.* § 1630.2(o)(2).

18 *Id.*

19 42 U.S.C. § 12111(10)(A), P.L. No. 101-336, 104 Stat. 327 (1990), as amended by P.L. No. 102-166, 105 Stat. 1074 (1991) and P.L. No. 110-325, 122 Stat. 3553 (2008).

20 As has been noted by courts and commentators, the “undue hardship” exception is an affirmative defense that the employer has the obligation to assert. *See, e.g., Rodal v. Anesthesia Grp. Of Onondaga, P.C.*, 369 F.3d 113, 121–22 (2d Cir. 2004) (“undue hardship is an employer’s affirmative defense, proof of which requires a detailed showing that the proposed accommodation would ‘require[e] significant difficulty or expense’ in light of specific enumerated statutory factors”) (quoting *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 221 (2d Cir. 2001)).



- deductions, and/or outside funding;
- ii. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
  - iii. The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
  - iv. The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
  - v. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.<sup>21</sup>

The accommodation requirements of ADA compliance, including those pertinent to an undue hardship analysis, are quintessentially “fact specific,”<sup>22</sup> and the ADA regulations set forth specific process requirements for analyzing reasonable accommodation requests, which courts have amplified over time. That is to say, once the employer becomes aware of an employee's potential need for accommodation, the employer and the employee must engage in an “informal, interactive process” to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”<sup>23</sup> This is typically preceded by the employer's obtaining and reviewing appropriate medical documentation from the employee's treater. Medical documentation may be most helpful if it sets forth not only a diagnosis but also the functional effects of the particular condition on the employee's ability to perform essential functions, as well as offering proposed accommodations that may help the employee perform the essential functions of the job.

The interactive process then involves a dialogue between the employee and employer (in which the medical treater may also be consulted), which is intended to arrive at a determination of reasonable accommodation that may be different from the accommodation(s) originally requested by the employee but proves reasonable nonetheless. A critical aspect of this process is for the employer to recognize that the obligation to provide equal access remains, even if the accommodation originally requested is not reasonable. In that event, the employer has an ongoing duty to interact so as to identify and offer, if possible, alternative reasonable accommodations that may meet the needs of the employee. For instance, in response to an employee's request to work remotely, an employer might deny the request on the grounds it does not allow the employee their essential

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21 29 C.F.R. § 1630.2(p)(2) (2011).

22 *See* Laguerre v. Nat'l Grid USA, 2022 WL 728819 at \*4, n.6 (2d Cir. Mar. 11, 2022).

23 29 C.F.R. § 1630.2(o)(3).

functions. At that point, the employer still has the obligation to offer an alternative reasonable accommodation, if one exists, that allows the employee to fulfill their essential functions. This might include offering as accommodations the employee's use of a different workspace or the employee's ability to work through a "hybrid arrangement" (part work-at-home, part work-in-office at a different workspace).

Employers who fail to make a reasonable accommodation to the known limitations of an otherwise qualified employee or who fail to interact in good faith with an employee needing accommodation may be subject to a claim of failure to accommodate under the ADA.<sup>24</sup> This requirement of good-faith interaction is a parallel obligation applying to employees as well as employers, however; this means employees are also responsible to continue the dialogue for purposes of identifying reasonable accommodations. To prevail on a claim of failure to accommodate, the employee must demonstrate that "(1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith."<sup>25</sup>

From these criteria, it is readily apparent that a good faith, robust interactive process is not only the best way to identify a reasonable accommodation but is also, for purposes of legal compliance, essential to demonstrate the employer's good faith. This will be particularly important where an interactive process ultimately does not adduce a proposed accommodation that the employee finds to be acceptable—which may well be the case where remote work, or a continuation of remote work, is denied as an accommodation.

## II. REMOTE WORK: AGENCY AND JUDICIAL INTERPRETATIONS PRIOR TO 2020

At the onset of the COVID-19 pandemic in March 2020, the topic of work-from-home was thrust on many employees and employers alike, as many businesses shifted to remote operation pursuant to emergency orders and to promote fundamental public safety. But, well before 2020, remote work began to be requested as a reasonable accommodation, particularly once technology developed to the point where electronic communications from home offices became practicable. Agencies and courts also began to grapple with the implications of such requests, and their pre-2020 positions remain important to assessing the status of remote work in the post shutdown era.

### A. *PRE-2020 EEOC GUIDANCE ON REMOTE WORK ACCOMMODATION*

On February 1, 2001, President George W. Bush announced the "New Freedom Initiative," which was described as "a comprehensive program to promote the full

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24 See 42 U.S.C. § 12112(b)(5)(A).

25 See, e.g., *McMillan v. City of New York*, 711 F.3d 120, 125–26 (2d Cir. 2013); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319–20 (3d Cir. 1999).

participation of people with disabilities in all areas of society by increasing access to assistive and universally designed technologies, expanding educational and employment opportunities, and promoting increased access into daily community life” in an effort to ensure the ADA is fully enforced.<sup>26</sup> As part of the New Freedom Initiative, the Bush Administration “[s]ought to increase the number of employees with disabilities in the Federal workforce by implementing innovative hiring and working practices, including telework.”<sup>27</sup>

The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for administering the ADA, began seriously to address the potential reasonableness of remote work as an accommodation in guidance documents dated 2002 and 2003.<sup>28</sup> Prior to this, EEOC ADA guidance tended not to emphasize remote work as an accommodation option, most likely because technology had not advanced enough to render remote work feasible for most positions.<sup>29</sup>

### 1. 2002 Guidance

In its “Guidance on Reasonable Accommodation and Undue Hardship under the ADA” (the “2002 Guidance”), the EEOC took the position that employers are not obligated to create or maintain formal “telework” programs under the ADA.<sup>30</sup> However, in the appropriate individual case, an employer “*must* modify its policy concerning where work is performed” if (1) the modification “is needed as a reasonable accommodation”; (2) the accommodation would be “effective”; and (3) the accommodation would not cause “undue hardship.”<sup>31</sup> The 2002 Guidance continued by noting that “[w]hether this accommodation is effective will depend on whether the essential functions of the position can be performed at home.”<sup>32</sup> If the essential functions of the job could only be performed at the workplace,

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26 Press Release: President’s New Freedom Initiative, The White House (Feb. 1, 2001), <https://georgewbush-whitehouse.archives.gov/infocus/newfreedom/>.

27 *Id.*

28 U.S. Equal Opportunity Emp. Comm’n, EEOC-CVG-2003-1, “EEOC Guidance on Reasonable Accommodation and Undue Hardship under the ADA” (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [hereinafter 2002 Guidance]; U.S. Equal Opportunity Emp. Comm’n, EEOC-NVTA-2003-1, “Work at Home / Telework as a Reasonable Accommodation” (Feb. 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> [hereinafter 2003 Guidance].

29 See U.S. Equal Opportunity Emp. Comm’n, EEOC-CVG-2000-4, “Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA” (July 27, 2000), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>; U.S. Equal Opportunity Emp. Comm’n, EEOC-NVTA-2001-1, “Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures” (Oct. 31, 2001), <https://www.eeoc.gov/laws/guidance/obtaining-and-using-employee-medical-information-part-emergency-evacuation-procedures>; U.S. Equal Opportunity Emp. Comm’n, EEOC-CVG-1995-3, “Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations” (Oct. 10, 1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>.

30 EEOC, 2002 Guidance, *supra* note 28.

31 EEOC, 2002 Guidance, *supra* note 28, Q.34 (citing 29 C.F.R. § 1630.2(o)(1)(ii), (2)(ii) (1997)).

32 *Id.*

such as a “food server” or “cashier in a store,” then remote work would not be “effective” and therefore would not be required under the ADA.<sup>33</sup>

Drawing directly from the statute and regulations, the EEOC reemphasized that the effectiveness of remote work is a fact-specific inquiry, which depends on the nature of the employee’s duties, the employer’s ability to adequately supervise the employee, and the employee’s need to work with certain equipment or tools that cannot be replicated at home.<sup>34</sup> The 2002 Guidance identified certain positions, such as telemarketers and proofreaders, as examples of positions with essential functions that could likely be performed from home.<sup>35</sup> For those types of positions, the EEOC indicated that an employer could not deny a request to work at home unless the employer could show that remote work would cause undue hardship or that another accommodation would be effective.<sup>36</sup>

## 2. 2003 Guidance

The next year, the EEOC issued “Work at Home/Telework as a Reasonable Accommodation” (the “2003 Guidance”).<sup>37</sup> This Guidance was the EEOC’s first to address remote work in depth and offers practical detail as to what EEOC views as the appropriate process for assessing the reasonableness of a remote work accommodation.<sup>38</sup>

The 2003 Guidance directs that the employer first consider all of the employee’s duties and then determine which are “essential,” as opposed to “marginal,” functions.<sup>39</sup> If any essential duties are incapable of being performed from home, the employer is not required to permit remote work; however, if only minor or marginal job duties cannot be performed from home, the employer “may need to reassign” them and/or “substitute another minor task” that could be performed at home.<sup>40</sup> In addition to identifying cashiers and food servers as presumably ineligible for remote work (as in the 2002 Guidance), the 2003 Guidance now added “truck drivers” to the list of positions with essential functions that probably cannot be performed from home.<sup>41</sup>

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33 *Id.*

34 *Id.*

35 EEOC, 2002 Guidance, *supra* note 28.

36 *Id.*

37 EEOC, 2003 Guidance, *supra* note 28.

38 The 2002 Guidance contained EEOC responses to forty-six discrete questions about ADA compliance, only one of which pertained to remote work. The 2003 Guidance, by contrast, was entirely focused on remote work as a reasonable accommodation, with its stated purpose of “explain[ing] the ways that employers may use existing telework programs or allow an individual to work at home as a reasonable accommodation.”

39 EEOC, 2003 Guidance, *supra* note 28, Q.4.

40 *Id.*

41 *Id.*

The 2003 Guidance identified three additional considerations for determining whether remote work is a reasonable accommodation, all of which remain very relevant to an assessment of the reasonableness of remote work on campus: (1) whether the job requires face-to-face interaction with customers, coworkers, or associates; (2) whether the job requires in-person interaction with outside colleagues, clients, or customers; (3) and where the job requires “[a]ccess to documents or information located only in the workplace.”<sup>42</sup> The EEOC emphasized that, “[f]requently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.”<sup>43</sup> The EEOC also stressed the need for flexibility, advising that employers consider part-time remote-work arrangements where at least some of the employee’s position can be performed from home.<sup>44</sup>

By the same token, the 2003 Guidance also reinforced the significant caveat that employers are not and should not be required to alter performance criteria for employees working from home: while employers should take a “flexible” approach, they do “not have to lower production standards for individuals with disabilities who are working at home.”<sup>45</sup> The 2003 Guidance also affirmed that employers are not required to grant employee requests to work remotely where another accommodation or combination of accommodations would be effective and permit an employee to remain in the workplace; it remains the employer’s choice as to which of several reasonable accommodations will be selected.<sup>46</sup> Potential alternative accommodations include “providing devices or modifying equipment, making workplaces accessible (e.g., installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters.”<sup>47</sup>

### 3. 2009 H1N1 Guidance

In 2009, following an international outbreak of the H1N1 virus, the EEOC issued “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” (the “2009 Guidance”).<sup>48</sup> The central focus of the 2009 Guidance was to “identif[y] established ADA principles that are relevant to questions frequently asked about workplace pandemic planning.” While the 2009 Guidance dealt with multiple areas of ADA compliance, the EEOC accurately predicted that remote work would be a critical component in the management of pandemics, and

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42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at Q.5.

46 *Id.* at Q.6.

47 *Id.* at Q.6.

48 U.S. Equal Opportunity Emp. Comm’n, EEOC-NVTA-2009-3, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [hereinafter 2009 Guidance]. The 2009 Guidance was updated in March 2020, in response to the COVID-19 pandemic, as discussed below. The EEOC now maintains the 2009 Guidance and the updated March 2020 Guidance in the same document, with the March 2020 updates appearing in bold.

it was prescient in devoting significant attention to remote work as a reasonable accommodation and a public health imperative during a pandemic.<sup>49</sup>

The 2009 Guidance described remote work as “an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation.”<sup>50</sup> The 2009 Guidance affirmed that, during a pandemic, employers may encourage remote working arrangements and employees “with disabilities that put them at high risk for complications of pandemic influenza or coronavirus may request telework as a reasonable accommodation.”<sup>51</sup> Moreover, employers must “continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship.” Thus, if an employee with a disability begins working from home due to the pandemic, the employer should provide the same reasonable accommodation the employee received at the workplace to the employee at the remote work site.<sup>52</sup>

### ***B. JUDICIAL DECISIONS ABOUT REMOTE WORK ACCOMMODATIONS, PRIOR TO MARCH 2020***

Prior to the 2020 pandemic shutdown, courts reached differing opinions on whether remote work is a reasonable accommodation.<sup>53</sup> During the 1980s and 1990s, many federal courts, including the D.C. Circuit, Federal Circuit, and Fourth Circuit, affirmed that coming to work regularly was either an “essential function,” a “necessary element,” or the bare requirement of performing a job successfully.<sup>54</sup> Courts that found remote-work accommodations to be unreasonable tended to focus on evidence that personal contact, interaction, and coordination are needed for a specific position.<sup>55</sup>

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49 *Id.* (updated Mar. 2020).

50 *Id.* at Q.10.

51 *Id.*

52 *Id.* at Q.14. The EEOC provided a specific example to illustrate this principle: “An accountant with low vision has a screen-reader on her office computer as a reasonable accommodation. In preparation for telework during a pandemic or other emergency event, the employer issues notebook computers to all accountants. In accordance with the ADA, the employer provides the accountant with a notebook computer that has a screen-reader installed.” *Id.*

53 *Compare* *Langon v. Dep’t of Health and Hum. Servs.*, 959 F.2d 1053, 1060 (D.C. Cir. 1992); *Anzalone v. Allstate Ins. Co.*, 5 AD Cas. (BNA) 455, 458 (E.D. La. 1995); *Carr v. Reno*, 23 F.3d 525, 530 (D.D.C. 1994), *with* *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995).

54 *See* *Tyndall v. Nat’l Edu. Ctr. Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (citing *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) (holding that “coming to work regularly” is an “essential function”)); *see also* *Law v. U.S. Postal Serv.*, 852 F.2d 1278, 1279–80 (Fed. Cir. 1988) (holding that attendance is a minimum function of any job); *Walders v. Garrett*, 765 F. Supp. 303, 310 (E.D. Va. 1991) (“[R]egular, predictable attendance is fundamental to most [jobs]”), *aff’d*, 956 F.2d 1163 (4th Cir. 1992).

55 *See, e.g.*, *Whillock v. Delta Air Lines*, 926 F. Supp. 1555, 1564, 5 AD Cas. (BNA) 1027 (N.D. Ga. 1995), *aff’d*, 86 F.3d 1171, 7 AD Cas. (BNA) 1267 (11th Cir. 1996); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227–28, 3 AD Cas. (BNA) 449, 457–58 (S.D.N.Y. 1994), *aff’d*, 60 F.3d 811, 6 AD Cas. (BNA) 576 (2d Cir. 1995).

Prior to the seminal decision in *Vande Zande v. Wisconsin Department of Administration*,<sup>56</sup> courts often approached remote work accommodations requests on a case-by-case basis, considering the specific facts and circumstances in great detail. For example, in *Tyndall v. National Education Center, Inc.*, the United States Court of Appeals for the Fourth Circuit ruled that remote work was not a reasonable accommodation for a professor at the beginning of a semester.<sup>57</sup> The court emphasized that the start of a new semester is a particularly pivotal time in the formation of a class, and it was important that the professor be there in person.<sup>58</sup>

In *Vande Zande v. Wisconsin Department of Administration*, the United States Court of Appeals for the Seventh Circuit rejected a request for remote work as a reasonable accommodation in a 1995 decision that remains significant.<sup>59</sup> The plaintiff in *Vande Zande* was a clerical employee within the state's housing division who was paralyzed and prone to ulcers; to accommodate this disability, plaintiff sought to work full-time from home and asked the employer to supply a desktop computer for her home. The court of appeals found for the employer, indicating that no jury could "be permitted to stretch the concept of 'reasonable accommodation' so far."<sup>60</sup> The court explained that, in its view, "[m]ost jobs ... involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."<sup>61</sup> The court noted that this was the "majority view," with which it agreed.<sup>62</sup> Second, the court stressed that individuals who work as part of a larger team needed to be in-person to facilitate collaboration.<sup>63</sup> Without assessing whether supervisory or team-building challenges in fact undermined the request of the employee in that case, the court concluded that "[a]n employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced."<sup>64</sup> The court acknowledged that there might be exceptions but offered the opinion that "it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."<sup>65</sup>

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56 44 F.3d 538 (7th Cir. 1995).

57 31 F.3d 209, 213 (4th Cir. 1994).

58 *Id.*

59 44 F.3d 538.

60 *Id.* at 544.

61 *Id.* at 545.

62 *Id.* at 544 (citing *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213–14 (4th Cir. 1994); *Law v. U.S. Post Serv.*, 852 F.2d 1278 (Fed. Cir. 1988) (*per curiam*)).

63 *Vande Zande*, 44 F.3d at 544. Subsequent cases have also stressed working in person when special equipment is involved. *See Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (holding a 2006 part-time work plan reasonable).

64 *Vande Zande*, 44 F.3d at 544.

65 *Id.*

Although *Vande Zande* was not the first case to indicate that physical presence was an essential job function,<sup>66</sup> the decision was reaffirmed by the Seventh Circuit on several occasions after 1995<sup>67</sup> and was influential in several other circuits. Two years after the *Vande Zande* decision, the United States Court of Appeals for the Sixth Circuit in *Smith v. Ameritech* adopted and reinforced the Seventh Circuit standard.<sup>68</sup> *Smith* involved a phonebook salesman's request to work from home, due to a herniated disc. The court of appeals found that this was not a reasonable accommodation because at-home work was presumed to result in lower productivity.<sup>69</sup> More recently, in *EEOC v. Ford Motor Co.*, the United States Court of Appeals for the Sixth Circuit extended this principle, ruling *en banc* that remote work was not required as an accommodation for a resale buyer because "[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones."<sup>70</sup> In response to the argument that technology had advanced to the point of making remote work feasible, the court noted that "technology has not changed so much as to make regular in-person attendance marginal for [the] job."<sup>71</sup>

Even before 2020, the presumption articulated in *Vande Zande* and reiterated by other courts—namely, that physical attendance is an essential function of nearly all jobs—was not universally accepted as a rationale to deny remote work as a reasonable accommodation. For instance, in the 2010 decision in *Bisker v. GGS Information Systems*, the United States District Court for the Middle District of Pennsylvania declined, among other rulings, to accept the physical attendance requirement as a *per se* rule.<sup>72</sup> Rather, the court held that remote work was a reasonable accommodation where the plaintiff's disability was established through medical documentation and plaintiff had shown they could replicate their work setup in a manner that was not overly costly and allowed for performance of essential functions.<sup>73</sup> In 2013, the United States Court of Appeals for the Second Circuit in *McMillan v. City of New York* denied an employer's motion for summary judgment on a failure-to-accommodate claim brought by an employee with a history of tardiness who sought a hybrid work schedule.<sup>74</sup> The court found that the employer failed to demonstrate undue hardship in the particular case.<sup>75</sup> In the

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66 *Law*, 852 F.2d at 1279–80; *Langon v. Dep't of Health & Hum. Servs.*, 959 F.2d 1278 (Fed. Cir. 1998); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) (holding that "coming to work regularly" is an "essential function" of any job).

67 *E.g.*, *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019), *as amended, reh'g en banc denied* Aug. 9, 2019; *Rauen v. U.S. Tobacco Mfg. Ltd. P'ship*, 319 F.3d 891, 896 (7th Cir. 2003).

68 129 F.3d 857, 860 (6th Cir. 1997).

69 *Id.* at 867.

70 782 F.3d 753, 757, 758 (6th Cir. 2015) (*en banc*); *see also* *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 813 (6th Cir. 2020) (citing *Ford Motor Co. en banc* decision).

71 *EEOC v. Ford Motor Co.*, 782 F.3d at 765.

72 2010 WL 2265979 (M.D. Pa. June 2, 2010).

73 *Id.* at \*4.

74 711 F.3d 120, 125–26, 126–29 (2d Cir. 2013).

75 *Id.* at 126–29.



process, the court noted that simply assuming regular attendance to be an essential function for every job is antithetical to the individualized inquiry mandated by the ADA.<sup>76</sup>

Notwithstanding these decisions, it is fair to say that the approach employed in *Vande Zande* and many other court of appeals decisions, in which in-person attendance was presumed to be an essential function of most if not all positions, was the prevailing judicial view prior to the COVID-19 pandemic.<sup>77</sup> Several commentators have noted the general unwillingness of courts in the pre-pandemic era to consider remote-work accommodations as even potentially reasonable, notwithstanding EEOC guidance encouraging individualized assessment as well as the rapid development of technology that made remote work more feasible.<sup>78</sup> It has been argued that, by assuming in-person attendance was an essential function of “most” (usually, all) jobs, courts improperly conflated the concepts of reasonableness and “undue hardship,” thus making both showings the burden of the employee when demonstrating undue hardship is in fact the burden of the employer.<sup>79</sup>

For whatever reason, in the view of many courts that ruled on the issue before the 2020 pandemic, in-person work was not only the dominant workplace paradigm but was also presumed to be an essential function of most jobs. The question is whether the many advances experienced during the pandemic regarding the feasibility of remote work have changed this paradigm and, in particular, whether they call for a refined approach by colleges and universities to the question of remote work as an accommodation.

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76 *Id.* See also M. Hancock, Note, “Working from Home” or “Shirking from Home”: *McMillian v. City of New York’s Effect on the ADA*, 16 DUQ. BUS. L.J. 155–56, 162 (2013).

77 In addition to *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995), and *Ford Motor Company*, 782 F.3d 753 (6th Cir. 2015)(en banc), examples include the Fifth Circuit’s decision in *Credeur v. La*, 860 F.3d 785 (5th Cir. 2017) (in-house litigation attorney for the state was not entitled to work remotely as an accommodation where he worked in a supervisory role requiring collaboration with other employees). See also *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) and *Heaser v. Toro Co.*, 247 F.3d 826, 829 (8th Cir. 2001) (both identifying in-office attendance as an essential function of the job).

78 See generally N. B. Porter, *A New Look at the ADA’s Undue Hardship Defense*, 84 MO. L. REV. 121, 156 (2019) (noting that many courts find “undue hardship” without requiring that employers prove one or more of the factors identified in the statute and regulations as the undue hardship defense). See also Note, *The Future of Teleworking Accommodations Under the ADA Post-COVID-19*, 70 U. KAN. L. REV. 105, 116–17 (2021) (arguing that identifying in-person attendance as an “essential function” improperly conflates “reasonableness” and “undue hardship” requirements of ADA). Other post-March 2020 articles, which also are not related to higher education but speak more generally to workplace accommodation, include R. Gillette, *The New Normal? Rethinking Telework Accommodations in a Post COVID-19 World*, 9 BELMONT L. REV. 231 (2021); C. Headrick, “Remote Work ‘Reasonable’? Why the COVID-19 Pandemic Calls for a Reinterpretation of the ‘Reasonable Accommodation’ Standard, and How Companies Can Respond”, 40 MINN. J.L. & INEQ. 211 (2022); S. Hickox & C. Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25 (2020); R. Arnov-Richman, *Is There an Individual Right to Remote Work? A Private Law Analysis*, 35 ABA J. LAB. & EMP. L. 1 (2020).

79 See Note, *supra* note 78 at 116–17.

### III. REMOTE WORK: OVERVIEW OF GUIDANCE AND DECISIONS SINCE MARCH 2020

In 1995, the court in *Vande Zande* noted briefly that the balancing of interests with respect to remote work accommodation requests “will no doubt change as communications technology advances.”<sup>80</sup> This prediction clearly turned out to be accurate, although neither the *Vande Zande* court nor anyone else appears to have anticipated just how quickly and profoundly changes would occur in response to an emergency like the COVID-19 pandemic. Not only did the COVID-19 shutdowns demonstrate the feasibility of remote work on an unprecedented scale, but they also highlighted how employees could in fact be supervised and collaborate remotely and how students could in fact be taught remotely.

Technology also advanced at lightning speed—because it had to do so—and advances in technology have definitely affected how and whether the essential functions of a particular job can be fulfilled remotely. As the EEOC has noted, in the current age of cloud computing, “access to documents or information located in the workplace” may be far less of a concern than was the case twenty years ago (although information security concerns may be far greater now than they were when the 2003 EEOC Guidance was issued).<sup>81</sup> In short, the 2020 pandemic—and, specifically, the sudden, mass migration to remote work for significant portions of the work population—have definitely challenged a number of the assumptions that underlay pre-pandemic jurisprudence about the reasonableness of remote work, although much more development of the law is likely going forward.

#### A. EEOC Guidance and Enforcement

On March 14, 2020, the EEOC issued a Technical Assistance Q & A document entitled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (“2020 Technical Assistance Q & A”). In this document, issued as the United States moved into the March 2020 emergency business shutdowns, the EEOC urged employers to “thoroughly consider all possible reasonable accommodations, including telework and reassignment.”<sup>82</sup> The EEOC was judicious in the 2020 Technical Assistance Q & A and other public statements regarding the significance of the emergency shutdowns; specifically, the EEOC clarified that allowing remote work during the pandemic does not mean employers would be required to continue permitting remote work arrangements indefinitely

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80 *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995).

81 Several recent NACUA presentations also offer extremely useful post-March 2020 analyses of EEOC and judicial decision-making regarding pandemic-related changes to remote work, both as they affect institutional management and also as they affect ADA accommodation. *See, e.g.*, K. Baillie, P. Connelly & K. Kleba, “Remote Work Accommodations: A Brave New World or Same Old, Same Old?” NACUA Annual Conference (June 26–29, 2022); K. Caggiano-Siino, S. Gilbertson & F. F. Thompson, “In a State of Flux: The Future of Employment Compliance Amidst the Pandemic’s Effects,” NACUA Fall 2021 Virtual CLE Workshop (Nov. 10–12, 2021).

82 EEOC Technical Assistance Q & A, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (Mar. 14, 2020, as updated Mar. 19, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [hereinafter (2020 Technical Assistance Q & A)].

as a reasonable accommodation under the ADA, especially if the employer could effectively address the employee's need through a different accommodation within the workplace.<sup>83</sup> Additionally, the 2020 Technical Assistance Q & A clarified that an employee without a disability is not entitled under the ADA to work remotely in order to protect a family member with a disability from COVID-19 exposure.<sup>84</sup> But the EEOC also cautioned employers not to engage in disparate treatment of disabled employees if remote work was allowed.<sup>85</sup> Moreover, the EEOC emphasized that an employee's request for a disability-related accommodation is a specific, protected activity; as such, regardless of whether the request is granted, retaliation against employees who make such requests is a violation of federal law.<sup>86</sup>

On March 19, 2020, the EEOC also updated its 2009 H1N1 Guidance in response to the COVID-19 pandemic (the "2020 Guidance").<sup>87</sup> The 2020 Guidance reiterated the core principles articulated by the EEOC in 2009, including that remote work is an "effective infection-control strategy;" that a pandemic may increase the likelihood that remote work is a reasonable accommodation for individuals with disabilities, placing them at greater risk of complications should they be infected; and that employees who move to remote work because of the pandemic are still entitled to the same accommodations at home that they received in the workplace (even where the initial accommodation was unrelated to the pandemic).<sup>88</sup>

The 2020 Guidance also offered new content, including the EEOC's acknowledgment that "[t]he rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation."<sup>89</sup> It encouraged employers to address these requests as soon as possible, but noted that "the extraordinary circumstances of the COVID-19 pandemic may result in delay" in discussions about and provisions of ADA accommodations.<sup>90</sup> "Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible."<sup>91</sup>

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83 *Id.* The EEOC also posted a video conference dated March 30, 2020, discussing the status of remote work in a "post-COVID" world. *See* EEOC, "The COVID-19 Pandemic and Antidiscrimination Laws," YOUTUBE (Mar. 30, 2020), <https://www.youtube.com/watch?v=X50G7I41NKg> [<https://perma.cc/3MD7-RB67>] (acknowledging telework will not automatically become a reasonable accommodation post-COVID-19 in a conference from late March).

84 *Id.*

85 2020 Technical Assistance Q & A, D.13.

86 *Id.*; *see* 42 U.S.C. § 12203 (ADA § 503); 29 C.F.R. § 1630.12. Retaliation occurs where there is a causal connection between an employee's protected activity (such as a request for reasonable accommodation) and an employer's taking an adverse employment action against that employee. *Id.*

87 EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (updated Mar. 19, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [hereinafter 2020 Guidance]. This is, as noted above, an update to the 2009 H1N1 Guidance, with updated noted on the posted 2020 Guidance.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at Q.14.

Although the EEOC's Technical Assistance and updated 2020 guidance exhibited a significant level of pragmatism and flexibility about challenges facing employers navigating the initial shutdown phase of the COVID-19 pandemic, the EEOC has also taken a strong position on the parallel issue of denial of remote work accommodations consequent to the "return to work" initiatives that began in 2021. On September 9, 2021, the EEOC filed a complaint in the United States District Court for the Northern District of Georgia against ISS Facility Services, Inc. In this enforcement action, the EEOC indicated that it sought to "correct unlawful employment practices on the basis of disability and to provide appropriate relief to Ronisha Moncrief."<sup>92</sup> Moncrief worked at ISS Facility Services in Covington, Georgia.<sup>93</sup> At the onset of the pandemic, all ISS employees were required to work remotely from March 2020 to June 2020.<sup>94</sup> When the facility reopened, plaintiff asked to work remotely two days per week and take frequent breaks while working on-site because of her pulmonary condition, which causes her to have difficulty breathing.<sup>95</sup> Although other employees allegedly were allowed to continue to work from home, plaintiff's reasonable accommodation request was denied and she was fired.<sup>96</sup>

The EEOC sued, viewing the employer's actions as relating directly to the employee's disability and to her request for accommodation and as raising substantial evidence not only of discrimination but also of retaliation. The underlying facts are difficult to adduce on the basis of the court filings to date; but, in a statement accompanying this filing, the EEOC said, "[d]enying a reasonable accommodation and terminating an employee because of her disability clearly violates the ADA at any time. In light of the additional risks to health and safety created by COVID-19, it is particularly concerning that an employer would take this action several months into a global pandemic."<sup>97</sup> The case remains pending in the United States District Court for the Northern District of Georgia.<sup>98</sup>

## B. JUDICIAL DEVELOPMENTS

In addition to the EEOC filing, since March 2020 a significant number of lawsuits have been filed against employers who allegedly violated the ADA by denying remote work or a continuation of remote work as a reasonable accommodation. While many suits are still pending or on appeal, there are a sufficient number of decisions allowing for assessment of trends and allowing employers to draw preliminary conclusions as to whether the lightning-fast—and, in some ways, successful—pivot to remote work in March of 2020 has refined the judicial approach to assessment of remote work as a reasonable accommodation. Several

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92 EEOC v. ISS Facility Servs., Inc., No. 1:21-CV-3708-SCJ-RDC (N.D. Ga. 2021).

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 EEOC, "Press Release: EEOC Sues ISS Facility Services for Disability Discrimination" (Sept. 7, 2021).

98 EEOC v. ISS Facility Servs., Inc., No. 1:21-CV-3708-SCJ-RDC (N.D. Ga. 2021).

such lawsuits, discussed below, offer insight into how educational institutions may wish to go about managing remote work requests going forward.

### 1. *General Trends in Judicial Decisions Analyzing Remote Work*

The COVID-19 pandemic cast doubt on many of the arguments previously accepted by the courts as to why remote work was not a reasonable accommodation. And, inasmuch as court systems themselves pivoted to remote work for substantial periods of time during 2020 and 2021, there is every reason to believe that courts are now much more familiar with the feasibility of remote work on a technological level. Courts have not necessarily ruled in favor of employees in remote work disputes and certainly are not overly sympathetic to the argument that, as one court termed it, “[i]f we worked remotely during COVID-19, then remote work is a reasonable accommodation.”<sup>99</sup> Nonetheless, it also appears from a survey of recent remote work decisions that the persuasive value of *Vande Zande* and its progeny is diminishing—and that employers should prepare to respond on an individualized, interactive basis to requests for remote work. Simply put, it appears advisable to engage in a robust interactive process, recognizing that the in-person paradigm, even if strongly embraced in a “return to campus” scenario, may be subject to exception for purposes of ADA compliance.

One useful example is the 2021 decision in *Frantti v. New York*,<sup>100</sup> in which the United States Court of Appeals for the Second Circuit affirmed summary judgment in favor of the employer (a state agency). The court of appeals found that the state employee’s insistence on remote work, an alternative schedule, or a transfer were not reasonable accommodations and that he had not been denied accommodation by the employer. With regard to the requests for remote work or an alternative schedule, the court noted that the essential functions of the employee’s particular position required him to perform involved analysis on complex, collaborative projects that unfolded over long periods of time; this in turn involved his communicating closely with coworkers and other parties, which the employer believed could not be done remotely. With regard to the full range of accommodations requested, the court also determined that, given the severity of his illness, the employee would not have been able to perform the essential functions of the position even with these or alternative accommodations.<sup>101</sup>

Also significant was the employee’s failure to make a direct request for the accommodations in question or engage in what the court viewed as a good faith interactive process. In fact, the employee “resigned instead of seeking accommodations,” essentially breaking off the interactive process. Therefore, the employer did not “refuse” to grant accommodations.<sup>102</sup> Based on this individualized analysis of the accommodations at issue and the terminated interactive process, the court found summary judgment in favor of the employer to be warranted.

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99 See *Montague v. U.S. Postal Serv.*, No. CV H-20-4329, 2022 WL 35825 (S.D. Tex. Jan. 4, 2022).

100 850 F. App’x 17, 20 (2d Cir. 2021).

101 *Id.*

102 *Id.*

Likewise, in *Brown v. Austin*,<sup>103</sup> the United States Court of Appeals for the Tenth Circuit affirmed summary judgment in favor of the employer, again finding a remote work accommodation request to be unreasonable because it would not allow the employee to fulfill the essential functions of the position. In this case, the employer worked as a health care fraud specialist conducting fraud investigations. To do so, he needed to use case files maintained only in his office and in paper format. While noting that “physical presence in the office does not become an essential function ... just because [the employer] says so,” the court noted that the employee had offered no plausible evidence that he needed the accommodations in question (or alternatives such as reassignment), while the employer had offered extensive evidence of the essential functions of the position requiring the employee’s in-office presence, including the testimony of other employees about the nature of the position.<sup>104</sup> The employer had also offered extensive evidence that the accommodations requested would result in undue hardship from the standpoint of operations and finances, but the court did not reach this defense.<sup>105</sup> Again, based on an individualized analysis of the needs of the employee and the essential functions of his position, the court found in favor of the employer.

On similar reasoning, the United States District Court for the District of Columbia in *Tobey v. United States General Services Administration [GSA]*<sup>106</sup> granted summary judgment in favor of the employer. There, the district court found that an assistant general counsel working within GSA could not perform the essential functions of his position working remotely, which included making timely in-person court appearances and meeting with clients. In addition, plaintiff exhibited performance issues, which the employer was entitled to take into account in assessing whether remote work was reasonable in this situation.<sup>107</sup> As such, the employer’s provision of alternative accommodations in lieu of granting the accommodation of remote work was neither a violation of the ADA accommodation requirements nor an act of retaliation against the employee.<sup>108</sup>

The court in *Tobey* also reviewed and rejected a claim that the employer did not interact in good faith with the employee in considering reasonable accommodations. On the contrary, the employer “adequately engaged in the interactive process” and provided temporary remote work, advanced sick leave, an ergonomic chair, and assistance with lifting and hauling, both before and after the employee formally requested accommodations. The employer also afforded the employee an extension of time to submit documentation and permitted the employee an unscheduled leave when the employee needed it. The court concluded that the

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103 13 F.4th 1079, 1085 (10th Cir. 2021). *Brown* arose under the Rehabilitation Act because the employer was the U.S. government but the court noted that the standards for accommodation under the Rehabilitation Act incorporate ADA standards. *Id.* at 1094 n.3.

104 *Id.* at 1089–90.

105 *Id.* at 1088–90.

106 480 F. Supp. 3d 155 (D.D.C. 2020).

107 *Id.* at 168–71.

108 *Id.*

interactive process was honored by the employer and that this was another basis on which the employer's conduct was "not actionable."<sup>109</sup>

These are only a few of the decisions issued since March of 2020 addressing remote work accommodation requests; and, as noted, the trend continues to favor the positions of employers on the central question of remote work accommodation.<sup>110</sup> This trend is not universal, but it definitely remains the case that the majority of remote-work accommodation lawsuits are decided in favor of employers.<sup>111</sup>

But it also seems clear, both from the sampling above and from other recent decisions, that the approach of courts is shifting away from assumptions about remote work and toward individualized assessment of remote work requests. Courts appear to be scrutinizing the essential functions of the particular position and the interactive process used to engage with the particular employee, and the employers who are prevailing in decisions such as those summarized above appear to be employing compliant interactive processes in addressing accommodation requests.<sup>112</sup> While the opinions of employers on the need for in-person work are respected (as in *Frantti and Brown*), courts do not appear to be relying on presumptions favoring in-person work, in a pronounced departure from *Vande Zande*, *Ford Motor Company*, and similar decisions rendered prior to 2020. For instance, in *Frantti and Tobey*, both courts emphasized the importance of the interactive process—*Frantti* in finding that the employee himself failed to interact and *Tobey* in finding that the employer adequately did so. Equally significant is the judicial response where the employer fails to engage in an individualized assessment; for instance, where one employer failed to offer evidence that satisfied the requirements of an undue hardship defense, no assumptions were made in the employer's favor and the court granted an injunction requiring the employer to continue remote work for the disabled employee.<sup>113</sup>

## 2. Focus Upon Decisions Involving Educational Institutions

Several decisions relating to remote work and involving educational institutions have been reported since March 2020. They are worth noting because the contexts in which those matters arose are likely to recur within higher education. Moreover,

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109 *Id.* at 169–70.

110 Other decisions rendered since March of 2020 are noted in K. Baillie, P. Connelly & K. Kleba, "Remote Work Accommodations," *supra* note 81.

111 An example of a decision decided in favor of the employee is *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56 (D. Mass. 2020) further discussed *infra* note 112.

112 See cases in K. Baillie, P. Connelly & K. Kleba, "Remote Work Accommodations," *supra* note 81.

113 In *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 59–61 (D. Mass. 2020), the United States District Court for the District of Massachusetts ruled in favor of a trauma center manager who, after performing his job remotely during the initial months of the pandemic, submitted evidence of disability and subsequently refused to return to in-person work. The employer denied a remote-work accommodation. After hearing, the district court granted an injunction in favor of the employee, permitting him to work from home because there was no evidence of undue hardship upon the employer. *Id.*

the arguments that those institutions successfully advanced may be instructive in developing good campus accommodation practices for the future.

In *Thomas v. Bridgeport Board of Education*,<sup>114</sup> the United States District Court for District of Connecticut denied a motion for a preliminary injunction that would have required a public school district to let a high school teacher teach remotely as a reasonable accommodation. The court found the employee was not likely to succeed on her failure-to-accommodate claim, in part because the school district had determined, based on an assessment of school and student needs, that in-person instruction was an essential function of the plaintiff's and other K-12 teaching positions. Related to this, the court also noted that the school district had presented credible evidence of undue hardship in that, if this teacher could not work in person, the district would be forced to hire another teacher to replace the employee in the in-person classroom, which would "be an added expense, [and] extremely difficult to do as there is currently a shortage of substitute teachers."<sup>115</sup> The court denied the motion for preliminary injunction.

Similarly, the United States District Court for the Middle District of Tennessee in *Dobbs-Weinstein v. Vanderbilt University* ruled in favor of an educational institution on a university professor's motion for an injunction that would have required the university to let her teach and mentor students remotely.<sup>116</sup> The court found insufficient evidence of irreparable harm or the other elements necessary to support an injunction, noting that the university had denied the request for remote teaching but offered plaintiff the alternative accommodations of (1) letting her teach her two in-person classes in a larger room than scheduled, with all students wearing N95 or KN95 masks; or (2) allowing her to take paid leave under the FMLA. There is a strong indication that the court also felt the employee was not interacting in good faith, in that she apparently refused the paid leave offer because she was concerned it might preclude her from using previously approved research grants to visit Paris and Rome. In denying the injunction, the court noted that it could not "reconcile the incongruity of Plaintiff's request to be excused from [teaching in-person classes] ... with her intention to travel internationally for conferences ... "<sup>117</sup>

A third decision involving education, *Mundy v. Board of Regents for the University of Wisconsin System*,<sup>118</sup> is also noteworthy in its denial of a claim of failure to accommodate and its analysis in doing so. That decision involved a graduate student employed as a research assistant in a bacteriological lab who requested remote work as an accommodation of her anxiety disorder. The university offered evidence that the plaintiff exhibited performance issues, both in progressing on her thesis and also in her research assistant employment. Her faculty advisor, who also managed the lab, was therefore reluctant to allow her to work remotely

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114 2020 WL 12188900 (D. Conn. Nov. 19, 2020).

115 *Id.* at \*3.

116 2022 WL 860450 (M.D. Tenn. Mar. 22, 2022).

117 *Id.* at \*1-2.

118 2022 WL 103562 (W.D. Wisc. Jan. 11, 2022).



because she had not demonstrated she could be productive working outside the lab.<sup>119</sup> The court also noted that, when the university denied remote work to the plaintiff but instead offered other options for accommodations, the plaintiff ceased interacting with the university to explore the possibility of a “mutually agreeable accommodation,” unilaterally rejected what the university proposed, and terminated the interactive process; in this instance, as the court noted, a plaintiff is not entitled to relief.<sup>120</sup> The court thus granted the university’s motion for summary judgment.

These recent decisions are consistent with the trends noted above in cases that do not involve educational institutions, in that courts have emphasized individualized assessment of the essential functions appropriate to the particular case. While it is important to note that two of these three education-related decisions involved motions for a preliminary injunction (and therefore could conceivably be decided differently on the merits), such decisions as well as other rendered since March 2020 suggest that institutional employers should engage in individualized assessments and good faith interactive processes when assessing remote work requests—even where, in the shift back to in-person learning, there is a reluctance to continue permitting remote work, either as an accommodation or as part of a flexible approach to pandemic management.

Cases like *Dobbs-Weinstein*, *Thomas*, and *Mundy* also underscore the importance to educational institutions of being prepared on an operational level to not only undertake, but demonstrate, the essential functions of positions, their contentions about undue hardship, and their commitments to the interactive process. In *Dobbs-Weinstein*, the university could show it responded to the faculty member’s request for remote teaching with two alternative accommodations; by contrast, the faculty member refused them both and arguably did not interact in good faith.<sup>121</sup> In *Mundy*, the university could show that the graduate research assistant exhibited performance issues when she worked outside the lab, with the requested remote work therefore denied because she would be unable to perform the essential functions of her job. In addition, the university offered her several alternative accommodations, which she rejected and then terminated the interactive process.<sup>122</sup> In *Thomas*, which addressed both the reasonableness of accommodations and the “undue hardship” defense, the school district made a judgment that the best interests of the students and school district required a return to in-person learning; the court respected this, and courts generally can be expected to respect such findings, as long as institutions also can demonstrate that they were flexible with employees who are denied remote work accommodations (which, in *Thomas*, was demonstrated by the faculty member’s being placed on unpaid leave but not losing her position).<sup>123</sup> The court in *Thomas* also respected the school district’s offering evidence of “undue hardship,” specifically, its showing that replacing the plaintiff

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119 *Id.* at \*7–8.

120 *Id.*

121 *Dobbs-Weinstein*, *supra* note 115, at \*1–2.

122 *Mundy*, *supra* at n.117, at \*7–8.

123 *Thomas v. Bridgeport Bd. of Educ.*, 2020 WL 12188900, at \*3 (D. Conn. Nov. 19, 2020)..

would have resulted in the district's incurring the cost of hiring an additional teacher as well as injecting operational challenges because it was difficult to hire temporary faculty at that time.<sup>124</sup>

These cases, as well as the non-education cases summarized above, definitely suggest that educational institutions should not rely on the kinds of assumptions about in-person workplaces that threaded through pre-pandemic decisions such as *Vande Zande* and *Ford Motor Company*, even in jurisdictions where such decisions might remain settled law. Perhaps even more important, these recent decisions and others postdating March of 2020 strongly suggest that educational institutions may be able to prove up "undue hardship" defenses in cases beyond those involving significant financial impact—serious though financial impact may prove to be within higher education going forward. Perhaps even more than in the corporate world, higher education faces complicated situations in which difficult interests will collide and create unique circumstances supporting a finding of undue hardship. For instance, a faculty member may seek to teach remotely but the institution may judge, as did the school district in *Thomas*, that this is not in the best interests of the students themselves. Indeed, legitimate considerations in such circumstances may include whether students themselves may be experiencing disabilities or other learning challenges that make remote learning undesirable as a pedagogical matter and as a matter of institutional mission. These kinds of considerations are legitimate under the "undue hardship" provisions of the ADA and regulations. In addition, higher education also offers certain modalities of teaching, and offers certain subjects, that arguably cannot be provided effectively on an ongoing basis through remote learning (e.g., clinical training healthcare or teacher education programs; certain types of music training). A grant of remote work to faculty teaching within those areas might therefore raise the undue hardship issue identified in *Thomas*, in which an institution was forced to hire additional personnel, perhaps at great expense, to provide necessary in-person instruction. Moreover, in-person campuses employ individuals in unique positions that have no analogies within much of the corporate world—residence hall advisors and other student-focused positions come to mind as positions that probably cannot be undertaken remotely when students are in residence on campus. Again, a grant of remote work for such positions, while students are on campus, is likely to be both unreasonable, given the essential functions of the positions, and also an undue hardship.

On the other hand, many educational institutions have in recent years enhanced their commitments, as a matter of institutional mission, to the principles of diversity, equity, and inclusion on campus. These commitments definitely encompass inclusion and expansion of opportunities for individuals with disabilities, whose difficulties accessing the workplace were part of the impetus for the passage of the ADA and later amendments. Under these circumstances, conducting a workplace accommodation process in an interactive, flexible manner—and limiting "undue hardship" defenses to those circumstances that are well-supported by objective evidence, not assumptions—is an approach that aligns not only with legal compliance obligations but also with fundamental institutional diversity missions.

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124 *Id.*

In sum, recent agency guidance and court decisions indicate that institutions should prepare going forward to demonstrate the essential functions of positions, individualized assessment of remote-work requests, good faith involvement in an interactive process, and flexibility in accommodating employees through alternatives, if not through remote work. Assumptions about the “essential” nature of in-person work for all positions are no longer a sound basis for denying accommodations, if indeed they ever were. In any event, the lessons from the 2020 pivot toward remote work, and subsequent decisions about remote work, suggest that a robust interactive approach will now be expected, and also respected, by agencies and courts—if institutions engage in the process in good faith and can demonstrate that they did so. Recent decisions also suggest that educational institutions, which may experience unique operational challenges compared to the corporate world, may have more opportunity than previously thought to demonstrate “undue hardship,” when operational or mission considerations indicate it is necessary to do so.

#### **IV. PRACTICAL GUIDANCE FOR HIGHER EDUCATION IN MANAGING REMOTE WORK REQUESTS**

Below, this article concludes by offering practical guidance to practices and procedures that will assist institutions in interacting about remote work accommodation requests. Specifically, it is recommended that institutions commit (or recommit) to using ADA-compliant policies; updating and then applying job descriptions that clarify the essential functions of positions; using a flexible and good faith interactive process; and employing appropriate communication and documentation in all dealings with employees, supervisors, and other stakeholders involved in the ADA accommodation process. Robust policies and practices, focused on employing and documenting good faith, and individualized assessment, will best position institutions to make appropriate, defensible, and nondiscriminatory remote work decisions that are consistent with their institutional missions.

##### **1. UPDATE AND APPLY ADA POLICIES**

- The guidance, decisions, and trends discussed above suggest that institutions must begin with the “first principle” of effective campus ADA compliance—which is that ADA policies are legally compliant and capable of being understood and used by campus personnel. Most policies need to be updated every few years to reflect changes in institutional structure or staffing; an update to incorporate learning from the pandemic is also well advised.
- Institutions should err on the side of detailing the procedures that will be used to evaluate accommodation requests, interact with medical providers, and interact with the employee themselves. Individuals seeking accommodation (particularly those who are emotionally distressed or medically compromised) often benefit from detail about what is required, what is expected, and what will happen during the process. Their medical providers may also benefit from being afforded more detail and information, rather than less.

- Institutions should consider reviewing and updating their full range of ADA-related policies, including policies such as service animal/emotional support animal policies and barrier-removal plans for facilities. While these policies do not necessarily bear directly on a remote work request, they may affect the alternative accommodations that an institution can offer during an interactive process.
- It is important to make sure the institution has identified a Section 504 coordinator, provided appropriate grievance policies, and otherwise complied with “nuts and bolts” regulatory requirements of disability legal compliance (under both federal and state laws).

## 2. TAKE CARE NOT TO CONFLATE ADA AND FLEX POLICIES

- Many institutions adopted “Flex Work” policies during the early (pre-vaccination) stages of the COVID-19 pandemic to accommodate individuals who were immune compromised but not necessarily disabled (or who lived with medically fragile individuals who were at risk if exposed to COVID).
- Flex policies are different from ADA accommodation policies, the latter of which reflect legal compliance obligations, not policy decisions that may be rescinded or changed at the discretion of the institution. It is important for institutions always to distinguish between ADA requests and requests made under flex policies.
- If an institution continues to maintain a flex policy as the pandemic winds down, it is important to guard against discrimination claims by individuals with disabilities who are seeking accommodations as a matter of right: it should not be more difficult for an individual with a disability to justify remote work as a reasonable accommodation than for a similarly situated, nondisabled person to do so using a flex policy. Moreover, disabled employees whose remote work accommodation requests have been denied should remain eligible to seek and obtain flex policy grants on the same basis as similarly situated non-disabled employees. Drawing these distinctions may be challenging and may lead employers to rescind or significantly limit the availability of flex policy arrangements in order to avoid potential issues of discrimination.
- Likewise, it is important to avoid related retaliation claims: individuals with disabilities now seeking ADA accommodations should not be penalized for having previously benefited from flex policies or for having engaged in prior protected activity.
- By the same token, and as noted by the EEOC, individuals with disabilities who have previously worked remotely during general shutdowns or under previous flex policy arrangements are not automatically entitled to continue working remotely, once the institution returns to more in-person service or rescinds its flex policy.

### **3. UPDATE JOB DESCRIPTIONS TO DISTINGUISH BETWEEN “ESSENTIAL” AND “MARGINAL” FUNCTIONS**

- In order to perform a proper analysis of the reasonable accommodations needed, institutions first have to know the essential functions of a particular position.
  - Many positions lack updated job descriptions and rely instead on original job postings (which may be decades old and reflect a hiring “laundry list,” rather than realistically reflecting the current job responsibilities).
  - Job descriptions are also useful to provide medical treaters with information about the essential functions of a position, which may help treaters make realistic recommendations about accommodation options (see Guidance 4 below).
- Functions assessed during annual evaluations may constitute a useful “proxy” summary of current essential functions, if no updated job descriptions exist; but updating job descriptions is an extremely useful compliance and risk management initiative that is highly recommended.

### **4. SEEK AND USE MEDICAL DOCUMENTATION**

- The interactive accommodation process requires that institutions understand not only the employee’s diagnosis but also the functional limitations of the particular disabling condition upon the particular employee.
- Therefore, medical documentation should usually be required, properly verified, and reasonably current.
- The institution should be flexible as to the particular type of treater whose documentation is sought, which will depend on the medical or mental condition for which accommodation is requested.
- Documentation should describe not only the condition but also the particular functional issues raised by the condition. It should also describe the expected duration of those limitations.
- Institutions may also wish to ask the treater to identify accommodations and explain how the recommended accommodations will enable the employee to fulfill the essential functions of the job.
  - Consider asking specific questions to promote a more useful treater response.
  - Consider also providing the job description, if one exists, or information about the employee’s essential functions (again, to promote a more useful response).
- As part of the documentation process, the employee should sign a release allowing follow-up questions to be asked directly to the medical treater.

- A good practice is to ask the employee to seek the documentation directly from the treater but to provide a form (and, ideally, a job description), with directions for the treater to send the information directly to the institution.

##### **5. *INDIVIDUALIZED ASSESSMENT AND INTERACTION: STILL CRITICAL***

- As demonstrated by the above case law, guidance, and regulations, it is still extremely important (perhaps, more important than ever) to conduct an individualized assessment of every ADA accommodation request and to make no assumptions about the reasonableness—or unreasonableness—of remote work requests.
- This remains the case even if the institution has determined to resume in-person learning and is reluctant to continue any remote work.
- Institutions should perform an individualized assessment in every situation in which an employee requests remote work as an accommodation; supervisors should not grant or deny remote work requests informally (without the benefit of documentation or knowledge of the appropriate interactive process).
- To facilitate a good faith process, ask for and use documentation, but be flexible in what is accepted.
- It is also important to be proactive in responding to requests and in initiating the interactive process—even with repeat “requesters” or where a grant of remote work is unlikely.

##### **6. *INTERACT IN GOOD FAITH, DOCUMENTING THE PROCESS AND RESULTS***

- Although interactive processes need not be formal (and meetings are not required by the regulations or statute), it is often advisable to meet separately at least once with the employee—and with their supervisor (the person who will manage the remote work or other accommodations). Meetings with these different stakeholders are often important to adduce the practical implications of particular requests. In particular, it is important to hear from the supervisor about performance issues on the part of the employee or operational challenges within the unit, which may factor into the institution’s consideration whether to grant a remote work request.
- It is recommended that the individual representing the university during the interactive process ask questions, take and maintain notes, and follow up in writing with the employee (and, often, with the supervisor).
- The institution should give due consideration to the employee’s preference for a particular accommodation, even though the institution retains discretion to grant or deny it if another accommodation is reasonable or if the accommodation imposes undue hardship.

- It is vital to avoid assumptions about what is being requested, the implications of the requests, and other details about how the remote work request will work on a practical level for a particular job or within a particular unit. When in doubt, ask the employee for clarification or follow up with the treater or supervisor. Treating the interactive process as a dialogue may yield the best-informed decision.
- Documentation is critical. Every step in the interactive process should be documented, both internally and to the employee. This is important not just for compliance purposes but also to maintain central institutional knowledge of the accommodations being provided to different employees.
- In addition, employees seeking accommodations need and are entitled to clear instructions and communications. They may have difficulty understanding institutional policies and procedures in meetings or oral communications, making written follow up (sometimes, multiple written follow-ups) advisable.

#### **7. PROPOSE ALTERNATIVES AND AVOID BEING THE PARTY THAT “CUTS OFF” THE PROCESS**

- The responsibility to provide equal access and benefits does not end simply because remote work or the originally requested accommodation cannot be granted
- As shown by the above case law, it is important to propose reasonable alternatives, which may include hybrid work, flexible hours, change in work location, or job transfer.
- As shown by decisions like Mundy, it is also important not to cut off the interactive process unless there are no further alternatives to discuss or the employee rejects reasonable offers. In practical terms, an institution should almost never say “no” without also proposing an alternative. Moreover, every institution should be prepared to document its attempts to continue seeking a reasonable resolution.
- One alternative that is underutilized is the “temporary accommodation,” which can be granted both as a stopgap during the interactive process and also as a “test period” to see if remote work is feasible for a particular position.
- A related strategy is to grant remote work as an accommodation while placing an “end date” upon the grant of remote work, at which time the institution and employee will interact again to reassess the reasonableness and effectiveness of the measure.
- It may also be advisable to schedule periodic “check-in meetings” with the employee and supervisor during any such temporary or time-limited grant of accommodation.

**8. *PREPARE TO ESTABLISH AND DOCUMENT ANY BONA FIDE, "UNDUE HARDSHIP" DEFENSE***

- Institutions bear the burden of showing that a remote work request would result in bona fide operational, programmatic, financial, or strategic difficulties constituting "undue hardship." Consistent with the regulations, these may include
  - Needs of students (some courses cannot be taught remotely; sometimes a critical mass needs to be on campus to make up a cohort).
  - Specific financial or operational requirements of the job or of the institution.
  - Impact on other individuals with disabilities or other campus stakeholders with special needs of a request to teach remotely or another accommodation.
  - Prior experience supervising the employee remotely; this employee's job performance.
- Ideally, such concerns will be reflected in documentation within the institution that predates the request for accommodation, such as prior documentation of issues with employee conduct or job performance.
- The grounds for denying an accommodation on the basis of undue hardship must be documented not just internally but also to the employee (and, again, alternatives to remote work should be offered, if any exist).
- Because a showing of undue hardship is the employer's burden, it is particularly important to base any such defense on objective evidence and documentation. Institutions should try to avoid assumptions, which may be challenged on the grounds of discrimination, retaliation, or arbitrary and capricious decision-making.

**9. *MAINTAIN CONFIDENTIALITY; BE PROMPT***

- The ADA includes specific confidentiality limitations, and these should be honored. It is important that those institutional representatives interacting on behalf of the institution share, even within the institution, only the minimum information needed to assess and provide accommodations. This applies not only to medical documentation from treaters (which may be subject to state law confidentiality protections) but also information about accommodation requests and diagnoses, which institutional employees may be eager to learn but which should only be shared on a strict "need-to-know" basis.
- It is also valuable to be prompt in responding to and resolving requests for accommodation. Delays have real-world implications for an employee's ability to perform the essential functions of a position. Moreover, undue delay on the part of the institution, once an accommodation has been requested, may undermine the institution's ability to show good faith interaction.



### **10. REMEMBER THAT THE ADA EQUAL ACCESS AND BENEFITS PROVISIONS NEVER LAPSE**

- Circumstances change, medical conditions progress, and disabilities develop. There is no time or numerical limitation upon an employee's ability to request accommodations. As an employee's needs, available technology, or other circumstances change—or as accommodations prove ineffective—the employee may request new or enhanced accommodations. This includes accommodations that were previously denied, such as remote work.
- The employer has a renewed obligation to engage in an interactive process with each new request, including when repeated requests are received from the same employee.
- Even with positions that do not seem to lend themselves to remote work, institutions should consider each remote work request as it arises and try to offer alternatives if remote work is not reasonable. Assumptions about remote work are less likely than before to satisfy institutional legal compliance obligations, yield reasonable results, or align with institutional mission.

## **V. CONCLUSION**

The implications of the COVID-19 pandemic on society will be debated for years and likely for decades, and this probably includes the effect of the pandemic upon workplace operations and structures. It is already clear that the COVID-19 related shutdowns beginning in March 2020 radically changed the ability of many workplaces and workers to perform work remotely; the benefits, burdens, and legal implications of this “new normal,” on campus and elsewhere, are just beginning to be assessed.

What has not changed, however, are the obligations of employers under the ADA and Rehabilitation Act to provide “reasonable accommodations” to qualified employees with disabilities. This includes providing, in appropriate instances, the once unusual but now much-better-accepted accommodation of remote or “hybrid remote” work. This article summarizes the state of agency and judicial assessment of remote work accommodations before and since the March 2020 shutdowns consequent to the COVID-19 pandemic. Recognizing that further legal developments regarding remote work accommodations are ongoing and inevitable, this article also identifies what are likely to be continuing trends away from judicial assumptions about remote work and toward judicial emphasis upon individualized and interactive assessment of remote-work accommodation requests. An apparent corollary is that institutions of higher learning may also have more opportunity to establish “undue hardship” defenses than was previously assumed due to their unique operational challenges and missions of colleges and universities.

This article concludes in Part IV by offering practical guidance as to policies and processes that institutions of higher learning may wish to consider implementing in order to ensure they are employing good practices in evaluating remote work

accommodation requests. These include updating institutional ADA policies; compiling useable information about the essential functions of positions; using a consistent, flexible, and good faith interactive process to evaluate accommodation requests; and committing to proper communication and documentation in all dealings with employees, supervisors, and other stakeholders during the interactive process.

As the above agency guidances and judicial decisions suggest, and as bears repeating, robust ADA policies and practices, focused on individualized assessment, will best position institutions of higher learning to make reasonable, defensible accommodation decisions about remote work requests. When well and consistently applied, this approach will in turn promote our institutional missions of diversity and inclusion.