# NOTES

# THE NEW NORMAL? RETHINKING TELEWORK ACCOMMODATIONS IN A POST COVID-19 WORLD

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## INTRODUCTION

Under the Americans with Disabilities Act ("ADA"), an employer is required to provide reasonable accommodations to qualified disabled

employees, which may include a telework program.[1] However, courts historically have been reluctant to grant telework as a reasonable accommodation, relying on an outdated presumption that physical presence is an essential function of most jobs that cannot be performed effectively at home.

Despite the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), which widened the scope of potentially valid bases for requesting telework accommodations, courts have continued to rely on the physical presence presumption to deny telework as a reasonable accommodation.[2] The emergence of the COVID-19 pandemic has necessitated an increase in telework arrangements across numerous disciplines. This increase has brought with it overwhelming anecdotal evidence showing unprecedented levels of successful teleworking arrangements without loss of productivity.

This Note argues for Amendment to the ADA as follows: (1) binding language to eliminate the physical presence presumption; (2) expressly listing telework as a reasonable accommodation in the ADAAA; and (3) including the susceptibility of a nuclear member of an individual's household as a qualifying disability for the individual herself. This Note also argues for some sort of incentive or encouragement for state and private employers to adopt telework arrangements. This Note will proceed in three parts.

First, Part I discusses the background of the ADA and the subsequent ADAAA, including its mandate that employers provide reasonable accommodations to employees with disabilities. Specifically, this Part discusses how courts have historically analyzed telework requests as a reasonable accommodation for a disability and exactly what criteria has been used to allow or deny those requests.

Next, Part II discusses how, even after the ADAAA was signed into law, many courts continuously failed to recognize telework as a reasonable accommodation. Further, this part documents how the emergence of COVID-19 illuminated deficiencies in ADA jurisprudence and thus the need to amend practice regarding reasonable accommodations. This Part lastly discusses the Telework Enhancement Act of 2010, and how federal agencies handled the pandemic in comparison to state and private employers.

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1. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112(b)(5) (1990).

2. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553 (2008).

Finally, Part III argues that the widespread increase of telework during the pandemic supports the need for Amendment to the ADA and adoption of a separate telework statute. Specifically, this Part acknowledges that the recent increase of telework and the associated increase of production levels supports the proposal of an amendment that will eliminate the physical presence presumption, include telework as a listed reasonable accommodation, and include the susceptibility of an individual's household to disease as a qualifying disability for the individual herself. This Part also argues that Congress should finally adopt the Multi State Telework Act, in order to incentivize state and private employers to adopt telework arrangements.

## I. THE ADA

### A. The Evolution of the ADA

On July 26, 1990, President Bush signed the Americans with Disabilities Act into law.[3] Considered the "emancipation proclamation for people with disabilities," the ADA was an attempt by Congress to decrease prejudice against individuals with disabilities.[4] The purpose was to provide "equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[5] Of the five titles of the ADA, Title 1 pertains to employment.[6] Specifically, Congress enacted Title 1 of the Act "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[7] The ADA aims to protect any and all individuals with real or perceived physical disabilities or mental impairments that substantially limit major life activities.[8] The Equal Employment Opportunity Commission ("EEOC") is the federal agency primarily responsible for enforcement of Title 1 of the ADA and, in its EEOC guidance of 1991, defines disability as a "physical or mental impairment that substantially limits one or more of the major life

3. ADA NAT'L NETWORK, *Timeline of the Americans with Disabilities Act*, INFORMATION, GUIDANCE, AND TRAINING ON THE AMERICANS WITH DISABILITIES ACT (Jan. 2021), https://adata.org/ada-timeline/ada-passed-house-july-26-ada-signed [https://perma.cc/Q27H-DUQY].

4. 136 CONG. REC. 17369 (1990) (statement of Sen. Tom Harkin).

5. 42 U.S.C. § 12101(a)(7).

6. *Glossary of ADA Terms*, ADA NATIONAL NETWORK: INFORMATION, GUIDANCE, AND TRAINING ON THE AMERICANS WITH DISABILITIES ACT (Jan. 2021), https://adata.org/glossary-terms [https://perma.cc/HGK9-RLP8#T].

7. 42 U.S.C. § 12101(b)(1).

8. 42 U.S.C. § 12102(1)–(4).

activities of such individual," "a record of impairment," or "being regarded as having such an impairment."[9]

However, the ADA requires more than anti-discrimination: it also requires affirmative conduct. Specifically, Title 1 requires an employer to provide reasonable accommodations in the work environment to disabled, qualified individuals, so long as the requested accommodations do not impose an undue hardship on the employer.[10] In *The ADA: Your Responsibilities as an Employer,* the EEOC clarifies that "an individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation, in order to be protected by the ADA."[11] Specifically, this means that the applicant or employee must "satisfy [the employer's] job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job-related" and "be able to perform those tasks that are essential to the job, with or without reasonable accommodation."[12] In this same guidance, the EEOC defines reasonable accommodations as:

> [A]ny change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.[13]

The ADA is not without limits. The ADA identifies a subset of individuals who an employer must accommodate, as well as the extent of accommodations. For example, an employer need only provide those accommodations that are deemed "reasonable" and do not impose an undue hardship.[14] In its 1991 guidance, the EEOC defines undue hardship as an action that requires "significant difficulty or expense" in relation to the size of the employer, the resources available, and the nature of the operation.[15] Under the ADA, a "reasonable accommodation" may include:

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9. 29 C.F.R. § 1630.2(g)(1) (2016); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, THE ADA: YOUR RESPONSIBILITIES AS AN EMPLOYER (Jan. 1, 1991), https://www.eeoc.gov/laws/guidance/ada-your-responsibilities-employer [https://perma.cc/HZ39-KUJF].

10. 42 U.S.C. § 12112(b)(5)(A).

11. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 9.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

> (a) making existing facilities used by employees readily accessible to and usable by individual with disabilities; and
>
> (b) job restricting, part-time, or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials, or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[16]

While the ADA does include an illustrative list of possible reasonable accommodations, this list is by no means exhaustive.[17] Accordingly, identifying exactly which accommodations are reasonable under the ADA has historically been a challenge for employees, employers, and for courts.[18] By way of example, Chief Judge Posner, writing for the Seventh Circuit in 1995, stated that although accommodation requires that the "employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions . . . . [T]he difficult term is 'reasonable.'"[19] Almost ten years later, the Supreme Court continued to refine the definition of "reasonable."[20]

In 2002, the Court granted certiorari in *U.S. Airways v. Barnett* to decide whether "the [ADA] requires an employer to reassign a disabled employee to a position as a 'reasonable accommodation,' even though another employee was entitled to hold the position under the employer's bona fide and established seniority system."[21] In the opinion, the Court provided further guidance on exactly what constituted a reasonable accommodation.[22] This case involved an employee, Mr. Barnett, who worked as a cargo-handler for U.S. Airways.[23] After Mr. Barnett was injured, he transferred to a less physically demanding position.[24] This position, however, subsequently became open for seniority-based bidding,

16. 42 U.S.C. § 12111(9).

17. *Id.* (using the "may include" language).

18. Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 339–40 (2003).

19. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).

20. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

21. *Id.* at 395–96; *see* Stephen F. Belfort, *Reasonable Accommodation and Reassignment under the Americans with Disabilities Act: Answers, Questions, and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931, 933 (2003).

22. *See Barnett*, 535 U.S. at 391.

23. *Id.* at 394.

24. *Id.*

in line with the employer's long-standing seniority policy used in filling positions.[25] When two employees with greater seniority planned to bid on this position, Mr. Barnett requested a reasonable accommodation in the form of an exception to the seniority policy.[26] U.S. Airways denied the request, disagreeing with Mr. Barnett on what Congress intended for the term "reasonable accommodation."[27]

The Court rejected U.S. Airways' interpretation that "reasonable" could not result in "preference."[28] The Court explained that just because an accommodation may violate a disability-neutral rule, it is not automatically unreasonable.[29] The Court reasoned that "[b]y definition, any special accommodation requires the employer to treat an employee with a disability differently, *i.e.*, preferentially."[30] The Court stated that otherwise, "the reasonable accommodation provision could not accomplish its intended objective," as Congress said nothing suggesting that a neutral employment rule would create an automatic exception to accommodations.[31]

At the same time, the Court rejected Barnett's interpretation that reasonable is synonymous with effective.[32] The Court reasoned that although an accommodation could be effective in terms of allowing an individual to perform essential tasks, this would not automatically make the accommodation reasonable.[33] While the Court did not provide a rigid test for when an accommodation is "reasonable," it did hold that an accommodation must, at the threshold level, be reasonable "on its face, *i.e.*, ordinarily or in the run of cases."[34] As such, once the employee has shown that the accommodation is "reasonable on its face," the burden shifts to the employer, who then must show case-specific circumstances demonstrating that the requested accommodation presents an undue hardship.[35]

While this case did not revolve around telework, it does highlight the case-by-case analysis required for all reasonable accommodations. Despite the lack of a rigid test for reasonable accommodations, courts have consistently understood that a reasonable accommodation by an employer does not require the elimination of an essential function of the job.[36]

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25. *Id.*
26. *Id.*
27. *Id.* at 394–95.
28. *Id.* at 397.
29. *Id.*
30. *Id.* (internal citation omitted).
31. *Id.* at 397–98.
32. *Id.* at 399–400.
33. *Id.* at 400–01.
34. *Id.* at 401–02.
35. *Id.* at 402.
36. *See id.*; Rorrer v. City of Stow, 743 F.3d 1025, 1039 (6th Cir. 2014); Knutson v. Schwan's Home Serv., Inc., 711 F.3d 911, 916 (8th Cir. 2013); Mason v. Avaya Commc'n, Inc., 357 F.3d 1114, 1122–24 (10th Cir. 2004).

Likewise, an employer is not required to create a new job, or recreate an old job, to enable an employee with a disability to work.[37]

### B. Regulatory History of Telework as a Reasonable Accommodation

While telework is not expressly mentioned in the text of the ADA or ADAAA, the EEOC issued guidance in 2003, upon the approval of the Chair of the U.S. Equal Employment Opportunity Commission, indicating that telework can qualify as a reasonable request for accommodation.[38] This guidance was issued in response to an increasing number of employers discovering "the benefits of allowing workers to work at home through telework [] programs," such as the ability to attract and retain valuable workers through good employee morale and productivity.[39] Additionally, the EEOC guidance noted that technological advancements had helped increase the telework opportunities available to employers and employees.[40] In order to provide direction for both employers and employees, this guidance serves to "address[] the use of telework as a reasonable accommodation for individuals with a disability under the ADA."[41]

The EEOC emphasized that not all persons with disabilities need, or even want, to work from home.[42] Further, the EEOC recognized that not all jobs can be effectively performed at home.[43] While acknowledging that there is no requirement for employers to offer a telework program to all employees, the EEOC clarified the lack of an existing telework program does not mean that an employer never has to reasonably accommodate an employee in the form of telework.[44] Specifically, the EEOC guidance states that where the person's disability prevents successful performance of the on-site job, and the job can be performed at home without causing significant difficulty or expense to the employer, telework is an acceptable reasonable accommodation.[45]

Moreover, the guidance outlines that employers should utilize an interactive process to determine whether telework will qualify as a reasonable accommodation in certain situations.[46] Specifically, the EEOC

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37. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 9.

38. U.S. EQUAL EMP.. OPPORTUNITY COMM'N, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (Feb. 3, 2003), https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation [https://perma.cc/RGD4-UVPY].

39. *Id.* ("also known as telecommuting" omitted).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

guidance advises that the process include (1) the employee informing the employer of the medical condition, (2) a discussion between the employee and employer regarding the need to work from home as a reasonable accommodation for the employee's disability, and (3) why telework is the appropriate reasonable accommodation.[47] The guidance specifies that many types of accommodation may be discussed, but "in some situations, working at home may be the only effective option for an employee with a disability."[48]

The 2003 guidance from the EEOC further discusses the recommended process for an employer to implement when determining whether a particular job can be effectively performed at home.[49] This process includes identifying and reviewing all essential functions of a job and determining whether some or all of those functions can be effectively performed at home.[50] The term "essential function" is defined in the ADA as "those tasks that are fundamental to performing a specific job."[51] Determining whether those essential functions can be effectively performed at home requires balancing several factors: the employer's "ability to supervise the employee adequately and whether any duties that require use of certain equipment [] can[] be replicated at home"; the employer's "need for face-to-face interaction"; the employer's requirement or necessity for "in-person interaction with outside colleagues"; and whether the position in question requires the employee to have immediate access to documents or other information located only at the workplace.[52] The 2003 EEOC guidance emphasizes that an employer should not deny a telework request solely because a job requires some contact and coordination with other employees, as meetings can frequently be conducted effectively by telephone and email.[53] Employees and employers continue to rely on this guidance from 2003 in order to "provide clarity . . . regarding existing requirements" under the ADA.[54]

While the EEOC's guidance is not binding on employers, some courts defer to it, holding that telework, in certain circumstances, qualifies as a reasonable accommodation.[55] Other courts, however, continue to assume physical presence is automatically an essential function of any job,

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *See* Merrill v. McCarthy, 184 F. Supp. 3d 221, 239 (E.D.N.C. 2016).

in direct contrast to the EEOC telework guidance of 2003.[56] This disparity in the way courts address telework as a reasonable accommodation and consider physical presence is based on a conflict between the 2003 EEOC guidance and holdings from the earliest cases involving reasonable accommodations, particularly the judicially created presumption that physical presence was essential to every job and thus telework was never reasonable, absent some extraordinary showing.[57] Despite some courts moving toward a more fact-specific inquiry for telework requests as recommended by the EEOC,[58] as of 2015, other courts still presumed that physical presence was an essential job function as a default rule, regardless of the context. [59]

The physical presumption standard was originally adopted by the Seventh Circuit in 1995 in its decision in *Vande Zande v. Wisconsin Dep't of Administration*.[60] This case involved a paraplegic employee's request to work from home.[61] Specifically, Lori Vande Zande was paralyzed from the waist down as a result of a tumor in her spinal cord.[62] Her paralysis made her prone to suffer from pressure ulcers, and the treatment for such a condition required she stay at home for several weeks.[63] Vande Zande worked for the housing division of the state's department of administration as a program assistant.[64] Her job duties required "preparing public information materials, planning meetings, interpreting regulation, typing, mailing, filing, and copying."[65] When her employer failed to accommodate her disability in the form of full-time telework, Vande Zande brought suit under the ADA.[66]

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56. *See* EEOC v. Ford, 782 F.3d 753, 771 (6th Cir. 2015) (Moore, C.J., dissenting) (dissenting because the majority refuses to engage in the fact-intensive, case-by-case determination required by the EEOC regulations).

57. *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (creating presumption that physical presence at work is an essential function of most jobs).

58. *See* Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997); Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001); McMillan v. City of New York, 711 F.3d 120, 126 (2d Cir. 2013) (disregarding presumption of physical presence and highlighting importance of true fact-specific, case-by-case analysis).

59. *See Ford*, 782 F.3d at 771 (Moore, C.J., dissenting); Mary Hancock, Comment, *'Working from Home' or 'Shirking from Home':* McMillan v. City of New York*'s Effect on the ADA*, 16 DUQ. Bus. L.J. 151, 161 (2013) ("The position the court took in Vande Zande . . . now represents the majority view.").

60. *Vande Zande*, 44 F.3d at 544–45.

61. *Id.* at 543.

62. *Id.*

63. *Id.*

64. *Id.* at 544.

65. *Id.*

66. *Id.*

The Seventh Circuit ultimately held that full-time work-from-home was not a required reasonable accommodation for this employee.[67] As such, summary judgment was granted for the employer.[68] Specifically, the court stated, "[m]ost jobs in organizations public or private 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."[69] Although the Seventh Circuit acknowledged that this finding would likely change as communications technology advanced, it remained "the situation [in 1995]."[70]

Many subsequent courts interpreted this holding to mean physical presence was an essential function of the job that could not be eliminated.[71] Just two years later, for example, the Sixth Circuit relied on *Vande Zande* in applying the presumption of physical presence in *Smith v. Ameritech*.[72] A few years thereafter, the Fifth and Ninth Circuits similarly declined to construe telework as a reasonable accommodation in *Fulmer v. George Gervin Youth Center, Inc.* and *Samper v. Providence St. Vincent Medical Center*, respectively, citing a presumption of physical presence as the reason.[73]

### C. The ADAAA's Impact on Telework

With rare exception, federal circuit courts continued the previous trend by granting very few requests for teleworking accommodations until Congress passed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA").[74] The Job Accommodations Network is a department of the U.S. Labor Department that advises companies on reaching ADA accommodations.[75] Prior to the ADAAA, about one percent of questions employers posed to the Job Accommodations Network concerned

67. *Id.*
68. *Id.* at 546.
69. *Id.* at 544.
70. *Id.*
71. *See* Whillock v. Delta Air Lines, Inc., 926 F. Supp. 1555, 1563–66 (N.D. Ga. 1995); Hancock, *supra* note 59.
72. Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997).
73. *See* Fulmer v. George Gervin Youth Ctr., Inc., 190 F.3d 537 (5th Cir. 1999); Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1238 (9th Cir. 2012) (asserting "common-sense notion" that attendance is an essential function).
74. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3)–(7), 122 Stat. 3553 (2008).
75. *About Jan*, JOB ACCOMMODATION NETWORK, https://askjan.org/about-us/index.cfm [https://perma.cc/BS9W-Y5JH] (last visited July 30, 2021).

telework.[76] In contrast, after the ADAAA was signed into law in 2009, the number tripled.[77] While the ADAAA did not specifically address telework as a reasonable accommodation, it did significantly increase the scope of the ADA, which resulted in more accommodations overall, "where telework is heavily represented."[78]

Specifically, Congress enacted the ADAAA to overturn several Supreme Court decisions that had narrowed the definition of disability and intended thereby to restore the original scope and effectiveness to the ADA.[79] The ADAAA clarified that disability must be "broadly defined to include more people."[80] Specifically, when the ADA was first passed into law in 1990, federal courts were very strict about which employees met the ADA's definition of a "disability."[81] This was because in the original ADA, "disability" was defined only as "an impairment that substantially limits one or more major life activities."[82] While retaining the original definition of disability, Congress in the ADAAA expanded the practical application of the ADA. Congress noted its expectation that "the ADA would be interpreted consistently with how courts had applied the definition of [disability] under the Rehabilitation Act of 1973 . . . ha[d] not been fulfilled."[83] The ADAAA expanded the courts' perceived scope of the ADA in several ways.

First, the ADAAA expanded the list of major life activities that a disability may affect.[84] Specifically, Congress expanded this provision to also include "major bodily functions."[85] This expanded the qualifying requirements for a disability to include problems with "functions of the immune system, normal cell growth . . . endocrine, and reproductive

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76. Joseph Marks, *Telework as ADA Accommodation on the Rise,* SHRM BLOG (Dec. 1, 2011), https://blog.shrm.org/trends/telework-as-ada-accommodation-on-the-rise [https://perma.cc/8HPS-8MUG].

77. *Id.*

78. *Id.*

79. ADA Amendments Act § 2(b).

80. *Id.* § 2(a)(1), (b)(1); ADA NAT'L NETWORK, *An Employer View of the Changes from the ADA Amendments Act*, INFORMATION, GUIDANCE, AND TRAINING ON THE AMERICANS WITH DISABILITIES ACT (Jan. 2021), https://adata.org/factsheet/employer-view-ada [https://perma.cc/2976-MRVJ].

81. Thom K. Cope, *The ABCs of the ADAAA: What Employers Need to Know about Recent Changes to the Americans with Disabilities Act,* MESCH CLARK ROTHSCHILD, https://www.mcrazlaw.com/the-abcs-of-the-adaaa-what-employers-need-to-know-about-recent-changes-to-the-americans-with-disabilities-act/ [https://perma.cc/CFX4-SKHA] (last visited June 19, 2021).

82. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

83. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), 122 Stat. 3553 (2008).

84. *Id.* § 4(a).

85. *Id.*

functions."[86] Second, the ADAAA prohibited courts from considering whether "mitigating measures" reduce the impact of the employee's impairment.[87] Third, the ADAAA clarified that "episodic" diseases may still qualify as a disability.[88] Finally, the ADAAA allowed individuals with a "perceived" disability to make claims under the ADA, even if the "perceived" disability does not impact a major life activity.[89]

In addition to expanding the qualifying factors for a disability and thereby expanding the classes of people with a qualifying disability, the ADAAA specifically rejected two controversial Supreme Court decisions that "played a large role in restricting the legal definition of disability."[90] The ADAAA explicitly overturned the Supreme Court's decisions in *Sutton v. United Air Lines*[91] and *Toyota Motor Mfg., KY, Inc. v. Williams*, discussed further below.[92] Congress unambiguously rejected the high standards imposed on the claimants by the Court in those cases and reiterated that Congress intended the scope of the ADA to be broad and inclusive.[93]

In *Sutton v. United Air Lines, Inc*., two severely myopic twin sisters applied to US Airlines for employment as commercial airline pilots.[94] Both sisters "had uncorrected visual acuity of 20/200 or worse, but with corrective measures, both function[ed] identically to individuals without similar impairments."[95] When they were denied employment, both sisters filed suit under the ADA.[96] The petitioners in this case maintained that "whether an impairment is substantially limiting should be determined without regard to corrective measures."[97] In contrast, the respondent maintained that "an impairment does not substantially limit a major life activity if it is corrected."[98] The Supreme Court ultimately held that the respondent had the correct approach. The Court reasoned:

> Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* § 2(b)(2)–(4) (Congress stated two of the purposes of the ADAAA to be "(3) to reject the Supreme Court's reasoning in Sutton . . .; (4) to reject the standards enunciated by the Supreme Court in Toyota Motor . . . .").
91. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).
92. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).
93. ADA Amendments Act § 2(a)(8)–(b)(1).
94. *Sutton*, 527 U.S. at 475.
95. *Id.*
96. *Id.*
97. *Id.* at 481.
98. *Id.*

> or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is "substantially limited" in a major life activity and thus "disabled" under the Act.[99]

Thus, the Supreme Court held that corrective and mitigating measures should be considered in determining whether an individual is disabled under the ADA.[100] Based on this reasoning, the Court determined that the petitioners had failed to state a claim that they were actually disabled.[101]

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, an employee who suffered from carpal tunnel syndrome and bilateral tendinitis sued Toyota Motor Manufacturing under the ADA after being terminated for an allegedly "poor attendance record."[102] Disputing this, the employee alleged that Toyota Motor Manufacturing had failed to reasonably accommodate her disability.[103] The employee based her claim that she was "disabled" under the ADA "on the ground that her physical impairments substantially limited her in (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working."[104] The district court found that the employee was not disabled, holding that she suffered from a physical impairment, but that impairment did not qualify as a disability because it had not substantially limited any major life activity.[105] The Court of Appeals reversed, holding that in order for an employee to demonstrate that she is disabled due to a substantial limitation, she has to "show that her manual disability involves a 'class' of manual activities affecting the ability to perform tasks at work," which the employee had effectively shown.[106]

The Supreme Court granted certiorari to determine the proper standard for assessing whether an individual is substantially limited in performing manual tasks and thus qualifies as "disabled" under the ADA.[107] The Court determined that the Court of Appeals applied the incorrect standard in analyzing only a limited class of manual tasks.[108] The Court ultimately held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most

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99. *Id.* at 482.
100. *Id.*
101. *Id.* at 494.
102. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 187 (2002).
103. *Id.* at 190.
104. *Id.*
105. *Id.* at 191.
106. *Id.* at 191–92.
107. *Id.* at 192.
108. *Id.* at 187.

people's daily lives. The impairment's impact must also be permanent or long term."[109]

In the ADAAA, Congress found "the holding of the Supreme Court in *Sutton v. United Air Lines, Inc.* . . . narrowed the broad scope of protection intended to be afforded by the ADA," and "the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* further narrowed the broad scope . . . ."[110] Congress found the Court's holding in *Toyota Motor Manufacturing*, wherein the Court interpreted the term "substantially limits" as meaning "significantly restricted," required a greater degree of limitation than was intended by Congress.[111] As a result, in the ADAAA, Congress clarified that the Court's narrow interpretation had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA."[112] In resolution, the ADAAA "convey[ed] that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[113]

Further, the ADAAA deleted two specific findings in the ADA that led the Supreme Court to limit the meaning and application of the definition of disability in *Sutton v. United Air Lines* and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.[114] The deleted findings had included the purported fact that "some 43,000,000 Americans have one or more physical or mental disabilities" and that "individuals with disabilities are a discrete and insular minority."[115] In explaining the reason for deleting the previous findings, the 2008 Senate Statement of the Managers noted:

> The [Supreme] Court treated these findings as limitations on how it construed other provisions of the ADA. This conclusion had the effect of interfering with previous judicial precedents holding that, like other civil rights statutes, the ADA must be construed broadly to effectuate its remedial purpose. Deleting these findings removes this barrier to construing and applying the definition of disability more generously.[116]

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109. *Id.* at 198.

110. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4), 122 Stat. 3553 (2008).

111. *Id.* § 2(a)(7).

112. *Id.* § 2(b)(5).

113. *Id.*

114. *Id.*

115. *Id.*

116. 154 Cong. Rec. S8840 (daily ed. Sept. 16, 2008) (Statement of the Managers) ("Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's

Although the ADAAA did not specifically address telework or the physical presence presumption, it did broaden the scope of qualified individuals, thus broadening the reasonable scope of requested accommodations.[117] As such, employers and courts began to see more telework requests as a result of the increase in reasonable accommodations overall. Five years after the ADAAA was passed, the Second Circuit for the first time addressed the use of telework as a reasonable accommodation.[118] The Second Circuit ultimately rejected the physical presence presumption, breaking with a number of circuit courts at that time.[119]

In *McMillian v. City of New York*, a city employee who had schizophrenia brought action against the city alleging disability discrimination in violation of the ADA.[120] The employee's schizophrenia required "treatment that prevent[ed] him from arriving to work at a consistent time each day." [121] When his employer refused to accommodate his disability in the form of a later start time each day, the employee brought suit under the ADA.[122] The district court held that physical presence was "an essential requirement of virtually all employment."[123] The Second Circuit, however, expressly rejected this heavy reliance on the presumption.[124] In rejecting the presumption, Judge John Walker Jr., writing for the majority, explained that "physical presence at or by a specific time is not, as a matter of law, an essential function of all employment."[125] Further, the Second Circuit highlighted the importance of "penetrating factual analysis," stating, "[w]hile a timely arrival is normally an essential function, a court must still conduct a fact-specific inquiry, drawing all inferences in favor of the non-moving party."[126] The Second Circuit's ruling, unfortunately, did not gain much traction.

Despite the increase in telework requests, the strengthened protections under the ADAAA, and the 2003 EEOC guidance on telework as a reasonable accommodation, many courts continued to apply the

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narrower standard" and "[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.").

117. ADA Amendments Act § 2(a) ("Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and *provide broad coverage*") (emphasis added).

118. McMillan v. City of New York*,* 711 F.3d 120 (2d Cir. 2013).

119. *Id.* at 126.

120. *Id.* at 123–24.

121. *Id.* at 123.

122. *Id.* at 124.

123. *Id.* at 126.

124. *Id.*

125. *Id.*

126. *Id.*

physical presence presumption and summarily deny such requests.[127] For instance, the Sixth Circuit in its *EEOC v. Ford* decision continued the presumption of physical presence, holding that "regular and predictable on-site job attendance was both an essential function of, and prerequisite to perform other essential functions of, the employee's . . . job."[128] This case involved a woman with irritable bowel syndrome who requested to work from home on an as-needed basis.[129] The Sixth Circuit, relying in part on *Smith v. Ameritech*,[130] noted that "in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees."[131] The Sixth Circuit also heavily relied on the EEOC's informal guidance that stated that an employer may refuse a telecommuting request when, among other things, the job requires "face-to-face interaction and coordination of work with other employees;" "in-person interaction with outside colleagues, clients, or customers;" and "immediate access to documents or other information located only in the workplace."[132]

Additionally, the court rejected the argument that general technological advancement can justify consideration of telework.[133] Instead, the court held that in order to reconsider telework as a reasonable accommodation, the record must show the "highly interactive job" can now be "performed at home effectively due to advances in technology."[134] The dissent, conversely, argued that "it should no longer be assumed that teamwork must be done in-person," explaining that any presumption of physical presence impedes the case-by-case analysis required in these cases.[135]

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127. EEOC v. Ford, 782 F.3d 753 (6th Cir. 2015); *see also* Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1223 (9th Cir. 2012).

128. *Ford*, 782 F.3d at 761.

129. *Id.* at 758.

130. Smith v. Ameritech, 129 F.3d 857 (6th Cir. 1997).

131. *Ford*, 782 F.3d at 762.

132. *Id.*; WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION, *supra* note 38.

133. *Ford*, 782 F.3d at 765.

134. *Id.* This court, however, has not been completely rigid in its interpretation since *EEOC v. Ford*. For example, three years later, the Sixth Circuit recognized in *Hostettler v. College of Wooster* that "full time presence is not an essential function of a job simply because an employer says it is." Hostettler v. College of Wooster, 895 F.3d 844, 857 (6th Cir. 2018).

135. *Ford*, 782 F.3d at 775–76 ("[T]he majority's insistence that the 'general rule' is that physical attendance at the worksite is an essential function of most jobs does not advance the analysis in this case.")

## II. COVID-19 HIGHLIGHTS CLEAR DEFICIENCIES IN ADA JURISPRUDENCE

Despite the widening scope of the ADA over the years and the fact that technological advancements have led to better telework capability, a majority of courts still appear hesitant to move away from the physical presence presumption. While the presumption has yet to change, the frequency of telework greatly increased near the end of 2019 due to the emergence of the coronavirus disease ("COVID-19"), and it has steadily continued to increase since then.[136] Kate Lister, the President of Global Workplace Analytics, predicts that "[twenty-five to thirty percent] of the workforce will be working from home multiple days a week by the end of 2021."[137] In March 2020, in response to the restrictions placed on the normal course of business and resulting work arrangements, the EEOC issued enforcement guidelines designed to "help employers implement strategies to navigate the impact of COVID-19 in the workplace."[138] These guidelines were temporary and specifically addressed the use of telework as a reasonable accommodation during the pandemic.[139]

According to the Bureau of Labor Statistics, in 2017 and 2018, only twenty percent of workers "were occasionally paid to work from home, and just [twelve percent] worked from home at least one full day per month."[140] In contrast, as of April 6, 2020, "up to half of American workers" were working from home, which was "more than double the fraction who worked from home (at least occasionally) in 2017-18."[141] Moreover, that trend is generally expected to continue. As economist Susan Athey told the Washington Post, "[p]eople will change their habits, and some of these habits will stick. . . . There's a lot of things where people are just slowly shifting, and this will accelerate that."[142] With the statistical evidence of

136. Katherine Guyot & Isabel V. Sawhill, *Telecommuting will likely continue long after the pandemic*, BROOKINGS (Apr. 6, 2020), https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic/ [https://perma.cc/VFH6-MAGT].

137. Kate Lister, *Work-At-Home After COVID-19—Our Forecast,* GLOBAL WORKPLACE ANALYTICS, https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast [https://perma.cc/4SNB-DCZ7].

138. U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [https://perma.cc/6PR6-WVFU].

139. *Id.*

140. Guyot & Sawhill, *supra* note 136.

141. *Id.*

142. Craig Timberg et al., *The new coronavirus economy: A gigantic experiment reshaping how we work and live*, WASH. POST (Mar. 21, 2020), https://www.washingtonpost.com/business/2020/03/21/economy-change-lifestyle-coronavirus [https://perma.cc/B242-9T6J].

successful telework during the COVID-19 pandemic,[143] the long-held presumption is likely to change as society continues to adapt. Part II addresses deficiencies in the ADA jurisprudence, as shown by the struggle of employers to adapt to telework arrangements during the pandemic, and the EEOC's attempt to improve this struggle.

### A. Emergence of COVID-19 and the Surprisingly Positive Impact on Telework

The first confirmed case of the coronavirus disease ("COVID-19") in the United States was reported on January 21, 2020.[144] While there were only a total of 14 cases between January 21 and February 23, 2020, that number jumped to over 1,500 by March 2020.[145] On March 11, 2020, the World Health Organization declared COVID-19 a pandemic.[146] By the end of 2020, there were 83,832,334 cases worldwide, with over 20 million cases and 346,000 deaths in the United States alone.[147] In an attempt to contain the spread of COVID-19, many states and localities across the United States "adopted social distancing measures, closing businesses and enacting stay-at-home orders."[148] In compliance with these stay-at-home orders, many businesses authorized their employees to work from home. However, a staggering number of employees did not have viable telework options and faced difficulties with their continued employment.

On March 21, 2020, the EEOC updated the "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" with additional guidance.[149] The EEOC originally issued the document in

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143. *See id.*; Guyot & Sawhill, *supra* note 136.

144. Anne Schuchat & CDC COVID-19 Response Team, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24–April 21, 2020*, CDC MORBIDITY AND MORTALITY WEEKLY REPORT (May 8, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e2-H.pdf [https://perma.cc/6XYA-KDS9].

145. *Id.*

146. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

147. AJMC Staff, *A Timeline of COVID-19 Developments in 2020*, AJMC (Jan. 1, 2021), https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020 [https://perma.cc/X55E-4XAE].

148. Mathew Dey et al., *Ability to work from home: evidence from two surveys and implications for the labor market in the COVID-19 pandemic*, MONTHLY LAB. REV. U.S. BUREAU OF LAB. STAT. (June 2020), https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm [https://perma.cc/BFM3-68BK].

149. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *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 (updated Mar. 21, 2020) [https://perma.cc/DTT8-CSNL].

2009, during the spread of H1N1 virus, and then it revised and reissued the guidance in 2020 to "incorporate updates regarding the COVID-19 pandemic."[150] One of the most important concepts of this new pandemic guidance is the reasonable accommodation provision.[151] Under this provision, the EEOC explained that "telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation."[152] Specifically, "employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic, even if the employer does not have a policy allowing it."[153] The EEOC further justified this decision by explaining that "telework is an example of social distancing, which public health authorities may require in the event of a pandemic."[154] Social distancing "reduces physical contact between people to minimize disease transmission."[155] As such, during a pandemic, social distancing measures may qualify as a reasonable accommodation for at-risk employees. Social distancing in the form of telework has been heavily utilized to combat the COVID-19 pandemic.

On March 27, 2020, the EEOC conducted a webinar on the COVID-19 pandemic in specific relation to antidiscrimination laws.[156] One section of the webinar addressed requests for telework, leave, and other types of job modifications.[157] This section included a list of CDC-identified medical conditions, including chronic lung disease and serious heart conditions, "as potentially putting individuals at higher risk."[158] The EEOC stated that all of these CDC-identified medical conditions qualify an individual to seek a reasonable accommodation.[159] As such, an individual with a disability that puts her at higher risk to contract COVID-19 is also qualified to request a reasonable accommodation.[160] Additionally, the EEOC explained there could be situations in which accommodations are reasonably requested to prevent the exacerbation of a pre-existing disability

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. Michael Oliver Eckard & Michelle McMahon, *The EEOC's Webinar on the COVID-19 Pandemic and Antidiscrimination Laws—an Overview,* 11 NAT. L. REV. 23 (Mar. 30, 2020), https://www.natlawreview.com/article/eeoc-s-webinar-covid-19-pandemic-and-antidiscrimination-laws-overview [https://perma.cc/UJ62-5JM2].
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

during the COVID-19 pandemic.[161] It is important to note, however, that an individual with a qualifying condition still must first request a reasonable accommodation.[162]

The EEOC acknowledged the difference between reasonable accommodations in the usual course of business as compared to a pandemic and its application to the "essential function" determination.[163] Specifically, the EEOC stated:

> To the extent the employer is permitting telework to employees because of COVID-19 [for the purpose of slowing or stopping the spread] and is choosing to excuse an employee from performing one or more essential functions, then the employer is not required to grant a request to continue telework as a reasonable accommodation after the COVID-19 crisis has ended if that request requires continuing to excuse the employee from performing an essential function.[164]

Thus, the EEOC clarified that telework during a pandemic could indeed include the elimination of an essential job function, as opposed to the normal course of business in which an accommodation is deemed unreasonable if an essential function has to be removed.[165] However, "assuming all requirements for reasonable accommodation are satisfied . . . . The period for providing telework for the COVID-19 pandemic could serve as a trial period to show whether this employee with a disability could satisfactorily perform the essential functions while working remotely."[166] Thus, an employee could use satisfactory telework productivity during the COVID-19 pandemic to show that her job can be performed at home, and essentially overcome the physical presence presumption for specific job functions. The question for employers will be whether any essential functions were in fact eliminated during the COVID-19-related telework arrangements.

The U.S. Department of Health and Human Services ("HHS"), a federal agency that employs over 79,000 people, provided further guidance in May of 2020 regarding high-risk individuals that may qualify to seek reasonable accommodations.[167] Specifically, HHS listed direct steps to

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161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Employers with Workers at High Risk*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 29, 2020),

modify its operations with the goal of protecting at-risk individuals.[168] HHS advised employers to "protect employees at higher risk for severe illness by supporting and encouraging options to telework," "provide employees from higher transmission areas [to] telework," and "encourage telework for as many employees as possible."[169]

### B. Resulting Telework Statistics

In April 2020, the chief economist of freelancing platform Upwork conducted a report, based on the surveys of two independent researchers, on the effects of the "sudden shock of COVID-19" on remote work in the U.S.[170] The surveys showed that ninety-four percent of 1,500 hiring managers indicated that some of their workers teleworked during the pandemic.[171] Further, they showed comparisons of pre-COVID-19 and post-COVID-19 teleworking numbers.[172] By way of example, forty-six percent of employers had no remote workers on their team pre-COVID-19, with only six percent of employers having no remote workers when COVID-19 first emerged.[173] Additionally, twenty percent of employers had a fully remote team during COVID-19 compared to roughly only two percent of employers pre-COVID-19.[174] The survey additionally included questions regarding the effectiveness of remote work—or at least the effectiveness as perceived by hiring managers.[175] The results showed that fifty-six percent of hiring managers felt that remote work had gone better than expected while only about one in ten felt it had gone worse than expected.[176] This data suggests that hiring managers "view remote work more positively overall" after engaging in the telework process due to the COVID-19 pandemic.[177]

In July 2020, Gallup, an American analytics and advisory company, conducted another study based on the results of its annual Work and

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https://www.cdc.gov/coronavirus/2019-ncov/community/high-risk-workers.html [https://perma.cc/APL3-ZPD2].

168. *Id.*

169. *Id.*

170. Adam Ozimek, *The Future of Remote Work*, UPWORK (2020), https://www.upwork.com/press/economics/the-future-of-remote-work/ [https://perma.cc/WGE4-HAJX] (Upwork began as "a new web-based platform that brought visibility and trust to remote work").

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

Education poll.[178] The results showed that one in four workers were working entirely from home.[179] Even for those individuals who were not working entirely from home, the average number of workdays telecommuters worked from home had more than doubled.[180] Among these individuals teleworking, there was a clear variation by occupation.[181] Individuals working in management, business, and financial operations were the most likely to telework, at forty-six percent.[182] Individuals working in professional and related occupations were a close second, at forty-four percent.[183] In contrast, individuals working in service, natural resource and maintenance, and production and transportation occupations were less likely to telework, at five percent, five percent, and four percent, respectively.[184]

Not only is it important to note the sheer number of individuals teleworking during the COVID-19 pandemic, but it also is vital to note the productivity levels and employee/employer attitudes associated with telework.[185] From May through June of 2020, the Boston Consulting Group performed a study on employee sentiment in response to the increasing rise of telework.[186] Boston Consulting Group interviewed 12,000 professionals employed before and during COVID-19 in the US, Germany, and India.[187] Those interviewed had occupations ranging from analysts and engineers to human resources personnel and health care providers.[188] The study explored the employees' attitudes towards flexibility, productivity, well-being, learning and development, and more.[189] The study revealed that "a surprisingly large number of employees said they have been able to

178. Jeffrey M. Jones, *U.S. Remote Workdays Have Doubled During Pandemic*, GALLUP (Aug. 31, 2020), https://news.gallup.com/poll/318173/remote-workdays-doubled-during-pandemic.aspx [https://perma.cc/JJ58-Q3F4].

179. *Id.*

180. *Id.* (5.8 days per month last fall to 11.9 days currently).

181. *Supplemental data measuring the effects of the coronavirus (COVID-19) pandemic on the labor market*, U.S. BUREAU OF LAB. STAT. (Dec. 9, 2020), https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm#:~:text=The%20likelihood%20of%20teleworking%20because,operations%20occupations%20(50%20percent) [https://perma.cc/M5LY-J3Q3].

182. *Id.*

183. *Id.*

184. *Id.*

185. Adriana Dahik et al., *What 12,000 Employees Have to Say About the Future of Remote Work*, BOS. CONSULTING GRP. (Aug. 11, 2020), https://www.bcg.com/en-us/publications/2020/valuable-productivity-gains-covid-19 [https://perma.cc/GB7V-D4WB].

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

maintain or even improve their productivity during the pandemic."[190] Seventy-five percent of employees said they have been able to maintain or improve productivity on their individual tasks.[191] While the number for employees who regularly performed collaborative tasks was lower, still more than half of the employees polled engaged in collaborative work.[192]

At the federal level, a large number of Department of Defense ("DOD") personnel have been teleworking and "successfully continuing the mission."[193] Lisa Hershman, Chief Management Officer of the DOD, spoke specifically in regard to how they managed medical care and stated they saw a phenomenal increase in productivity metrics once personnel began working remotely.[194] When Hershman inquired into this change in productivity levels, her employees indicated that teleworking allowed for fewer interruptions by phone calls and people knocking on doors, as well as the elimination of long commutes, resulting in decreased fatigue.[195]

This collective data shows that more occupations are capable of performing effective telework than previously thought. While not all occupations can effectively be performed from a remote location, this data shows the need for employers to reexamine telework as a reasonable accommodation across multiple disciplines.

### C. Federal Telework Act of 2010

The COVID-19 pandemic was not the first time a crisis had resulted in an increase in telecommuting.[196] For example, interest in teleworking spiked significantly following the events of 9/11 and the following anthrax attacks.[197] As Congressman Tom Davis explained in a 2004 committee hearing, "[w]e now realize that telework needs to be an essential component of any continuity of operations plan. Something we once considered advantageous and beneficial has evolved into a cornerstone of emergency preparedness."[198]

In March 2010, President Obama hosted a White House Forum on "workplace flexibilities," which included telework, emphasizing their "vital role in recruiting and retaining the best and brightest workers and

190. *Id.*
191. *Id.*
192. *Id.*
193. David Vergun, *DOD Personnel Prove Productive, Resilient During Pandemic*, U.S. DEP'T OF DEF. (Sept. 21, 2020), https://www.defense.gov/Explore/News/Article/Article/2355591/dod-personnel-prove-productive-resilient-during-pandemic/ [https://perma.cc/6T5D-YWM8].
194. *Id.*
195. *Id.*
196. Guyot & Sawhill, *supra* note 136.
197. *Id.*
198. *Id.*

maximizing their effectiveness."[199] Four months later, on December 9, 2010, Congress passed and President Obama signed into law the Telework Enhancement Act of 2010 ("Act").[200] Congress drafted the Act with the purpose "to require the head of each executive agency to establish and implement a policy under which employees shall be authorized to telework."[201] Specifically, the Act mandates every executive agency to: "(1) establish a policy under which eligible employees of the agency may be authorized to telework; (2) determine the eligibility for all employees of the agency to participate in telework; and (3) notify all employees of the agency of their eligibility to telework."[202]

The Act specifies roles, responsibilities, and expectations for all federal executive agencies with regard to telework policies, employee eligibility and participation, program implementation, and reporting.[203] Further, it assigns specific duties to governmental agencies, charging them with directing overall policy and providing policy guidance to federal executive agencies on an ongoing basis. For example, the U.S. Office of Personnel Management ("OPM"), which serves as the chief human resources agency and personnel policy manager for the federal government, was charged with annual reporting to Congress of different agencies' telework programs.[204] This allowed Congress to oversee the implementation of the Act.[205]

While the Act began as an effort to address transportation concerns, the benefits were more diverse than expected. Among them were "sav[ing] money by helping government reduce real estate and energy costs[,] . . . mak[ing] [the government] more resilient in severe weather and other emergencies, improv[ing] the quality of employee work-life, and increas[ing] employment opportunities for persons with disabilities."[206] One of the most impressive benefits was the environmental impact.[207]

In response to the Act, two literature reviews were compiled by OPM researchers. The reviews detail the best practices on using telework as a tool to reduce green gas emissions, alleviate traffic congestion, and

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199. U.S. OFF. OF PERS. MGMT., GUIDE TO TELEWORK IN THE FEDERAL GOVERNMENT (2011), https://www.telework.gov/guidance-legislation/telework-guidance/telework-guide/guide-to-telework-in-the-federal-government.pdf [https://perma.cc/RV65-YZQT].

200. Telework Enhancement Act of 2010, Pub. L. No. 111-292, § 6501 et seq., 124 Stat. 3165 (2010).

201. *Id.*

202. 5 U.S.C. § 6502 (2021).

203. *See* Telework Enhancement Act § 6501 et seq.

204. 5 U.S.C. § 6506(b) (2021).

205. *See id.*

206. U.S. OFF. OF PERS. MGMT., *supra* note 199.

207. *Id.*

improve local air quality.[208] Specifically, these studies showed a ten-year savings of 312.4 million tons of greenhouse gas emissions with the use of regular telework.[209] In addition to the benefit on greenhouse emissions, following the passage of the Act, companies have successfully reduced energy costs, real estate costs, employee fuel costs, and many other utility costs by utilizing telework for their employees.[210]

One of the most successful examples of the telework benefits is the United States Patent and Trademark Office ("PTO"), which is widely considered a leader in telework within the federal government.[211] PTO has 7,030 teleworkers and 8,125 eligible telework positions.[212] Of PTO's teleworkers, 3,739 of them telework four to five days per week. As a result of their arrangement, PTO had saved $19.8 million in real estate costs as of August 2011, just one year after the passage of the Act.[213]

In contrast, there is no similar telework mandate for non-federal employers. As such, the EEOC issued additional guidelines designed to "help [non-federal] employers implement strategies to navigate the impact of COVID-19 in the workplace."[214] However, EEOC guidance is simply that—guidance. In order to ensure that non-federal employers and employees alike are aware of the full potential and advantages of teleworking as a reasonable accommodation, any "guidance" needs to be addressed in the form of binding legislation or encouraging telework by providing economic incentives.

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208. U.S. OFF. OF PERS. MGMT., 2012 STATUS OF TELEWORK IN THE FEDERAL GOVERNMENT REPORT TO CONGRESS (2012), https://www.telework.gov/reports-studies/reports-to-congress/2012-report-to-congress.pdf [https://perma.cc/9AMT-PQKE].

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS (June 28, 2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [https://perma.cc/3WHN-3MAY].

## III. THE PANDEMIC SHOWCASES THE NEED FOR RETHINKING TELEWORK AS A REASONABLE ACCOMMODATION

### A. Proposed Amendment to the ADA

#### *1. Eliminate the Physical Presence Presumption*

While Courts have grown more open to examining on a case-by-case basis whether physical presence is essential in particular situations, the shift away from this outdated presumption has been slow. Plaintiffs challenging denial of telework accommodation still face "rough sledding," as judges frequently throw out telework disability lawsuits on summary judgment motions.[215] The widespread use of teleworking over the past year, however, shows that physical presence is often no longer essential for effective performance in a number of occupations. Without binding law, employers and courts alike are free to continue to deny telework without an actual inquiry into whether physical attendance is essential to an employee's position. As such, binding legislation is necessary to discredit this outdated presumption. The best way to accomplish this goal is with an Amendment to the ADA that specifically lists "telework" as a possible reasonable accommodation, with direction that the presumption of physical presence is no longer valid under this analysis. Telework as a reasonable accommodation must be decided on a case-by-case basis.

While the ADAAA increased the protections to individuals with disabilities, many courts still continuously denied telework as a reasonable accommodation. This was because many courts relied on the presumption of physical presence, just as the Sixth Circuit did in *EEOC v. Ford*, holding that "regular and predictable on-site job attendance was both an essential function of, and prerequisite to perform other essential functions of, the employee's . . . job."[216]

The Seventh Circuit correctly noted in its *Vande Zande* holding that the presumption of physical presence would likely change as "communications technology" advances, and the case was decided in that fashion solely due to the technological advancements of that time.[217] The handling of the coronavirus across a number of disciplines shows that "communications technology" has advanced to the point where this outdated presumption, that physical presence is an essential element of every job, has been proven invalid. Instead, whether physical presence is essential to the position requires a case-by-case fact-specific inquiry. While

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215. Robert Iafolla, *Work at Home Gets Skeptical Eye From Courts as Disability Issue*, BLOOMBERG L. (Feb. 21, 2019, 5:15 AM), https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue [https://perma.cc/GEQ5-XHFG].

216. *See* EEOC v. Ford Motor Co., 782 F.3d 753, 761 (6th Cir. 2015).

217. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995).

some positions, such as construction or retail, admittedly require in-person work that is "hands-on," a growing body of evidence suggests most office occupations can be effectively performed at home. Further, not only are some individuals more productive at home due to the decreased levels of interruptions, but many jobs originally thought incapable of being performed remotely have now successfully done so. By way of example, as noted in the Upwork survey, over half of the managers interviewed felt that remote work since the pandemic had gone better than expected, suggesting that telework through the pandemic has led managers to view remote work "more positively overall."[218]

Following the *Vande Zande* holding, those courts that continued to rely on the physical presence presumption did so also in reliance on one discrete section of the EEOC's 2003 informal guidance that stated that an employer may refuse a telecommuting request when, among other things, the job requires "face-to-face interaction and coordination of work with other employees;" "in-person interaction with outside colleagues, clients, or customers;" and "immediate access to documents or other information located only in the workplace."[219] By way of example, the Sixth Circuit, as recently as 2015, has continued to rely on both the *Vande Zande* holding and the discrete section of 2003 EEOC guidance to deny telework as a reasonable accommodation.[220]

Despite the Sixth Circuit recognizing a few years later that physical presence is not presumed just because an employer says so, it has yet to officially reject the presumption. Teleworking statistics during the pandemic have shown concrete evidence, however, that "face to face interaction" and "coordination of work with other employees" can still effectively be performed remotely. Through the technological capabilities of Zoom and similar virtual platforms, individuals are able to freely and easily interact with their co-workers in a face-to-face setting, even if that format is virtual. As such, the Sixth Circuit and other circuits that have relied on the old 2003 EEOC guidance, should give similar weight to the EEOC's recent Pandemic guidance in addressing telework as a reasonable accommodation.

The EEOC's "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" guidance clarified that "assuming all requirements for reasonable accommodation are satisfied . . . the period for providing telework for the COVID-19 pandemic could serve as a trial period to show whether this employee with a disability could satisfactorily perform the essential functions while working remotely."[221] Thus, the mere fact that employees have effectively worked from home during the

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218. Ozimek, *supra* note 170.

219. WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION, *supra* note 38.

220. *See Ford Motor Co.*, 782 F.3d at 763.

221. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 214.

pandemic can serve as future evidence that physical presence is no longer presumptively essential. As long as an employee has not had to eliminate other essential functions when teleworking, this "trial" of telework can serve as conclusive evidence that physical attendance is no longer essential for his or her position. The Second Circuit had the correct interpretation when it held that "physical presence at or by a specific time is not, as a matter of law, an essential function of all employment."[222]

Finally, the physical presence presumption directly contradicts the legally required case-by-case analysis for at-home work accommodations. As the Supreme Court held in *U.S. Airways v. Barnett*, at the threshold level, a proposed accommodation must only be reasonable "on its face, *i.e.*, ordinarily or in the run of cases."[223] Once the employee has made the showing that the accommodation is "reasonable on its face," the burden then falls to the employer to show case-specific circumstances suggesting that an undue hardship would be caused by the accommodation.[224] For that reason, statistics of telework during the pandemic can serve as persuasive evidence that telework is "reasonable on its face," as telework has successfully been performed across multiple disciplines. Any qualified, disabled employee who has *successfully* teleworked throughout the pandemic could meet their initial burden of showing that telework is a reasonable accommodation. As such, the burden should then shift to the employer to show that physical performance is essential to the employee's particular position and that elimination of any physical presence requirement would result in an undue hardship for the employer.

Courts should give more deference to the EEOC regulations and focus on the specific facts of each case, but have yet failed to adjust to changing circumstances and often continue to impose a presumption that physical presence is mandatory. Accordingly, an amendment to the ADA is necessary to ensure that, going forward, courts no longer defer to an outdated presumption. Any amendment needs to make clear that not only can telework be possible as a reasonable accommodation, but unreasonableness cannot be presumed simply because an employer indicated that "attendance" is an essential function of a position. This result can be accomplished by expressly listing telework as a reasonable accommodation in the ADA, as well as including a section expressly rejecting the physical presence presumption. See my proposed statutory amendment below.

222. McMillan v. City of New York, 711 F.3d 120, 126 (2d Cir. 2013).
223. US Airways, Inc. v. Barnett, 535 U.S. 391, 401 (2002).
224. *McMillan*, 711 F.3d at 126.

*2. Include the Nuclear Family's Susceptibility as a Disabling Condition*

The ADAAA expressly expanded the list of major life activities that a disability may affect to include "major bodily functions."[225] This expanded definition allowed "functions of the immune system, normal cell growth . . . endocrine, and reproductive functions" to serve as a qualifying disability. [226] Including "functions of the immune system" suggests that Congress intended for individuals at high risk for contracting illnesses to be covered by the ADA. The EEOC's webinar conducted on the COVID-19 pandemic further supports this position.[227] This webinar clarified that the definition of "disability" can and should be extended to include high-risk individuals.[228] As such, an amendment should clarify that the ADAAA's current provision under "major bodily functions" was intended to include a high susceptibility of illness as a disabling condition, one that could be the basis for requesting a reasonable accommodation in the form of telework.

In the EEOC's Pandemic Preparedness guidance, the EEOC explained how telework was effective for infection-control strategies, specifying that those employees who were "at-risk" may request telework as a reasonable accommodation.[229] The EEOC also explained how social distancing measures such as telework "minimize disease transmission."[230] Further, during the EEOC's webinar on reasonable accommodations during the COVID-19 pandemic, it expressly stated that diseases putting individuals at higher risk are a CDC-identified medical condition.[231] In addition to the EEOC guidance, the HHS also encouraged employers to offer telework to those employees at risk for serious illness.[232] These high-risk individuals, however, do not deserve protection only amidst a worldwide pandemic. The swiftness with which the pandemic swept across the U.S. shows the need for preventive measures, especially for those high-risk individuals.

If these conditions qualify as disabling during the pandemic, the same concerns of protecting these individuals should extend after the pandemic. It is clear that both the EEOC and HHS intend for a high susceptibility of illness to be regarded as a disabling condition.[233] As such, this should also be considered a disabling condition after the pandemic.

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225. 42 U.S.C. § 12102(2)(B) (2021).

226. *Id.*

227. Eckard & McMahon, *supra* note 156.

228. *Id.*

229. *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, *supra* note 149.

230. *Id.*

231. Eckard & McMahon, *supra* note 156.

232. *Employers with Workers at High Risk*, *supra* note 167.

233. Eckard & McMahon, *supra* note 156; *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, *supra* note 149.

Even in the absence of COVID-19, it is still essential to provide these at-risk workers with options to work out of lower-transmission areas. Not only does this protect against any future threats of pandemic, but it protects high-risk employees from more common illnesses. Even though more common illnesses are not as grave a concern for a majority of the population, we should not exclude those at-risk individuals who could suffer greatly at the expense of the common cold. While the ADAAA's current language suggests that high-risk individuals may be included, any amendment should expressly state this proposition.

Further, if it is made clear that an immunocompromised employee can qualify as a disabled individual in certain circumstances, any amendment should also include guidance addressing reasonable accommodations for disability concerns of the employee's nuclear family. The same logic applied to protecting high risk individuals extends to the susceptibility of their family. An employee whose child suffers from an autoimmune disease suffers the same concerns as if she was the high-risk individual herself. As such, any amendment should also include a provision for a high-risk family member as qualifying an individual to seek a reasonable accommodation.

While this amendment would by no means require an employer to accommodate all at-risk employees, or those with an at-risk nuclear family member, in the form of telework, it can clarify that in some situations, telework could qualify as a reasonable accommodation for these individuals. In this circumstance, telework may be the perfect solution, balancing both the interest of employer and employee alike. As long as the essential functions of the job can be accomplished, excluding any presumption in favor of physical presence, high risk individuals, and those individuals with high-risk nuclear family members, should be granted telework as a reasonable accommodation. See below my proposed statutory amendment.

### B. Incentive Program for State and Private Employers

While Federal agencies have been accustomed to teleworking for many years due to the Telework Enhancement Act of 2010, state and private employers have been slow to adopt this working arrangement. This is due to the lack of any similar program encouraging telework. Because of the overwhelming evidence showing high production levels, as well as positive employee and employer attitudes towards telework, Congress should adopt some program to encourage telework for state and private employers.

This would not be the first attempt to incentivize non-federal employers to adopt telework programs. In 2001, the EPA attempted an incentive program by offering pollution tax credits to companies in five

U.S. metros that allow employees to telecommute from home.[234] The program's environmental incentives were supported by figures from the National Environmental Policy Institute, which projected that "every 100,000 people who participate in the program would slash emissions by 2,613 tons per year."[235] Similarly, in 2016, lawmakers proposed the Multi-State Worker Tax Fairness Act, which would eliminate a double-taxation burden from telecommuters who live and work in different states, to the Congressional Committee.[236] While it died in committee, lawmakers recently sent an updated version to Congress in August 2020.[237] Although the original proposal did not take off, the statistics of telecommuting employees and resulting productivity during COVID-19 suggests this second attempt may be successful.

By the end of 2020, all but seven states had some telecommuting policy within various state departments intended to increase the use of telework, with a number of those states having a statute or executive order encouraging the same.[238] By way of example, Oregon "allows employers to take a tax credit of [thirty-five] percent for investments made in telework (i.e., costs of purchasing and installing office and computer equipment)."[239] Based on the overwhelming evidence of productive telework arrangements during the past year, as well as the similar telework incentive programs in forty-three states, Congress should finally adopt the Multi-State Worker Fairness Act. Further, if Congress were to amend the ADA to include provisions on telework, Congress may be further inclined to adopt this bill, due to the steady increase in telework overall.

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234. Jack Lane, *EPA Offers Incentives to Firms That Adopt Telecommuting in Five U.S. Metros*, SITE SELECTION (May 2001), https://siteselection.com/ssinsider/incentive/ti0105.htm [https://perma.cc/46Q4-SM7N].

235. *Id.* (The National Environmental Policy Institute is a Washington, D.C.-based research and advocacy group that hosted a news conference at the Capitol to announce the EPA's pilot program).

236. *Work Flexibility in the United States*, 1 MILLION FOR WORK FLEXIBILITY, https://www.workflexibility.org/policy/ [https://perma.cc/3ZN8-NNG4].

237. Multi-State Worker Tax Fairness Act of 2020, H.R. 7968, 116th Cong. (Aug. 7, 2020).

238. Jared Walczak, *Teleworking Employees Face Double Taxation Due to Aggressive "Convenience Rule" Policies in Seven States*, TAX FOUND. (Aug. 13, 2020), https://taxfoundation.org/remote-work-from-home-teleworking/ [https://perma.cc/WUA7-5J7X].

239. *Implementing Commuter Benefits as One of the Nation's Best Workplaces for Commuters*, U.S. ENV'T PROT. AGENCY (Jan. 2005), https://www.bestworkplaces.org/wp-content/uploads/2010/10/telecommute_benefit_brief.pdf [https://perma.cc/ZH86-CQD6].

### C. Addressing Employer Concerns

Despite the increasing shift towards telework seen throughout the COVID-19 pandemic, some employers remain opposed to widespread telework in the long run. Specifically, some employers worry that teleworking's overall impact is somewhat ambiguous. While it is true that telework has the capabilities to carry some risk for innovation and worker satisfaction, there are ways to minimize these risks, such as assuring that teleworking remains a choice and is not "overdone."[240] Specifically, "co-operation among social partners may be key to address concerns."[241] Further, policymakers can promote the diffusion of managerial best practices, self-management and ICT skills, investments in home offices, and fast and reliable broadband across the country.[242]

Admittedly, there could be a good basis to deny telework to certain employees, despite the recognition of a qualifying disability, whether it be a high-risk individual or another form of disability. For example, employees who have a prior history of using company-owned computers to view inappropriate activity or who were otherwise disciplined, have not demonstrated trustworthiness, and this could be a traditional, viable reason to deny them the ability to telework. However, any amendment addressing reasonable accommodations, or the rejection of the physical presence presumption, will not eliminate other neutral employment reasons for denying telework. The telework arrangement would still need to avoid any undue hardship upon the employer. It would similarly not exclude the normal course of disciplining employees by increased supervision when needed.

As such, an amendment should in no way interrupt the ability of employers to determine that employees are no longer capable of effectively performing telework, even if that telework has been ongoing. A significant decrease in productivity or a violation of company policy could still

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240. *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?*, OECD (Sept. 7, 2020), https://www.oecd.org/coronavirus/policy-responses/productivity-gains-from-teleworking-in-the-post-covid-19-era-a5d52e99/#:~:text=Telework%20has%20been%20crucial%20to,able%20to%20work%20from%20home (last visited Aug. 28, 2021).

241. *Id.*; *see* Hugh Mosley et al., *The role of the social partners in the design and implementation of active measures*, 27 EMP. AND TRAINING DEP'T INT'L LAB. OFF. GENEVA: EMP. TRAINING PAPERS 1 (1998) ("The philosophy of 'social partnership' advocate[s] recognition of workers' rights, including the right to trade union organizations, and co-operative industrial relations in collaboration with workers' representatives" and "conflict between capital and labour is not regarded as a zero-sum game . . . but as a positive-sum game in which both parties stand to gain from cooperative solutions.").

242. *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?*, *supra* note 240.

adequately warrant the denial of telework, without violating the statute. As such, any amendment will not compel state and private employers to adopt telework programs, or grant telework any time an employee requested it. Rather, the amendment will serve as a clarification for courts that have continued to use an outdated presumption.

### D. Proposed Legislation

Amendment to the ADA to permit Greater Access to Telework as a Reasonable Accommodation.

1. 42 U.S. Code 12101, Findings and Purpose, is hereby amended as follows:

a. By striking the word "and" at the end of paragraph (a)(7);

b. By inserting a new finding, paragraph (a)(9), to read as follows: "technology has advanced to a point where many jobs can be performed via telework from remote locations with no or negligible degradation of work performance and without causing significant difficulty or expense for the employer;"

c. By inserting a new finding, paragraph (a)(10), to read as follows: "national polls and other data have documented the unprecedented number of employees utilizing full-time or part-time telework during the COVID-19 pandemic and unprecedented levels of employer satisfaction;"

d. By inserting a new finding, paragraph (a)(11), to read as follows: "based on the above findings, the long-standing presumption utilized by many courts that physical presence is essential for job performance is no longer valid. Telework can be an appropriate and reasonable accommodation for employees with disabilities and shall be considered on a case-by-case basis;" and

e. By inserting a new finding, paragraph (a)(12), to read as follows: "based on scientific findings and labor practices during the COVID-19 pandemic, particularly the recognized benefits from social distancing, it is appropriate to expand the definition of disability to include immunocompromised individuals, or those individuals at a higher susceptibility of disease, and those nuclear family members with the same condition."

2. 42 U.S. Code 12101, Definition of Disability, is hereby amended as follows:

a. By inserting the following sentence at the end of paragraph (2)(B), "Functions of the immune system include individuals with an immunosuppressed system who are at higher risk of contracting disease."

b. By inserting the following subparagraph at the end of paragraph (4)(C),

"(i) The impairment may, in certain circumstances, be that of the individual's nuclear family member.

(ii) If a nuclear family member has a disability resulting in a high risk of contracting disease, said family member's impairment may substantially limit the individual's major life activity of caring for oneself and one's family."

3. 42 U.S. Code 12111, paragraph (9), Definition of Reasonable Accommodation, is hereby amended by inserting paragraph (C) "request to telework as a reasonable accommodation" and the following subparagraphs:

"(i) physical presence should not be presumed when analyzing the essential functions of a position.

(ii) instead, whether physical presence is an essential function must be made on a case-by-case basis, with a fact-specific inquiry. Physical presence is not essential simply because an employer says so; the employer must provide evidence it is essential to the position."

## CONCLUSION

Courts historically have been reluctant to grant telework as a reasonable accommodation, relying on an outdated presumption that physical presence is an essential function of most jobs that cannot be performed effectively at home. The emergence of the COVID-19 pandemic, however, has necessitated an increase in telework arrangements across numerous disciplines. This increase has brought with it overwhelming anecdotal evidence showing unprecedented levels of successful teleworking arrangements without loss of productivity. As such, the COVID-19 pandemic has highlighted the clear deficiencies in ADA jurisprudence and thus the need to amend the ADA. With the statistical evidence of successful telework during the COVID-19 pandemic, the long-held, outdated presumption of physical presence is likely to continue to change as society continues to adapt. In order to ensure that, moving forward, courts resolve issues of reasonable accommodations in accordance with these societal changes, Congress needs to address it in the form of binding legislation: an Amendment to the ADA.