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## Remote Work “Reasonable”? Why the COVID-19 Pandemic Calls for a Reinterpretation of the “Reasonable Accommodation” Standard, and How Companies Can Respond

Caroline Headrick†

For many Americans, the news of a work-from-home order may have provided some level of apprehension, or excitement, followed by a slow ease into a new pattern of life where their feet hit the floor and ten minutes later, coffee in hand, they can open their computer and start their days. For at least some, this new pattern provided a welcome respite from the springtime commute—which at least in Minnesota is sometimes snowy, and often unpredictable—but for me it was welcome for an entirely different reason. I got my driver’s license when I was twenty-one years old, not exactly the age most kids dream about driving. This was because I was born with cerebral palsy; its effect on my body made learning to drive a difficult and lengthy process. As you can imagine, there were several years in between turning sixteen and actually receiving my license where I was in situations in which individuals expected me to be able to drive, and I in turn had to have the challenging and often uncomfortable conversation about why that was not possible. This affected several areas of my life, including the jobs I took. For years, I chose where to apply to jobs primarily based on transportation logistics. Despite having my license now, waking up every morning this past summer and knowing I would not have to drive anywhere was still somewhat of a relief, and I suspect this was also the case for many people like me.

The disabled community is underrepresented in employment, and as companies look to adapt to a work-from-home culture, it

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†. J.D. Candidate, 2022, University of Minnesota Law School. Special thanks to Professors Stephen F. Befort and Brett McDonnell and to Note & Comment Editor Stephen Earnest for your time, thoughtful critique, and guidance throughout the writing process. A sincere thanks to all the *Journal of Law & Inequality* members who edited this article. Finally, thank you to my family and closest friends. Without your support I would not be where I am today.

creates an open question as to how a post-COVID-19 world will affect the disabled workforce.<sup>1</sup> At its passage, the Americans with Disabilities Act (ADA) estimated approximately forty-three million Americans to be disabled.<sup>2</sup> Since 2008, the Department of Labor has provided statistics on the rate of unemployment amongst individuals with disabilities versus able bodied individuals. Statistics from 2019 showed that 79.2% of individuals with a disability were not in the labor force at all, compared with 31.1% of individuals without a disability.<sup>3</sup> For 2020, the labor force and employment rates of individuals with disabilities showed that 20.5% of individuals with disabilities above the age of 16 were in the labor force: there was an employment to population ratio of 17.9% and an unemployment rate of 12.6%, versus 67.1% of individuals without disabilities above the age of 16 in the labor force during the same period, with an employment to population ratio of 61.8%, and an unemployment rate of 7.9% for individuals without disabilities.<sup>4</sup> Individuals with disabilities are entering the labor force and employed at one-third of the rate of individuals without disabilities; where we go from here and how courts—and subsequently employers—reinterpret reasonable accommodation to

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1. See Nathaniel Meyersohn, *Workers with Disabilities are Especially Hard Hit in the Coronavirus Economy*, CNN BUS. (May 14, 2020), <https://www.cnn.com/2020/05/14/business/disabilities-workers-grocery-stores-coronavirus/index.html> [<https://perma.cc/FZZ8-EJRL>] (explaining that many intellectually impaired individuals have lost jobs in retail).

2. Americans with Disabilities Act, 42 U.S.C. § 12101 (2009). The purpose of the Act was in part to increase access to employment. *See also* Sutton v. United Air Lines, 527 U.S. 471, 484 (1999) (acknowledging Congress's finding that some 43 million Americans have one or more physical or mental disabilities).

3. U.S. BUREAU OF LAB. STATS., PERSONS WITH A DISABILITY, 2019, at 8 (2020), <https://www.dol.gov/sites/dolgov/files/odep/pdf/dol-odep-2019-briefing-appended-submission.pdf> [<https://perma.cc/PC2N-CBRC>].

4. *Compare Disability Employment Statistics*, U.S. DEPT' LAB., <https://www.dol.gov/agencies/odep/research-evaluation/statistics> [<https://perma.cc/2HM3-HFR7>], with Jaime Rall, James R. Reed & Amanda Essex, *Employing People with Disabilities*, NATIONAL CONF. OF STATE LEG. (Dec. 15, 2016), <https://leg.mt.gov/bills/2019/Minutes/House/Exhibits/buh35a04.pdf> [<https://perma.cc/X8B3-E5FE>] (highlighting that the disparities in employment remain high, in spite of state and local initiatives to promote work opportunities for individuals who are disabled by offering tax exempt status to business). *See* Minn. Stat. Ann. §§ 16C.16 et seq., Minn. Admin. Code §§ 1230.1400 et seq., Minn. Stat. Ann. § 43A.02, Minn. Stat. Ann. § 43A.09, Minn. Stat. Ann. § 43A.10, Minn. Stat. Ann. § 43A.19, and Minn. Stat. Ann. § 43A.191, for Minnesota state statutes offering benefits for hiring individuals who are disabled.

include telework,<sup>5</sup> or not, or somewhere in between, has the potential to change all this.<sup>6</sup>

This Note will consider the effects of the shift to telework on individuals who are disabled. Because the telework workforce consists primarily of management, financial, professional, and other corporate-oriented jobs,<sup>7</sup> I will consider the effects of telework policies primarily on these populations, though I acknowledge that there is a large portion of individuals who are disabled who work in the service industry.<sup>8</sup> This Note will consider both the benefits and the drawbacks of telework for a wide range of physically, mentally, and emotionally impaired individuals. Part I will introduce the ADA and focus on the history of reasonable accommodations for disabled workers in the corporate workplace. Part II will explore the benefits and drawbacks of making telework a reasonable accommodation—or of a long-term company policy in favor of telework—the prospect of continued telework offers benefits and drawbacks to both the employees it is meant to serve, and to their employers. After analyzing these benefits and drawbacks of telework in Part II, Part III will consider whether working from home will be a reasonable accommodation under the ADA moving forward. The relevant statutory language, caselaw, and Equal Employment Opportunity Commission (EEOC) guidances will be analyzed in answering this question.

This Note will not advocate for making telework a wholesale reasonable accommodation; rather, it suggests that a telework accommodation may be appropriate for some employee-employer relationships in at least some instances, and detrimental in other

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5. I will refer to telework interchangeably as either telework, work-from-home, or remote work. The terms are used interchangeably by case law, scholarly literature, and cultural sources, so my usage will track with the sources I am analyzing, but all terms refer to the same concept. Similarly, I will refer to disabilities as either “disabilities” or “impairments,” and mental impairments as either “mental” or “psychological” throughout the paper. Again, these terms are often used interchangeably in the literature, amongst their respective pairs, and my usage will track with the sources I analyze.

6. See Lisa Schur & Douglas L. Kruse, *Coronavirus Could Revolutionize Work Opportunities for People with Disabilities*, CONVERSATION (May 5, 2020), <https://theconversation.com/coronavirus-could-revolutionize-work-opportunities-for-people-with-disabilities-137462> [<https://perma.cc/Z7DW-F54Q>].

7. See Drew Desilver, *Before the Coronavirus, Telework Was an Optional Benefit, Mostly For the Affluent Few*, PEW RSCH. CTR. (Mar. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/03/20/before-the-coronavirus-telework-was-an-optional-benefit-mostly-for-the-affluent-few/> [<https://perma.cc/NW6Z-UE3W>] (noting that 24% of workers in “management, business, and financial” occupations had the ability to work from home).

8. See Meyersohn, *supra* note 1 (explaining that many intellectually impaired individuals have lost jobs in retail).

instances. Employers, employees, and co-workers should all be open to flexible work arrangements that make work accessible while not sacrificing working relationships or the quality of the work product individuals provide. Part IV will close with the implications of telework for the disabled community and provide suggestions on how employers should approach the accommodation conversation, regardless of whether they choose to make an accommodation or not.

## I. History of Reasonable Accommodation

### A. *The ADA and the Reasonable Accommodation Requirement*

The ADA was passed in 1990 to provide increased access to employment and public life for individuals with disabilities.<sup>9</sup> One of the most powerful ways that the ADA accomplishes this goal is through the reasonable accommodation standard.

The text of the ADA mandates that no covered entity shall discriminate against a **qualified individual** on the basis of **disability**, a qualified individual being one who can perform the **essential functions** of the job, with or without **reasonable accommodation**, unless it poses an **undue hardship** on the employer.<sup>10</sup> While the statute gives some direction on what constitutes a reasonable accommodation, such as job restructuring, modified work schedule, interpreters, and buying or modifying equipment or devices,<sup>11</sup> reasonable accommodations remain an issue at the forefront of public and legal consciousness.<sup>12</sup> Because reasonable accommodation is a somewhat nebulous term, it can be helpful to understand the term in context:

**Qualified individual:** one who can perform the essential functions of the job with or without reasonable accommodation, unless accommodations would impose an undue hardship on the employer.<sup>13</sup>

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9. 42 U.S.C. § 12101 (2009).

10. 42 U.S.C. § 12112(a)–(b)(5)(A) (2009); 42 U.S.C. § 12111 (2009).

11. 42 U.S.C. § 12111(9)(B) (2009).

12. Leora Eisenstadt, *Our Work-From-Home World is Proving More Job Flexibility is Possible*, CHI. TRIB. (May 8, 2020), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-coronavirus-remote-working-20200508-s3ehs5x4tzhw3ctxvta2v4hl3m-story.html> [https://perma.cc/U8ST-CG44]. Eisenstadt's op-ed was featured in the Chicago Tribune during the summer months of the COVID-19 pandemic.

13. 42 U.S.C. § 12111(8). Put another way: someone who is eligible for a job and who can bring an action against their employer for a reasonable accommodation to enable successful job performance.

a. **Essential functions** are determined on the basis of factors such as employer discretion, job description, time spent on performance, and the experience of past and present incumbents.<sup>14</sup>

b. **Undue hardship** is determined by factors such as cost and resources of the individual, employer, and facility.<sup>15</sup>

**Disability:** Under Title I an individual may be disabled for three possible reasons, but this paper focuses on individuals with a substantial limitation on (a) major life activity, (b) major bodily function.

In the early years the Court construed the term “disability” narrowly meaning many individuals were found not to be disabled. Following the ADA Amendments in 2008, the Court widened the definition of disability to provide for a wide breadth of coverage.<sup>16</sup> Increasingly individuals are found to be disabled but not qualified.<sup>17</sup> This is important insofar as the broad reach of the ADA means many individuals are eligible for, and stand to benefit from, a reasonable accommodation.

### B. *The In-Person Work Requirement*

Prior to the famed case *Vande Zande v. Wisconsin Dept. of Admin.*, many courts—including the D.C. Circuit, Federal Circuit, and Fourth Circuit—had already affirmed, in cases like *Carr v. Reno*, *Law v. U.S. Postal Service*, and *Walders v. Garrett*, that coming to work regularly was either an “essential function,” a “necessary element,” or the bare requirement of performing a job successfully.<sup>18</sup> In *Vande Zande*, the Seventh Circuit rejected

14. *Id.*; see also *Keith v. County of Oakland*, 703 F.3d 918, 925–26 (6th Cir. 2013) (listing numerous factors that make a job function essential).

15. 42 U.S.C. § 12111(10)(B); see also *Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 735 (D.M.D. 1996) (defining undue hardship as “an action requiring [the employer to undertake a] significant difficulty or expense”).

16. 42 U.S.C. § 12101(b).

17. Stephen F. Befort, *An Empirical Examination of Cost Outcomes Under the ADA Amendments Act*, in *DISABILITY LAW CASES AND MATERIALS* 98, 98-101 (Stephen F. Befort & Nicole Buonocore Porte eds., 2017); cf. *Lloyd v. HA of Montgomery*, 857 F. Supp. 2d 1252 (M.D. Ala. 2012). An example of a case decided soon after the amendments where the plaintiff was diagnosed with high blood pressure and asthma both conditions that are disabilities due to their effect on major bodily functions but may not have been disabilities prior to the amendments.

18. See *Tyndall v. Nat'l Edu. Ctr. Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (citing to *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. United States 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).

telework as a reasonable accommodation on two grounds. First, the court, like many before it, accepted that regular physical attendance at work is an essential function of any job irrespective of the ability to telework.<sup>19</sup> Second, the court stressed that if an individual needed to work in a team, this needed to occur in person.<sup>20</sup> *Vande Zande* is particularly famous for delineating a balancing test for determining what constitutes a reasonable accommodation: an accommodation must be efficacious to the individual and “proportional” in terms of a cost-benefit analysis.<sup>21</sup> The case law following *Vande Zande* further legitimized the Seventh Circuit’s reasoning.<sup>22</sup>

### C. *New Freedom Initiative Supported Accessibility*

Not long after *Vande Zande* was decided in 1995, the George W. Bush Administration launched the New Freedom Initiative (NFI) in 2001.<sup>23</sup> The aim of the NFI was to increase educational and employment opportunities for disabled Americans via assistive technology.<sup>24</sup> In addition to signing the Assistive Technology Act Amendments in 2004, the NFI funded research into the status of, and attitudes towards, workers who are disabled.<sup>25</sup> In the NFI-funded Disability Case Research Consortium, researchers conducted interviews and focus groups at large companies including

19. See *Tyndall*, 31 F.3d at 213 (citing to *Law*, 852 F.2d at 1279–80 (holding that “coming to work regularly” is an “essential function”). *But see* Robert Nichols & Caroline Melo, *Pandemic Telework May Undermine Employer ADA Defense*, LEXISNEXIS: LEXIS360 (Apr. 6, 2020), <https://www.law360.com/articles/1259855/pandemic-telework-may-undermine-employer-ada-defense> [https://perma.cc/85X6-ZTBD] (challenging the notion that working from home severely diminished the quality of the employee’s performance).

20. *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995). Subsequent cases have also stressed working in person when special equipment is involved. See also *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (holding a 2006 part-time work plan reasonable).

21. *Vande Zande*, 44 F.3d at 543.

22. *Compare Credeur v. Louisiana*, 860 F.3d 785, 793–97 (5th Cir. 2017) (finding that allowing Credeur to work from home would be an unreasonable accommodation because it imposed an undue burden on her employer), *with McMillan v. City of New York*, 711 F.3d 120, 126–29 (2d Cir. 2013) (holding that allowing McMillan to arrive tardy, work through lunch, and stay late was not an undue hardship on the employer).

23. See *President’s New Freedom Initiative*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Feb. 1, 2001) <https://georgewbush-whitehouse.archives.gov/infocus/newfreedom/> [https://perma.cc/9JCA-R69G].

24. *Id.*; see also Assistive Technology Act 29 U.S.C. § 3001(b) (2004) (stating the purpose of the Act is to improve the provision of assistive technology to individuals with disabilities).

25. See *President’s New Freedom Initiative*, *supra* note 23; see also Rall et al., *supra* note 4 (noting a shift in companies’ attitudes towards wanting more disabled individuals to work for them in light of the statutory changes in recent years).

Microsoft and Sears.<sup>26</sup> Researchers found that individuals who are disabled face a multitude of barriers even after finding work, including lower pay, less job security, less training, and less participation in decision making.<sup>27</sup> The research also revealed one of the reasons why accommodations are so important: inclusion of individuals who are disabled correlates positively with inclusion of other groups.<sup>28</sup> The research's key findings about how managers can approach the accommodation process are analyzed in Part IV.B.<sup>29</sup> This Note also analyzes the statutory text of the Assistive Technology Act Amendments and explores how the Act has spurred technology growth and inclusion in employment, particularly via state action.<sup>30</sup>

## II. Visualizing Telework Long Term

If telework is to be considered as a potential reasonable accommodation in the future—which it almost certainly will be—then it is essential to consider both the impact of a teleworking workforce generally, as well as the implications of telework on the disabled population. I will begin by discussing the former<sup>31</sup> and then move to the latter.<sup>32</sup>

### A. *Telework Has Benefits for Employers While Addressing Next Generation Demands*

Telework is a good financial investment for companies. Research has found that working from home reduces meeting time

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26. DISABILITY CASE STUDY RSCH. CONSORTIUM, CONDUCTING AND BENCHMARKING INCLUSIVE EMPLOYMENT POLICIES, PRACTICES, AND CULTURE 10–15 (2008), <https://www.dol.gov/sites/dolgov/files/odep/research/corporateculturefinalreport.pdf> [<https://perma.cc/F6DF-2BUE>].

27. *Id.* at 9.

28. *Id.* at 6–7, 84.

29. *Id.* at 35–49.

30. See *infra* Part II.B; 29 U.S.C. § 3002(4); 29 U.S.C. § 3002(6)(B) (2015); see also Joy Relton, *The Assistive Technology Act of 2004*, AM. FOUND. FOR THE BLIND, <https://www.afb.org/aw/6/1/14652> [<https://perma.cc/9BQD-3NJN>] (asserting the Act ensures the continued existence of significant funding for assistive technology); cf. Cherlynn Low, *Accessibility in Tech Improved in 2020, But More Must be Done*, ENGADGET (Dec. 23, 2020), <https://www.engadget.com/accessibility-in-tech-2020-150002855.html> [<https://perma.cc/C2LM-Z2RJ>] (exploring the plethora of accessibility features added to technology and tech platforms in the past several years).

31. See *infra* Part II.A–B.

32. See *infra* Part II.C.

and costs<sup>33</sup> and rent and ownership costs like utilities, cleaning, and taxes,<sup>34</sup> in addition to potential savings on overhead of up to \$11,000 per year for each employee who teleworks half the time.<sup>35</sup> One implication of reduced costs is that more funds can be channeled towards accommodations. In a survey from The Conference Board, 55% of respondents whose companies were working remotely at the time of the survey believed their revenue would return to pre-pandemic levels within 12 months.<sup>36</sup> The U.S. Census Bureau found that nearly one-third of all U.S. workers worked from home during the pandemic and 98% of individuals surveyed expressed a desire to work from home or to generally have a more flexible schedule in the future.<sup>37</sup> During the COVID-19 pandemic, the employment rate fell markedly less in sectors where telework was feasible: a dip of 8% in teleworking sectors versus 21% in sectors where it was not feasible.<sup>38</sup> In the past, employers may have cited the cost of equipment as a reason to deny a telework accommodation.<sup>39</sup> Given

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33. Nick Routley, *What Employers and Employees Really Think About Remote Working*, WORLD ECON. F. (June 3, 2020), <https://www.weforum.org/agenda/2020/06/coronavirus-covid19-remote-working-office-employees-employers/> [<https://perma.cc/E33C-Y942>]; see also Xuimei Dong, *New Normal of Legal Telework Likely to Outlast the Pandemic*, LEXISNEXIS: LEXIS360 (July 24, 2020), <https://plus.lexis.com/document/?pdmfid=1530671&crd=91a57213-65a6-4b99-aeb8-d2d074cfb2a8&pdaactivityid=a4144f05-72ae-4e77-847d-2204abfa2aeb&pdtargetclientid=-None-&ecomp=p5qk&prid=424c74e3-c0a3-41fb-902a-24a72b762e7e> [<https://perma.cc/YBK2-LXLC>]. Law firms are considering telework as a way to decrease their real estate footprint by moving some professionals to virtual workspaces permanently or indefinitely.

34. Baruch Silverman, *Does Working from Home Save Companies Money?*, BUSINESS.COM (June 16, 2020), <https://www.business.com/articles/working-from-home-save-money/> [<https://perma.cc/7MAP-C74W>].

35. Routley, *supra* note 33.

36. *See Execs Expect Work Remote Trend to Continue*, BUS. FACILITIES (June 3, 2020), <https://businessfacilities.com/2020/06/even-after-covid-19-execs-expect-remote-work-trend-to-continue/> [<https://perma.cc/5PLE-5KES>] (citing THE CONFERENCE BOARD, FROM IMMEDIATE RESPONSES TO PLANNING FOR THE REIMAGINED WORKPLACE 3 (2020) <https://conference-board.org/pdfdownload.cfm?masterProductID=20874> [<https://perma.cc/UN6X-MCC8>]). The survey suggests that these optimistic financial reports could be due to increased productivity. Companies with over 10% of their workforce working remotely were more likely to report increased productivity compared to 19% of companies where 10% or less of their employees were working remotely.

37. *See* Routley, *supra* note 33.

38. *See* Matthew Dey, Harley Frazis, Mark A. Loewenstein & Hugette Sun, *Ability to Work From Home: Evidence From Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (June 2020), <https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm> [<https://perma.cc/V4XC-9PBK>].

39. *See generally* *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) (explaining the history of cost in relation to reasonable accommodations).

the potential to save so much on overhead costs and the wealth of laptops, monitors, and other telework equipment now readily available at comparatively cheap prices, it seems hard to imagine that telework could place an undue cost or operational burden on corporate employers.<sup>40</sup>

Although telework has gained traction in the wake of the pandemic, it was gaining popularity long before 2020.<sup>41</sup> Previously, desks in the U.S. were empty an average of 40–50% of working hours.<sup>42</sup> Even prior to the pandemic, there was a more than 100% increase in telework since 2005.<sup>43</sup> Surveys taken of Accenture and Ernst & Young employees from 2013 and 2015 respectively found flexible work arrangements to be amongst the top desires of employees.<sup>44</sup> These findings suggest teleworking will not only continue to skyrocket in popularity, but also that making telework-friendly professions like management, professional, or administrative jobs more accessible to the disabled will reduce job insecurity among that population.

The Executive Branch has attempted to do its part to spur the employment of individuals with disabilities. Signed into law in 2004, the Assistive Technology Act (ATA) is becoming particularly relevant in today's virtual world. The goal of the ATA is to increase availability of and access to assistive technology and to make individuals more productive, particularly in the workforce.<sup>45</sup> "Assistive technology device" is defined in the Act as "any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities."<sup>46</sup> Assistive devices are also included as reasonable

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40. *Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 736 (D.M.D. 1996) (finding that the cost of a TTY phone was \$279, and the employer admitted this cost was not a factor in the firing); *see also* Low, *supra* note 30 (exploring the recent advances in accessible technology, many of which allow for synchronous communication); *see also* Routley, *supra* note 33 (explaining that the average employer saves up to \$11,000 a year when employees telework at least part-time).

41. Peter J. Mateyaka, Melanie A. Rapino & Liana Christin Landivar, *Home-Based Workers in the United States: 2010*, U.S. CENSUS BUREAU (2012), <https://www.census.gov/prod/2012pubs/p70-132.pdf> [<https://perma.cc/P4HK-HC6G>] (finding work-from-home increased steadily from the late 1990s until 2010 and certain areas, including engineering and science occupations, increased significantly).

42. Kate Lister & Tom Harnish, *Telework and Its Effects in the United States*, in TELEWORK IN THE 21ST CENTURY 128 (Jon C. Messenger ed., 2019) (ebook).

43. *Id.* at 129.

44. *Id.* at 133.

45. 29 U.S.C. § 3002(6)(B) (2015).

46. 29 U.S.C. § 3002(4) (2015).

accommodations under the ADA.<sup>47</sup> The ADA and the ATA have the potential to work in tandem by creating equipment and products that increase telework capabilities; the more assistive devices that exist, are developed, or are integrated into our everyday technological landscape, the more likely disabled and previously disenfranchised workers will be able to become productive members of the workforce. In just one example of how the ATA has impacted accessibility, individuals in Missouri can receive training on assistive technology and then use that training to obtain jobs where they train individuals on basic computer use skills, including how to use word processors and how to surf the internet.<sup>48</sup> However, there is much left to do, and we should be mindful of creating and improving our technology as we shift to a virtual—and teleworking—world. A telework friendly company policy could lead to greater inclusion, be good for morale, and secure tax benefits.<sup>49</sup>

More recently, in July 2015, the National Conference of State Legislatures published a report on state and local government initiatives to include individuals with disabilities in employment.<sup>50</sup> Many states, Minnesota included, have offered tax breaks or preferred partnership status to companies that hit certain thresholds of disability employment.<sup>51</sup>

Beyond productivity, flexibility, lower overhead costs, and tax breaks, telework also shows potential to increase health and well-being: a survey of 2,050 individuals administered by Prudential in between April and May 2020 found 69% of respondents found more time for self-care if allowed to telework.<sup>52</sup> The increased ability to care for oneself has the potential to offset some of the negative emotions associated with telework. Furthermore, a 2018 paper on telework and physical activity found that telework is correlated with higher levels of physical activity, including more walking and biking.<sup>53</sup> In fact, teleworking four times a month is associated with

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47. 42 U.S.C. § 12111(9)(B) (2012).

48. See Relton, *supra* note 30.

49. See *infra*, Part II.A; see also Rall et al., *supra* note 4 (highlighting the varied benefits of teleworking policies).

50. See Rall et al., *supra* note 4.

51. *Id.*; see MINN. STAT. § 16C.16; see also MINN. STAT. § 43A.19. Minnesota has also implemented affirmative action programs into state agencies.

52. Tom Ryan, *Is Remote Working Bad for Corporate Culture?*, RETAILWIRE (June 8, 2020), <https://www.retailwire.com/discussion/is-remote-working-bad-for-corporate-culture/> [https://perma.cc/7SC4-BAZZ].

53. Sandip Chakrabarti, *Does Telecommuting Promote Sustainable Travel and Physical Activity?*, 9 J. TRANSP. & HEALTH 19 (2018), <https://www.sciencedirect.com/science/article/abs/pii/S2214140517309258> [https://perma.cc/BAJ9-QCAT].

as much as 15% more walks per week and 44% higher odds of 30 minutes or more of physical activity.<sup>54</sup> As the older generations seek to stay in the workforce longer, telework has the added benefit for both employee and employer of making their continued work possible because it allows them flexibility in when and how to work and attend to their health.<sup>55</sup>

*B. Potential Drawbacks of Telework for Employers and Employees*

Putting efficiency and productivity, flexibility, tax breaks, and health benefits aside, widespread telework presents several legal challenges for employers, particularly when facing wage and hour and tax laws. Employers may find that employees are attracted to remote positions because they give the flexibility to move out of chaotic and expensive cities.<sup>56</sup> However, having employees that work outside the bounds of a company's particular city or state could create a host of liability issues for the employer—including a myriad of tax-reporting requirements to follow by state, the risk of being sued in any state where their employees now work, and minimum wage, or wage and hour statutes.<sup>57</sup> The Minnesota Supreme Court, for example, recently ruled that employers with their place of business outside of Minneapolis will still be subject to the Minneapolis Sick and Safe Time Ordinance for those employees who are now working in Minneapolis over 80 hours a year.<sup>58</sup>

An additional area of uncertainty is how long-term work-from-home might create or exacerbate various areas of social and

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54. *Id.* at 21.

55. Andrea Loubier, *Benefits of Telecommuting for the Future of Work*, FORBES (July 20, 2017), <https://www.forbes.com/sites/andrealoubier/2017/07/20/benefits-of-telecommuting-for-the-future-of-work/?sh=2d9d099716c6> [<https://perma.cc/TCE3-6UBC>].

56. Amit Gautam, *How Will Long-Term Work-From-Home Impact Innovation, Collaboration and Mental Health?*, FORBES (Dec. 14, 2020), <https://www.forbes.com/sites/forbestechcouncil/2020/12/14/how-will-long-term-work-from-home-impact-innovation-collaboration-and-mental-health/?sh=3681ff0e2c33> [<https://perma.cc/G259-9PG6>].

57. Stephen Miller, *Out-of-State Remote Work Creates Tax Headaches for Employers*, SHRM (June 16, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/out-of-state-remote-work-creates-tax-headaches.aspx> [<https://perma.cc/U2VM-XRXK>]; see also Bruce J. Douglas, *Working Remotely? Welcome to Minneapolis and its SST Ordinance*, NAT'L L. REV. (Sept. 18, 2020), <https://www.natlawreview.com/article/working-remotely-welcome-to-minneapolis-and-its-sst-ordinance> [<https://perma.cc/F7VB-23G9>] (discussing the application of a Minneapolis city ordinance to employers whose employees worked remotely in the city even if the employer did not have a physical presence there).

58. Douglas, *supra* note 57.

economic inequality. Prior to the pandemic, it was largely believed that women did and would benefit from the work-life balance that telework can seemingly provide.<sup>59</sup> However, it appears that women may suffer more from the increased responsibilities that come with having no boundaries between work and home life.<sup>60</sup> Specifically, it can affect their performance evaluations, since evaluations are increasingly based on subjective impressions of a person: the employee who works harder and longer, but with less contact with their supervisor, will likely be passed up for a promotion.<sup>61</sup> Though it is too early to say for certain, this tends to suggest that women may find telework more exhausting and less rewarding in the long run, which may lead to a split where women prefer in-person work and men are more likely to telework.<sup>62</sup>

Another challenge is the cost burden that work-from-home poses on employees, the cost of setting up and maintaining a home office via appropriate furniture and technology, and the cost of internet and phone bills associated with telework.<sup>63</sup> A Nulab survey conducted on 850 companies who worked from home during the pandemic found that the average cost employees spent on setting up their home office was \$194, and it was on average \$35 more for those who were not allowed to bring supplies and equipment home.<sup>64</sup> A larger portion of employers have contemplated giving reimbursements or financial support for technology than have actually done so at this point.<sup>65</sup> Companies like Twitter and Indeed have been offering stipends for home office equipment.<sup>66</sup> Buffer, a

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59. Tomas Chamorro-Premuzic & Herminia Ibarra, *Why Killing the Office Won't Close the Gender Gap*, FAST CO. (June 27, 2020), <https://www.fastcompany.com/90521873/why-killing-the-office-wont-close-the-gender-gap> [https://perma.cc/CNE9-6QJW].

60. *Id.*

61. *Id.* (suggesting men are more likely to take extra time to build personal relationships with supervisors even in a virtual world).

62. *Id.* This article suggests that the presence of children is one factor that dictates the success of telework, so it is possible that as children go back to school, some of these gender disparities may decrease, and women may see more benefits from telework—though maybe not at pre-pandemic levels.

63. Annie Nova, *Working from Home? You Might Be Able to Expense a New Desk*, CNBC (June 8, 2020), <https://www.cnbc.com/2020/06/03/companies-are-paying-for-their-workers-home-offices.html> [https://perma.cc/VX72-C4E5].

64. Stephen Miller, *Is It Time For Employers to Reimburse Remote Workers' Expenses?*, SHRM (Sept. 11, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/employers-may-overlook-reimbursing-remote-work-expenses.aspx> [https://perma.cc/D6G4-7BYG].

65. *Id.* A July 2020 survey found 2 of 10 employers had provided resources to employees who contemplated working from home long term, but 2/3 of employers surveyed had plans to do so in the future.

66. Nova, *supra* note 63.

software company that has been teleworking since 2015, pays for initial office setup, an annual stipend for equipment, and internet bills.<sup>67</sup> Whether or not paying various bills is feasible or even reasonable will vary by employer, but for those planning to work largely or wholly remote going forward, it is key to consider how this decision impacts their workforce.

Two further drawbacks of work-from-home include Zoom fatigue<sup>68</sup> (which we have likely all experienced at this point) and the increasingly cumbersome collaboration process.<sup>69</sup> A recent survey by Netskope found that a sizeable chunk of respondents—68%—found their collaboration tools to be effective, but 59% found collaboration harder or saw no change in the virtual environment.<sup>70</sup> This issue of collaboration is important because it bears directly on the *Vande Zande* analysis—if collaborative tools are not effective virtually then telework could not be reasonable under the current framework. Furthermore, evidence suggests that a decrease in collaboration has also led to a decrease in innovation.<sup>71</sup> On the other hand, both Zoom fatigue and a cumbersome collaboration process actually have the potential to be beneficial to employers if handled correctly because they provide the opportunity to rethink how we work.

First, Zoom fatigue may cause managers to reconsider the need for a meeting and instead ask whether a simple email or instant message will do.<sup>72</sup> In 2019, CNBC published an article with the results of a Korn Ferry survey of 1,945 workers that revealed 67% of workers felt meetings kept them from getting their best work done.<sup>73</sup> A majority of respondents felt they “wasted” between one and five hours each week in meetings, with some even feeling they wasted more than ten hours a week in meetings.<sup>74</sup> On one hand,

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67. *Id.*

68. *Working from Home: The Long-Term Effects on Employee Well-Being*, WELLRIGHT BLOG (Aug. 5, 2020), <https://www.wellright.com/blog/long-term-effects-working-from-home-employee-well-being> [<https://perma.cc/3J7V-E3U3>].

69. Gautam, *supra* note 56.

70. *Id.*

71. Adi Gaskell, *Productivity in Times of Covid*, FORBES (Dec. 8, 2020), <https://www.forbes.com/sites/adigaskell/2020/12/08/productivity-in-times-of-covid/?sh=5f80650e1fa1> [<https://perma.cc/EV4U-JYMW>] (suggesting innovation drain can be countered by the right tools and training employees to work better remotely).

72. *Working From Home*, *supra* note 68.

73. Abigail Johnson Hess, *67% of Workers Say Spending Too Much Time in Meetings Distracts Them From Doing Their Job*, CNBC (Nov. 17, 2019, 9:30 AM), <https://www.cnbc.com/2019/11/17/67percent-of-workers-say-spending-too-much-time-in-meetings-distracts-them.html> [<https://perma.cc/25RA-CUT3>].

74. *Id.*

meetings are now our collaborative lifeline in a virtual world, but these survey results suggest that scheduling meetings with more intention has great potential for increasing productivity. Thirty-five percent of workers admitted they would attend a meeting even if they did not think it would be a productive use of their time.<sup>75</sup> It therefore becomes that much more important for employers to guard their meetings in a wholly virtual environment. Korn Ferry consultant Cathi Rittelmann suggests that the key to productive meetings is ensuring the (few) right people are invited and sending out a clear agenda ahead of time.<sup>76</sup>

Second, on the issue of collaboration, Buffer, one of the aforementioned companies providing stipends to employees for their remote work, relies heavily on asynchronous communication to create effective cross-company collaboration, especially across time zones.<sup>77</sup> The company suggests that written and direct communication has great benefits for clarity and efficiency.<sup>78</sup> Buffer focuses on real time meetings for social events, urgent matters, and relationship building.<sup>79</sup> Asynchronous communication is more inclusive because it takes the focus off the big personalities and loud talkers and equalizes the opportunity to speak.<sup>80</sup> One could imagine how this would empower individuals who are disabled—particularly the blind, deaf, or speech-impaired—to speak more often, because they do not have to compete with quicker and louder voices. The Buffer team also notes that asynchronous communication means everything is written down and searchable, reducing confusion or uncertainty about what was said.<sup>81</sup> While there is a definite drawback in the lack of regular face time with colleagues, the Buffer team suggests this can be alleviated with weekly video check-ins as opposed to constant video meetings.<sup>82</sup>

This simplistic view of asynchronous communication may not address matters around onboarding, managing interns, or other

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75. *Id.*

76. *Id.*

77. Hailley Griffis, *Asynchronous Communication and Why It Matters For Remote Work*, BUFFER BLOG (Mar. 17, 2020), <https://buffer.com/resources/asynchronous-communication/#:~:text=One%20remote%20work%20best%20practice,the%20same%20time%20for%20everyone> [https://perma.cc/N7L7-R3BS].

78. *Id.*

79. *Id.*

80. *Id.*

81. Victoria Gonda, *What Happened When Our Team Switched to Only Asynchronous Meetings*, BUFFER BLOG (July 29, 2019), <https://buffer.com/resources/asynchronous-meetings/> [https://perma.cc/95S2-K3U7].

82. *Id.*

situations where an employee is bound to have questions that may hinder their ability to even begin to be productive, but for teams who are well acquainted with their roles and each other, some asynchronous communication could be beneficial.

A final consequence of remote work for employers to consider is the impact of virtual work on reducing a sense of company culture. There is a diversity of conflicting data on the impact of telework on company culture, individual well-being, long-term productivity, and turnover rates.<sup>83</sup> This is likely due in part to the (relative) novelty of telework and the general split in generational attitudes between an older generation who may prefer in-person work and the younger workforce who increasingly demands telework.<sup>84</sup> Gallup has found that those who dislike remote work are five to ten percentage points less likely to feel recognized for their contributions, feel cared about by their fellow employees, and feel that their opinions count.<sup>85</sup> For individuals who prefer in-person work, remote work can result in 17% lower productivity and 24% higher turnover.<sup>86</sup> While Gallup suggests that individuals who work remotely may be disconnected from company culture,<sup>87</sup> there is little empirical data at this point to suggest what the long term

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83. Compare Sandi Mann & Lynn Holdsworth, *The Psychological Impact of Teleworking: Stress, Emotions and Health*, 18 NEW TECH. WORK & EMP. 3, 196 (2003) (discussing the negative emotional impact of teleworking and the increase in mental health symptoms of stress in teleworkers), and Tomas Chamorro-Premuzic, *4 Major Long-term Psychological Effects of Continued Remote Work*, FAST CO. (Aug. 31, 2020) <https://www.fastcompany.com/90544975/4-major-long-term-psychological-effects-of-continued-remote-work> [<https://perma.cc/276Q-USC6>] (suggesting prolonged remote work may increase loneliness, anxiety, and stress in teleworkers), with Loubier, *supra* note 55 (suggesting remote work can improve productivity and health while decreasing costs and employee turnover), and Lister & Harnish, *supra* note 42 (finding that the majority of U.S. workers feel the benefits of telework outweigh its negative aspects).

84. See Lister & Harnish, *supra* note 42, at 129, 133; see also Eisenstadt, *supra* note 12 (suggesting remote work appeals particularly to millennial workers who seek flexibility and work-life balance).

85. Jake Herway & Adam Hickman, *Remote Work: Is It a Virtual Threat to Your Culture?*, GALLUP (Aug. 25, 2020), <https://www.gallup.com/workplace/317753/remote-work-virtual-threat-culture.aspx> [<https://perma.cc/RH4N-R7JC>].

86. *Id.* Compare *id.*, with Loubier, *supra* note 55 (discussing a PGI survey that found that 80% of remote workers reported higher morale. This figure suggests that burnout may be occurring amongst older, or less tech capable populations, but it may be less likely to occur amongst the younger generation who demands telework).

87. Compare Herway & Hickman, *supra* note 85 ("Remote employees are seven percentage points less likely to see their connection to the mission of the company."), with Loubier, *supra* note 55 ("A study by Staples Advantage found 76% of telecommuters were willing to work overtime and felt more loyal to their company with the option for remote work and telecommuting.").

impacts of that disconnect might be,<sup>88</sup> and Gallup acknowledges that even without working remotely, 60% of employees could not agree on what their company stood for.<sup>89</sup> One fix, however, is to let go of the thought that every interaction has to be work-focused.<sup>90</sup> For some companies, this may mean creating a group message to share pet photos; for others, this could mean virtual pizza nights, movie nights, or just about anything else. These numbers are hard to interpret long term because the research is so varied, but the data seems to suggest that individuals who prefer teleworking are less likely to burn out, feel disconnected, and leave their company than those who do not enjoy telework. This suggests that companies may be healthiest long term if they can provide options that accommodate various working preferences.

*C. Considering Ways for Employers to Accommodate  
Employees Post-COVID-19*

As noted earlier, the rates of unemployment amongst the disabled population are alarmingly high.<sup>91</sup> This becomes even more concerning when considering that 50 million Americans, and 10% of the world's population, are disabled, making individuals who are disabled the largest minority group in both the United States and the world.<sup>92</sup> Furthermore, the tide towards telework has been changing for several years now. In their 2019 article on telework in the United States in the 20th century, Lister and Harnish estimate that 19.7% of Americans teleworked on a regular basis.<sup>93</sup> But if this

88. Gautam, *supra* note 56 (noting he has “yet to see the hybrid approach yield predictable results,” and instead he has found “technical issues, fatigue, anxiety, and the absence of physical interaction negatively affect productivity and well-being . . .”).

89. Herway & Hickman, *supra* note 85 (suggesting the “loss” of company culture caused by telework is actually a pre-existing weakness in the company's ethos).

90. Phil Lewis, *Make Sure That Remote Working Supercharges Your Culture—And Doesn't Stall It*, FORBES (Mar. 24, 2020, 7:17 AM), <https://www.forbes.com/sites/phillewis1/2020/03/24/make-sure-that-remote-working-supercharges-your-culture-and-doesnt-stall-it/?sh=4581f20a4e8b> [<https://perma.cc/X6Q2-XZJW>].

91. *Disability Employment Statistics*, *supra* note 4.

92. *Diverse Perspectives: People with Disabilities Fulfilling Your Business Goals*, U.S. DEPT. LAB.: OFF. DISABILITY EMP. POL'Y, <https://www.dol.gov/agencies/odep/publications/fact-sheets/diverse-perspectives-people-with-disabilities-fulfilling-your-business-goals> [<https://perma.cc/5AEG-58XW>]; *Factsheet on Persons with Disabilities*, UNITED NATIONS: ENABLE, <https://www.un.org/disabilities/documents/toolaction/pwdfs.pdf> [<https://perma.cc/WS53-YSGL>].

93. Lister & Harnish, *supra* note 42, at 129, 133; *see also* Speigner v. Wilkie, 31 Vet. App. 41, 43 (2019) (citing U.S. OFF. PERS. MGMT., STATUS OF TELEWORK IN THE

trend is to continue, it is essential that the corporate world learn how to accommodate all its workers.

i. Telework and the Capacity to Enfranchise: The Legal Field

Because the legal profession falls into the category of professional jobs that lend themselves to telework, it provides a good example for the potential for growth in inclusion in a variety of industries that are now teleworking. Additionally, the legal profession has been criticized in the past for its lack of accessibility. In 2009, Donald Stone published an article in the *Minnesota Journal of Law & Inequality* analyzing the then-current state of the profession for attorneys who are disabled.<sup>94</sup> Stone found only 7% of ABA members report having a disability, and those individuals reported rates of employment 6–9% lower than their able-bodied counterparts.<sup>95</sup> Furthermore, attorneys who are disabled are paid on average \$12,000 less than their non-disabled counterparts.<sup>96</sup> Stone's Attorneys with Disabilities Survey questioned the hiring and management practices of 50 firms throughout the country, over half of which employed an attorney who was either mentally or physically disabled.<sup>97</sup> The most common accommodations included modified work schedules, accessible technology, accessible architecture, additional secretary support, and modification of equipment—but not telework.<sup>98</sup>

The ABA National Conference on Employment of Lawyers with Disabilities has offered telework as one way to accommodate lawyers who are disabled.<sup>99</sup> It seems probable that telework could be one way to increase the number of attorneys who are physically and mentally impaired in the profession. Stone noted specifically

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FEDERAL GOVERNMENT, REPORT TO CONGRESS, FISCAL YEAR 2017, at 31 (2019), <https://www.telework.gov/reports-studies/reports-to-congress/2018-report-to-congress.pdf> [<https://perma.cc/722N-86JN>] (finding that by 2017, 21% of federal employees teleworked in some capacity).

94. Donald H. Stone, *The Disabled Lawyers Have Arrived; Have They Been Welcomed with Open Arms into the Profession? An Empirical Study of the Disabled Lawyer*, 27 LAW & INEQ. 93, 95–122 (2009).

95. *Id.* at 95.

96. *Id.*

97. *Id.* at 117.

98. *Id.* at 118. This survey was an unpublished online survey by the author attached to his paper in Appendix A.

99. *Id.* at 101–02 (referring to the findings of the AM. BAR ASS'N COMM'N ON MENTAL AND PHYSICAL DISABILITY L., THE NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES: A REPORT FROM THE AMERICAN BAR ASSOCIATION FOR THE LEGAL PROFESSION (2006)). Stone's survey was conducted in 2007, one year after the ABA Report was published.

that despite the inclusion of attorneys with psychological impairments in the profession, there is still a debate over whether accommodations for lawyers with mental disabilities are in fact reasonable.<sup>100</sup> Individuals with physical and mental impairments potentially have a lot to gain and lose in a teleworking world.<sup>101</sup> Stone is not the only attorney to acknowledge a dearth of opportunities for individuals who are disabled. Danielle Liebl is an attorney with cerebral palsy who began her career at Reed Smith, and, as of the publication of this Article, now works at as an Associate Corporate Counsel at Amazon.<sup>102</sup> In an op-ed for Lexis360, she implored the legal profession to do more to accommodate individuals with disabilities like herself.<sup>103</sup>

In 2016, the Sixth Circuit granted Andrea Mosby-Meachem, an in-house attorney, a judgement against her employer for denying her an accommodation to work from home for ten weeks while on bedrest.<sup>104</sup> In contrast to their *EEOC v. Ford* decision three years earlier,<sup>105</sup> the court found the plaintiff had established physical presence was not essential, particularly because she had never needed to represent the company in court or depositions, and because in-house and outside counsel testified her work did not suffer at home.<sup>106</sup> Unlike the Sixth Circuit's earlier *Ford* decision, where the court stressed that an open telework policy may lead to employee abuse, the court did not take issue with the office attorneys flouting an official policy against telework.<sup>107</sup> The discrepancy between the two decisions can largely be accounted for by Mosby-Meachem's continued high quality of work.<sup>108</sup>

While *Mosby-Meachem* suggests that the legal profession may be moving in a more inclusive direction, there is still much to do to

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100. *Id.* at 98, 122.

101. *See infra* Part II.C.ii.1–2.

102. Danielle Liebl, *ADA Protects Lawyers with Disabilities, but We Must Do More*, LEXISNEXIS: LAW360 (Aug. 10, 2020, 3:40 PM), <https://www.law360.com/articles/1299552/ada-protects-lawyers-with-disabilities-but-we-must-do-more> [<https://perma.cc/YF5W-N48Q>].

103. *Id.*

104. *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 599 (6th Cir. 2018).

105. *Equal Emp. Opportunity Comm'n v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).

106. *Mosby-Meachem*, 883 F.3d at 605.

107. *Compare id.* at 603–04 (finding that Mosby-Meachem was otherwise qualified to perform her job from home despite an official policy against telework), with *E.E.O.C. v. Ford*, 782 F.3d at 765 (arguing that allowing all disabled employees to telecommute on an unpredictable basis would undermine the purpose of the ADA).

108. *Mosby-Meachem*, 883 F.3d at 605.

make the professional world at large accessible. But if we can acknowledge that a problem exists, the next question is how do we fix it? Because of the nature of reasonable accommodations, the answer will vary based on the type of employer, the resources of the employer,<sup>109</sup> and the needs of the individual. As early as July 2020, several large law firms across the U.S. and the world—Dentons, Husch Blackwell, Hogan Lovells, and Covington & Burling, among others—began making the shift to providing options to attorneys and personnel to telework indefinitely regardless of disability status.<sup>110</sup>

However, it is important to consider a wide variety of experiences in judging the practical impacts of telework, specifically on individuals who are disabled. Individuals with mental (which may include emotional) and physical impairments, such as ADD, OCD, anxiety, and deafness, all have life experiences and obstacles which should be of central importance to their employers in deciding whether to continue to telework in whole or in part. I will analyze the potential impact of a telework accommodation on physical disabilities and mental disabilities in turn.

## ii. Implications of Teleworking and Accommodations Across Impairments

The potential positive impact of telework on those with ambulatory impairments seems plainly obvious. In fact, individuals with physical disabilities have been, and will likely continue to, telework at higher rates than other individuals.<sup>111</sup> One possible reason for this tendency to telework is because it decreases dependence on others.<sup>112</sup> Despite modified work schedules being a statutory accommodation, courts have been inconsistent on whether rearranging work schedules to best accommodate an individual's

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109. *McMillan v. City of New York*, 711 F.3d 120, 128 (2d Cir. 2013) (emphasizing that the ADA requires an individualized inquiry).

110. Dong, *supra* note 33.

111. Lisa A. Schur, Mason Ameri & Douglas Kruse, *Telework After COVID: A "Silver Lining" for Workers with Disabilities?*, 30 J. OCCUPATIONAL REHAB. 521, 523 (2020).

112. Annie Xu, Mark Chignell, Koichi Takeuchi, Naotsune Hosono & Takashi Tsuda, *Vocal Village Audioconferencing: A Collaborative SOHO Tool for Teleworkers with Physical Disabilities*, 2ND INT'L CONF. FOR UNIVERSAL DESIGN KYOTO 2006, July 2008, at 1–2.

transportation needs constitutes a reasonable accommodation.<sup>113</sup> In the past, courts have ruled that enabling a commute may be a reasonable accommodation, but a shift change to enable a family to pick an individual up from work is not.<sup>114</sup> An individual may be requesting a shift change for the same reasons that another employee is requesting an accommodation, but under the current distinction, it is possible that one could be allowed and the other denied depending on the posture of the employer and the attitude of the court. Because telework eliminates a commute, it eliminates any potential hazards individuals might face with driving, public transportation, parking, or other architectural barriers in the office.<sup>115</sup> Telework would therefore create an additional level of protection for individuals who are disabled.

### 1. *Physical Impairments*

There are many individuals who are disabled in ways that impact them physically or emotionally who may not be so fortunate in a post-COVID-19 world. Already, the media has latched on to the issues surrounding masks and the barrier masks create for lip readers, something that has presented reasonable accommodation issues in the past.<sup>116</sup> Telework does present unique challenges for individuals who are blind or deaf. Rooted in Rights is a blog focused on giving a voice to individuals with disabilities.<sup>117</sup> In one blog post, the author, Jess Gill, describes her own challenges with attempting to adjust to a world where we all wear masks, as she never learned to sign, she relies heavily on lip reading.<sup>118</sup> (Interestingly, Jess has an easier time hearing women than men.) Aside from having

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113. 42 U.S.C. § 12111(9)(B); compare *Regan v. Faurecia Auto. Seating, Inc.*, 679 F.3d 475, 479 (6th Cir. 2012) (holding that an employee's request for an altered work schedule was not a reasonable accommodation), with *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 498–502 (3d Cir. 2010) (holding that the ADA can obligate employers to accommodate employees' disability-related difficulties in getting to work).

114. Compare *Regan*, 679 F.3d at 480, with *Colwell*, 602 F.3d at 498–99.

115. *Colwell*, 602 F.3d at 499–500; see also *Lyons v. Legal Aid Soc.*, 68 F.3d 1512, 1514 (2d Cir. 1995) (holding that an employee's request that her employer pay for a parking spot near her office was a reasonable accommodation); see also Stone, *supra* note 94, at 95 (focusing on accommodating lawyers with physical disabilities and/or mental health issues and discussing court decisions concerning reasonable accommodations).

116. See *Southwestern Comm. Coll. v. Davis*, 442 U.S. 397 (1979); see also Jess Gill, *Challenges of Being a Deaf Lip Reader During COVID-19*, ROOTED IN RIGHTS (Apr. 23, 2020), <https://rootedinrights.org/the-challenges-of-being-a-deaf-lip-reader-during-the-covid-19-pandemic/> [<https://perma.cc/E2XJ-M94S>] (advocating for online meetings with closed captioning).

117. Gill, *supra* note 116.

118. *Id.*

interpreters available, Jess suggests texting or keeping a note pad to communicate with deaf individuals in person while wearing masks.<sup>119</sup> Another post provides a plethora of suggestions for adapting to deaf and blind coworkers.<sup>120</sup> Howard Rosenblum, CEO of the National Association of the Deaf, noted that prior to the pandemic, videoconferencing platforms were largely inaccessible to deaf individuals.<sup>121</sup> Closed captioning and pinning users—such as interpreters—to the home screen are just a few of the strides these platforms have made in recent months.<sup>122</sup> Providing materials ahead of time and special headsets are additional accommodations which may help individuals who are deaf transfer to a telework world.<sup>123</sup> Ensuring the technology that a company uses is compatible with screen readers and describing images and videos may help blind individuals.<sup>124</sup>

The increased reliance on platforms like Zoom, WebEx, and Microsoft Teams naturally creates questions over who will bear the financial burden of making these platforms accessible in the future. While this is not the focus on this paper, it does raise an important question. If funding accessible features becomes the responsibility of each individual employer, the costs that employers have to pay for accessible platforms could increase the burden on employers and detract from their ability to make other accommodations. That responsibility could quite possibly turn various accommodations into an undue hardship.<sup>125</sup>

## 2. *Mental Impairments*

Beyond accommodating physical disabilities, employers should consider the potential benefits *and* costs that telework may have on individuals with mental or psychological impairments.

While there may be benefits to telework for individuals who are mentally or emotionally impaired, here the potential downsides also become more pronounced. One of the potential benefits of telework for individuals who take medication is that it may allow

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119. *Id.*

120. See Alaina Leary, *How to Make Virtual Meets Accessible*, ROOTED IN RIGHTS (Apr. 13, 2020), <https://rootedinrights.org/how-to-make-your-virtual-meetings-and-events-accessible-to-the-disability-community/> [<https://perma.cc/KEK9-U29Y>].

121. Low, *supra* note 30.

122. *Id.*

123. See Leary, *supra* note 120.

124. *Id.*

125. Blake E. Reid, Christian Vogler & Zainab Alkebsi, *Telehealth and Telework Accessibility in a Pandemic-Induced Virtual World*, UNIV. COLO. L. REV., Nov. 9, 2020, at 16–19.

them to structure their daily schedule to avoid grogginess or other side effects of medication.<sup>126</sup> Individuals with anxiety disorder, obsessive compulsive disorder, and post-traumatic stress disorder may have more challenges with disruptions to daily life<sup>127</sup> because they may crave routine that is not conducive to asynchronous work schedules.<sup>128</sup> WebMD includes a web page on how individuals with ADHD should manage working from home, and on their page, WebMD acknowledges that the structure provided by an office and colleagues may have some benefits to those with the disorder.<sup>129</sup> This means employers may be able to play an important role in helping support individuals with mental and emotional impairments. The Department of Labor has suggested that positive reinforcement, frequent breaks, and regular meetings to prioritize tasks may help bring order to a remote work environment.<sup>130</sup> Reaching out to employees to discuss their preferred communicative method and using that method may be another way to provide structure and connectivity that is particularly helpful for individuals who are mentally impaired.<sup>131</sup>

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126. See Newstax Blogs, *Step 2: Mental Health*, LEXISNEXIS: LEXISBLOGS (Aug. 20, 2020, 2:01 AM), <https://plus.lexis.com/document/?pdmfid=1530671&crd=e2bb4eb7-cb98-4261-a7c8-c8fcf8385748&pdactivityid=774e3e0d-791a-45d7-b39f-9a913961cf76&pdtargetclientid=-None-&ecomp=p5qk&prid=295c9476-f77f-4c7c-9472-34187f0db39d> [<https://perma.cc/NV5N-LYJ8>] [hereinafter *Step 2: Mental Health*].

127. See Wolters Kluwer, ¶ 90, *123 What You Should Know About the ADA, the Rehabilitation Act, and COVID-19*, Apr. 17, 2020, at 2020 WL 2146074; but see Casey Shull, *Remote Work: A Solution for PTSD?*, DISTANT JOB (Aug. 31, 2018), <https://distantjob.com/blog/remote-work-solution-for-working-with-ptsd/> [<https://perma.cc/9SG3-FPBC>] (highlighting the benefits remote recruiting can have for employees with PTSD and employers).

128. See JAN, *Accommodation and Compliance Series: Obsessive Compulsive Disorder*, ASK JAN, <https://webcache.googleusercontent.com/search?q=cache:MQwXdDTXmTgJ:https://askjan.org/publications/Disability-Downloads.cfm%3Fpubid%3D1471117%26action%3Ddownload%26pubtype%3Dpdf+&cd=3&hl=en&ct=clnk&gl=us> [<https://perma.cc/QU2D-EWQ5>]; see also *Step 2: Mental Health*, *supra* note 126 (suggesting employers can accommodate employees by providing them with a routine); Wolters Kluwer, *supra* note 127 (acknowledging that employees with certain mental health conditions might have a harder time dealing with disruptions resulting from the COVID-19 pandemic).

129. *Working From Home When You Have ADHD*, WEBMD (Apr. 22, 2020), <https://www.webmd.com/add-adhd/work-from-home-adhd> [<https://perma.cc/99T7-FZSP>].

130. See *Accommodations for Employees with Psychiatric Disabilities*, OFFICE OF DISABILITY EMP'T POL'Y, <https://www.dol.gov/agencies/odep/program-areas/mental-health/maximizing-productivity-accommodations-for-employees-with-psychiatric-disabilities> [<https://perma.cc/46Y2-QUN3>].

131. See *Employing People with Mental Health Disabilities*, SHRM, <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/mental-health-disabilities.aspx> [<https://perma.cc/3V25-CTRK>].

Japanese studies of the effects of telework have found that teleworking can lead to decreased dependence on a team and as a result decreased trust of co-workers.<sup>132</sup> To treat this sense of isolation, the Japanese have created accessibility initiatives.<sup>133</sup> Studies found that increased accessibility led to better teamwork, increased self-confidence, and enjoyment of work, and increased understanding of how co-workers operate.<sup>134</sup> Perhaps employers should be cognizant of and open to requesting semi-regular in-person work of individuals who work on teams with mentally impaired co-workers. Such a request does not require employers to buy expensive equipment, it facilitates comradery, and it can play an important role in facilitating employee well-being without spending a dime.

### III. Reinterpreting Reasonable Accommodation

Now that we have seen what a telework accommodation could look like, this begs the question—is it even supported by the law? Many believe that answer should be “yes” in a post-pandemic world.<sup>135</sup> While *Vande Zande* is often cited as establishing that physical presence in the office is an essential function of a job, many fail to remember Judge Posner’s qualification that this in-person requirement may change with technology.<sup>136</sup> By 2017, 21% of all federal employees teleworked in some capacity.<sup>137</sup> Even under the *Vande Zande* standard, it is time to reexamine our view of reasonable accommodations.

Because the reasonable accommodation question is factored into the qualified standard, the existence of a reasonable accommodation is a particularly important step in enabling individuals who are disabled to become productive members of the workforce. The statutory text outlining reasonable accommodation focuses on physical accommodations such as appropriate equipment and devices and making physical spaces accessible, in addition to modified work schedules and job restructuring.<sup>138</sup> However,

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132. Xu, *supra* note 112, at 1–2.

133. *Id.* at 1, 3.

134. *Id.* at 3, 7.

135. See, e.g., Eisenstadt, *supra* note 12.

136. *Id.*; see *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (“This will no doubt change as communications technology advances, but is the situation today.”).

137. *Speigner v. Wilkie*, 31 Vet. App. 41, 43 (Vet. App. 2019).

138. 42 U.S.C. § 12111(9)(B).

recently, the courts have also read leaves of absence into this list.<sup>139</sup> While the text does not explicitly state that telework may be a reasonable accommodation, the trend of the courts suggests that telework may be included in the near future, not in a wholesale manner, but rather on a case-by-case basis. Updated EEOC guidances have also frequently recognized temporary telework as a reasonable accommodation,<sup>140</sup> lending further support to the possibility of a new reasonable accommodation.

*A. Statutory Language and Caselaw Suggest a Shift Is Possible*

Statutory language will always take precedence when considering whether a new interpretation of a statute is permissible.<sup>141</sup> The statute includes the following reasonable accommodations: “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations . . . .”<sup>142</sup> “[O]ther similar accommodations” leaves open the possibility for a multitude of accommodations. Arguably, job restructuring, as vague as it is, could be construed as inviting telework. In reality, the statute on its face does not clearly condone telework, and none of the listed accommodations are strikingly similar to telework. Therefore, the courts often justify telework not on a statutory interpretation ground, but rather because it is “reasonable,” and its reasonableness is determined by what would or does not place an undue hardship, cost or otherwise, on either employees or the business.<sup>143</sup> What the caselaw suggests is that

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139. Stephen F. Befort, *The Most Difficult Reasonable Accommodation Issues: Reassignment and Leave of Absence*, in *DISABILITY LAW CASES AND MATERIALS* 174, 174 (Stephen F. Befort & Nicole Buonocore Porte eds., 2017); see, e.g., *Humphrey v. Memorial Hosp. Ass’n*, 239 F.3d 1128, 1135 (9th Cir. 2011).

140. See U.S. EQUAL OPPORTUNITY. EMP’T COMM’N, *REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES* (2006) [hereinafter *Accommodations for Attorneys*]; see also U.S. EQUAL OPPORTUNITY. EMP’T COMM’N, *EEOC-NVTA-2009-3, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT* (2020) [hereinafter *Pandemic Preparedness*] (noting telework as a reasonable accommodation).

141. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184–90 (1978).

142. 42 U.S.C. § 12111(9) (2009); see also *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (noting employee requested to be moved to a straight-shift rather than a rotational shift).

143. 42 U.S.C. § 12111(10)(A)–(B); see *Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 735–36 (D.M.D. 1996).

whether or not telework will become a reasonable accommodation in the future is not a question that can be answered in isolation; rather, it will be a fact-specific inquiry to the needs of the business, and to the needs of the particular employees and team structures in any given business.<sup>144</sup> In Part IV.B, "Approaching the Accommodation Conversation," statistics supporting why telework likely will not cause undue hardship for many employers going forward, either based on cost or effects on operation, will be presented.

*B. Courts have waived on Telework as a Reasonable Accommodation*

Though it would be incorrect to assert that *Vande Zande* was the first case to suggest that physical presence is an essential function, that case seems to have solidified the idea.<sup>145</sup> Soon after *Vande Zande* was decided, the Sixth Circuit adopted the Seventh Circuit's standard in *Smith v. Ameritech* and rejected the request of a phone book salesman to work from home following a herniated disc over fears that telework would lower productivity.<sup>146</sup> Courts have continually found physical attendance to be an essential function of any job up until 2010 when the District of Pennsylvania declined to adopt the *Vande Zande* attendance standard as a per se rule.<sup>147</sup> Instead, that court found that where a request to work from home is backed by medical documentation and the plaintiff has shown they can replicate their work setup in a manner that is not overly costly, the plaintiff may have shown a reasonable accommodation.<sup>148</sup> In 2013, the Second Circuit declined to grant summary judgement to an employer when an employee was regularly tardy; instead, the Court offered the plaintiff the chance to show that work could be made up over lunch or after normal

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144. *Bryant*, 923 F. Supp. at 736; *see also Rehrs*, 486 F.3d at 357 (finding that allowing Rehrs to work a straight day-shift would cause other workers to have to work harder, longer, and/or be deprived of opportunities, making the accommodation one not mandated by the ADA).

145. *Eisenstadt*, *supra* note 12; *see also Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995) (citing *Tyndall v. Nat'l Edu. Ctr. Inc.*, 31 F.3d 209, 213–14 (4th Cir. 1994)); *Law v. United States Postal Serv.*, 852 F.2d 1278, 1279–80 (Fed. Cir. 1988); *Langon v. Dept. 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).

146. *Smith v. Ameritech*, 129 F.3d 857, 860, 867 (6th Cir. 1997).

147. *Bisker v. GGS Info. Sys.*, No. CIV. 1:CV-07-1465, 2010 WL 2265979, at \*1–4 (D. Pa. June 2, 2010). This case came two years after the ADA Amendments which widen the standard for coverage.

148. *Id.* at 4.

hours without placing undue hardship on the employer.<sup>149</sup> In *McMillian*, the Second Circuit found the assumption that regular attendance is an essential function to be antithetical to the individualized inquiry of the ADA.<sup>150</sup> This trend toward more flexible work schedules was challenged when a Louisiana court found that a supervisory or supervised role—inherently requiring teamwork—suggested telework would not be feasible.<sup>151</sup>

However, some employers—and courts—may simply find that telework is incompatible with various work situations. In *Tyndall*, the Fourth Circuit emphasized that the beginning of a semester is a particularly pivotal time in the formation of a class and it was therefore considered inappropriate—at the time—to consistently allow the professor to begin the semester remotely.<sup>152</sup> More recently, the Sixth Circuit sided with the Ford Motor Company, finding an employee could not perform the essential functions of her job where three failed telework trial runs proved an employee could not meet the bare expectations of her job, and the employee's lack of productivity at home left her fellow employees with work to pick up.<sup>153</sup> Furthermore, the court accepted that many of the plaintiff's telework friendly duties were not central enough to her job to support a telework exemption.<sup>154</sup>

The current state of the law, however, suggests that *Credeur* and *Tyndall* will represent anomalies going forward. After performing his job entirely from home during COVID-19—much like professors did during the height of COVID-19<sup>155</sup>—a trauma center manager refused to return to in-person work in May, the Massachusetts court overseeing the case subsequently issued an injunction allowing the plaintiff to keep his job and work from home due to the irreparable harm that would come from loss of a job and health insurance, and previous successful completion of his job at home suggested work-from-home did not place an undue hardship

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149. *McMillan v. City of New York*, 711 F.3d 122, 126–29 (2d Cir. 2013).

150. Mary 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).

151. *Credeur v. Louisiana*, 860 F.3d 785, 793–95 (5th Cir. 2017).

152. *Tyndall v. Nat’l Edu. Ctr. Inc.*, 31 F.3d 209, 213 (4th Cir. 1994).

153. *EEOC v. Ford Motors*, 782 F.3d 753, 759 (6th Cir. 2015).

154. *Id.* at 759.

155. Like any reasonable accommodation, telework must be considered within a fact specific inquiry of the operations of the employer. Whether a professor will be allowed to telework as a reasonable accommodation will depend on the operations of their specific employer, but *Peeples* appears to suggest that there will be a default in favor of allowing such an accommodation because so many professors across the country, and across disciplines have been able to work remotely for over a year.

on the company.<sup>156</sup> In practice, undue hardship can look like the inverse of reasonable accommodations,<sup>157</sup> and what is unduly burdensome or what constitutes a reasonable accommodation is also often determined by considering the impact on fellow workers or other impacted parties.<sup>158</sup> A shift change has been considered unreasonable in some circumstances because it would require each other employee to spend more time working the overnight shift.<sup>159</sup> Both reasonable accommodations and undue hardship must therefore be determined by an individualized inquiry.

### C. EEOC Guidance Favors Reinterpretation

Even as telework is more widely accepted among the general population,<sup>160</sup> it remains to be seen if, and how, it will be embraced under the ADA. EEOC guidance has hinted at the possibility of a telework accommodation on many occasions but has continually acknowledged that it is up to each employer's discretion to determine what fits that employer's own needs and is therefore "reasonable."<sup>161</sup> It is worth noting that the Sixth Circuit was heavily critical of the EEOC's stance on telework in the *Ford Motors* decision.<sup>162</sup> Ford argued that the EEOC was urging that an employer with a telework policy should be prepared to allow employees to telework unpredictably up to 80% of the time, and the court urged this would have the negative effect of employers

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156. *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 59–61, 66 (D. Mass. 2020).

157. Mark Weber, *Unreasonable Accommodation and Due Hardship*, in *DISABILITY LAW CASES AND MATERIALS* 135, 135–36 (Stephen F. Befort & Nicole Buonocore Porter eds., 2017).

158. *US Airways v. Barnett*, 535 U.S. 391, 396 (1985); *see also Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (holding that employer was not required to eliminate an essential function or create a new position to accommodate a disabled employee).

159. *Rehrs*, 486 F.3d at 357.

160. *Lister & Harnish*, *supra* note 42, at 129, 133; *see also Routley*, *supra* note 33 (stating that 98% of survey participants indicated a preference for having the option to work from home for the rest of their careers).

161. *Pandemic Preparedness*, *supra* note 140; *see also* U.S. EQUAL OPPORTUNITY EMP. COMM'N, EEOC-NVTA-2003-1, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (2003) [hereinafter *Work at Home/Telework*] (reiterating the EEOC's stance that employers are not required to offer telework as an accommodation for disabled employees unless the employer does already offer telework); *see also* U.S. Equal Opportunity Emp. Comm'n, *The COVID-19 Pandemic and Antidiscrimination Laws*, YOUTUBE (Mar. 30, 2020), <https://www.youtube.com/watch?v=X50G7141NKg> [<https://perma.cc/3MD7-RB67>] [hereinafter *COVID-19 Pandemic and Antidiscrimination Laws*] (acknowledging telework will not automatically become a reasonable accommodation post-COVID-19 in a conference from late March).

162. *See EEOC v. Ford Motors*, 782 F.3d 753 (6th Cir. 2015).

reducing telework policies to avoid liability.<sup>163</sup> However, this employer discretion standard is in harmony with the *Ford Motors* court deferring to the employer's judgment that the employee's tasks simply did not demand telework.<sup>164</sup>

The EEOC, the body responsible for administering the ADA, has been at the forefront of advocating for a more flexible view of reasonable accommodations. As far back as 2003, the EEOC has been issuing guidances that suggest telework may be a reasonable accommodation in at least some circumstances,<sup>165</sup> and again in 2006 suggesting that a lawyer working from home a few days per week doing writing and document review may be reasonable for at least a period of time.<sup>166</sup> In late March 2020, the EEOC called a meeting to respond to the COVID-19 pandemic, and during the conference, which was streamed online, the EEOC responded to several questions about the potential for telework.<sup>167</sup> The EEOC acknowledged that when teleworking, the same accommodations required in the office may not be necessary when someone is at home.<sup>168</sup> The EEOC urged employers that interim accommodations may be appropriate and reassured them that post-telework would not automatically become a reasonable accommodation.<sup>169</sup> The EEOC and caselaw suggest, however, that granting an accommodation—even if temporary—may become evidence of a reasonable accommodation if the individual was able to perform all the essential functions of their job.<sup>170</sup> In a post-pandemic world, concerns about the efficacy of telework seem largely unfounded.

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163. *Id.* at 765–66.

164. *See id.* at 759.

165. *Compare* Work at Home/Telework, *supra* note 161 (suggesting telework should be available as an accommodation if an employer gives senior employees the option to telework, but seemingly refraining from endorsing telework as a standard accommodation even for periodic impairments), *with* Anne Cullen, *Employers Not Required to Allow Post-Virus Telework: EEOC*, LEXISNEXIS: LEXIS360 (Sept. 8, 2020, 4:09 PM), <https://www.law360.com/articles/1308173/employers-not-required-to-allow-post-virus-telework-eeoc> [<https://perma.cc/N8VB-P8MK>] (stressing that the pandemic does not make telework a reasonable accommodation automatically, but a case by case analysis may support an accommodation in some instances).

166. Work at Home/Telework, *supra* note 161. Unlike the previous guidance, this one seems to suggest employers without an existing telework policy should consider telework as an accommodation for some impairments.

167. *See* COVID-19 Pandemic and Antidiscrimination Laws, *supra* note 161.

168. *Id.*

169. *Id.*

170. *Id.*; *see* Skerski v. Time Warner Cable Co., 257 F.3d 273, 285–87 (3rd Cir., 2001); *see also* Newstax Blogs, *EEOC Addresses Telework as a Reasonable Accommodation*, LEXISNEXIS: LEXISBLOGS (Dec. 11, 2020, 11:20 AM),

#### IV. Telework will Likely Become a Reasonable Accommodation Absent an Undue Hardship

There are possibilities beyond a fully remote or wholly in-person schedule that may better balance the interests of all parties, particularly when individuals are working on teams. For example, in a pre-COVID-19 guidance the EEOC suggested that it would be reasonable to allow an attorney to work from home three days a week when only reviewing documents and taking client phone calls.<sup>171</sup> Furthermore, the *Tyndall* case suggests that when working with others, formation is a particularly delicate time during which an employer can be especially strict about requiring attendance.<sup>172</sup> It may therefore become commonplace for employers to require teams to meet periodically face to face, perhaps especially when onboarding new members, while still giving lots of flexibility about where employees may work in between.

A potential, but particularly murky, problem at this point is what might happen if the needs and rights of various employees clash: for example, one employee may need to work from home for medication or transportation reasons while another may need to work in the office for structure. We see this regularly in another context when religious rights clash with sexual orientation<sup>173</sup> or lifestyle choices.<sup>174</sup> While it is impossible to predict exactly how each employer will respond to this situation, it has the potential to complicate employment decisions in a manner which could certainly pose a challenge—on one hand, employers could respond by simply inquiring about an employee's accommodation needs and creating teams around those needs, but it may not always be realistic to structure teams in this manner. Employers could also face accusations of affirmative action type accommodations if they begin structuring work groups around the needs of singular disabled employees,<sup>175</sup> and employers being required to hire an individual to

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<https://plus.lexis.com/document/?pdmfid=1530671&crd=9af84af9-386c-4755-99fc-66640b3ffcc&pdactivityid=33f6b580-3905-406a-bbd8-6ec58d32c9a7&pdtargetclientid=-None-&ecompr=p5qk&prid=51ba57c1-aa18-4072-8ef2-185f4c8f1d3f> [<https://perma.cc/7W8S-B7JL>] (stating that if a disabled employee can perform their job at the same level of performance while working remotely during the COVID-19 pandemic, then the employer is less likely to be able to successfully argue that the employee cannot have telework as a future accommodation).

171. Accommodations for Attorneys, *supra* note 140.

172. *Tyndall v. Nat'l Edu. Ctr. Inc.*, 31 F.3d 209, 213 (4th Cir. 1994).

173. *See Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Comm.*, 138 S. Ct. 1719 (2018).

174. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

175. *US Airways v. Barnett*, 535 U.S. 391 (2002) (Scalia, J., dissenting).

work remotely or work in person for a particular position could unduly reduce their applicant pool. It is possible that this kind of burden on employees and operations could pose an undue hardship if it unduly restricts how others are able to work beyond their desires.<sup>176</sup> A proposal for an employer to adopt such a system would be subject to a fact specific inquiry as to whether it posed an undue hardship for that particular employer and therefore made teamwork based teleworking structures unreasonable.

Is this move to telework just the beginning of a changing of the tide?<sup>177</sup> Many believe that telework will be a reasonable accommodation going forward for two main reasons: (1) we simply have shown that working from home is possible,<sup>178</sup> and (2) empirical studies largely suggest that productivity does not drop at home, as the courts have often suggested, but rather even one day of work at home per week increases productivity.<sup>179</sup>

*A. Vande Zande is Undue: For Most, Telework will not Pose an Undue Hardship*

*Vande Zande* rested on two fundamental beliefs about the way we work. First, we cannot work—either with our team or our equipment—if we are not physically present in the same space at the same time.<sup>180</sup> More recent caselaw and the COVID-19 pandemic have already shown us that this claim that teamwork must be done

176. *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007).

177. *Compare Bisker v. GGS Info. Sys.*, No. CIV. 1:CV-07-1465, 2010 WL 2265979, at \*1–4 (D. Pa. June 2, 2010) (stating that working from home can be a reasonable accommodation when the employee can still perform the essential functions of their job, explicitly rejecting the 7th circuit rule), *and Smith v. Ameritech*, 129 F.3d 857, 862 (6th Cir. 1997) (suggesting that working from home is not a reasonable accommodation when an employee cannot maintain the same quality of work), *with Execs Expect Work Remote Trend to Continue*, *supra* note 36 (stating that 77% of human resource executives anticipate that the number of employees working remotely at least three days a week will increase); *see also* Gill Press, *The Future of Work Post-COVID-19*, FORBES (July 15, 2020), <https://www.forbes.com/sites/gilpress/2020/07/15/the-future-of-work-post-covid-19/#6ae129fa4baf> [<https://perma.cc/CCQ6-K2TG>].

178. *Dey et al.*, *supra* note 38; *see Eisenstadt*, *supra* note 12.

179. *Hancock*, *supra* note 150, at 151, 165 (2013).

180. *Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995). This is not to say all jobs can be done remotely, but rather the corporate jobs considered in this paper largely can. *Cf. Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012). *Samper* stressed that the use of medical equipment was a factor in requiring physical presence of a nurse, but today telehealth companies are proliferating by offering phone and video consults and home visits with limited equipment, including Kavira Health, started by the author's brother *during* the COVID-19 pandemic. This suggests that even professions that quintessentially require equipment can be modified for telework long term.

in person simply is no longer true:<sup>181</sup> in some industries the percentage of teleworkers rose to as high as 86%.<sup>182</sup> Furthermore, with the rise in video-conferencing platforms, everyone, disabled or not, can communicate online instantaneously.<sup>183</sup> Second, productivity will not decrease,<sup>184</sup> implicitly negating an undue hardship.<sup>185</sup> Not only does modern teleworking actually largely increase productivity, it offers a variety of other benefits to employers and disabled employees alike.<sup>186</sup>

i. Teleworking Does Not Undermine Productivity

A recent Chinese study found teleworking individuals were on average more productive than their non-teleworking counterparts.<sup>187</sup> During the COVID-19 pandemic, a number of surveys were conducted testing the actual and perceived productiveness of employees based both on self-perception and manager perception.<sup>188</sup> One survey found that 47% of individuals felt more productive during the pandemic, while in another, 30% felt no change in their productivity, and only a minority felt less productive.<sup>189</sup> When surveying employers, 68% of employers

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181. See Dey et al., *supra* note 38 (explaining that .31% employed in early March had switched to telework by early April); see also *supra* Part III.B (arguing that recent caselaw from the 2nd Circuit indicates a willingness by the courts to accept that workplaces are changing and that accommodations that were not at one time reasonable may become reasonable).

182. See *Disability Employment Statistics*, *supra* note 4.

183. Reid, *supra* note 125, at 18–19.

184. *Contra* Tim Lawrence & Brian Scheld, *Work-from-home Productivity Gains Seen Evaporating as Pandemic Grinds On*, S&P GLOBAL MARKET INTELLIGENCE (Sept. 10, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/work-from-home-productivity-gains-seen-evaporating-as-pandemic-grinds-on-60119373> [https://perma.cc/5KYL-NS44] (suggesting pandemic productivity gains are an illusion because productivity in many white collar jobs, like consulting, cannot be easily quantified like it could in coding where you can measure the lines of code written); see Bloom et. al., *Does Working From Home Work? Evidence from a Chinese Experiment*, 130 Q. J. ECON. 165, 185 (exploring increased productivity in a pre-pandemic study that lasted nine months).

185. *Vande Zande*, 44 F.3d at 545; see also *Rehrs v. Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (stating that the impact on other employees must be taken into account when determining the reasonableness of an accommodation).

186. See *supra* Part II.A.

187. Schur et. al., *supra* note 111, at 523.

188. See Routley, *supra* note 33; see also Press, *supra* note 177 (stating that 47% of employee surveyed by Kentik reported feeling more productive while working from home); *Execs Expect Work Remote Trend to Continue*, *supra* note 36 (stating that 37% of companies that have more remote employees than pre-COVID-19 pandemic have reported increased productivity).

189. See Press, *supra* note 177.

reported either no change to productivity or an increase in productivity since telework began.<sup>190</sup> These statistics overwhelmingly suggest that both self- and manager-perceived productivity and actual productivity are higher when working from home, at least part-time, than the traditional office work model.<sup>191</sup>

### B. Approaching the Accommodation Conversation

NFI-funded research discovered two particularly interesting outcomes with important implications for employers looking to increase diversity today: (1) individuals perceived less prejudice as a whole from their colleagues when their *managers* believed the benefits of accommodations outweighed the costs;<sup>192</sup> and (2) the respect managers gave to an accommodation request throughout the inquiry process was more important than the actual granting of a request in how satisfied employees were with their employer.<sup>193</sup> This tells us two things about the accommodation process moving forward. First, managers have a key role in promoting the inclusion of individuals who are disabled in the workplace. Second, strict adherence to a telework accommodation may not be necessary, either from an ADA standard, but also on an individual level: employees may be more willing to be flexible with their bosses if their bosses are respectful of them. In sum, mutual respect, not costly accommodations, is what will provide the greatest satisfaction regardless of how the law may change.<sup>194</sup>

NFI research also suggested that companies making accommodations for individuals who are disabled also tend to make more accommodations for non-disabled individuals.<sup>195</sup> This suggests that as we move to a likely more virtual world where individuals feel the strain of needing to be available all the time,<sup>196</sup>

190. See *Execs Expect Work Remote Trend to Continue*, *supra* note 36.

191. Hancock, *supra* note 150, at 165.

192. DISABILITY CASE STUDY RSCH. CONSORTIUM, *supra* note 26, at 6.

193. *Id.* at 8.

194. See Ashley Shrew, *Let COVID-19 Expand Awareness of Disability Tech*, NATURE (May 5, 2020), <https://www-nature-com.ezp1.lib.umn.edu/articles/d41586-020-01312-w> [<https://perma.cc/S88X-22W7>]. Shrew is a researcher who is disabled. In suggesting how to approach post-COVID-19 accommodations she emphasizes that employers should be willing to listen to criticism instead of defaulting to convention.

195. DISABILITY CASE STUDY RSCH. CONSORTIUM, *supra* note 26, at 45.

196. Hancock, *supra* note 150, at 151, 165–66; see also Chris Westfall, *Mental Health and Remote Work: Survey Reveals 80% of Workers Would Quit Their Job for This*, FORBES (Oct. 8, 2020, 4:30 PM), <https://www.forbes.com/sites/chriswestfall/2020/10/08/mental-health-leadership-survey-reveals-80-of-remote-workers-would-quit-their-jobs-for-this/?sh=6c9a35f33a0f> [<https://perma.cc/GBH7-447R>] (stating that 4 out of 5 employees struggle with work-life balance while teleworking).

a focus on accommodating individuals who are disabled could also lead companies to a more flexible and balanced approach in handling the needs of all their employees.<sup>197</sup>

One way that employees could respond is by a framework similar to those adopted under the "right to request" laws that have begun to infiltrate Europe, Australia, and even parts of the United States.<sup>198</sup> These laws enable employees to request reduced working hours.<sup>199</sup> The German statute requires something akin to the interactive process required by the ADA,<sup>200</sup> and a safety valve for employers that allows them to reject accommodations for cost and operational burdens, similar to undue hardship.<sup>201</sup> These right to request laws were adopted first in Germany in 1967, and by the 1980s, they were utilized by as much as 45% of the population.<sup>202</sup> In the UK, these laws were initially resisted, but after their 2007 amendments, they cover wide swaths of workers and estimates say that as many as 90% of requests are honored by employers.<sup>203</sup>

### Conclusion

This Note has traced the history of reasonable accommodations surrounding telework and executive initiatives to promote inclusion in the workforce. Courts have justified their denial of telework on three tenets: (1) physical presence was considered an essential function; (2) telework was preemptively thought to lower productivity; and (3) telework was thought not to be compatible with teamwork or the need to use equipment.<sup>204</sup> Recent caselaw has put in doubt the belief that physical presence is an essential function.<sup>205</sup> At the same time, recent studies on the

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197. DISABILITY CASE STUDY RSCH. CONSORTIUM, *supra* note 26, at 45.

198. *An Interview with Professor Stephen Befort*, 28 MN J. INT'L L. 401, 411 (2019); see generally Paul D. Hallgren, *Requesting Balance: Promoting Flexible Work Arrangements with Procedural Right-to-Request Statutes*, 33 A.B.A. J. LAB. & EMP. L. 229, 234–39 (2018) (arguing that a right-to-request system would allow employees to have increased flexibility when determining their work schedule).

199. Hallgren, *supra* note 197, at 234.

200. See *ADA: Reasonable Accommodation/Interactive Process*, SHRM, <https://www.shrm.org/ResourcesAndTools/tools-and-samples/exreq/Pages/Details.aspx?Erid=818> [<https://perma.cc/QFT3-SULC>].

201. Hallgren, *supra* note 197, at 234.

202. Robert C. Bird & Liz Brown, *The United Kingdom Right to Request as a Model for Flexible Work in the European Union*, 55 AM. BUS. L.J. 53, 57, 60 (2018).

203. *Id.* at 66, 68–70.

204. See, e.g., *Vande Zande v. State of Wisconsin Dept. of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995).

205. *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 63 (D. Mass. Sept. 16, 2020).

efficacy of remote work have undermined the belief that telework reduces productivity.<sup>206</sup> Teleworking platforms have proven that individuals can in fact work in teams from remote locations.<sup>207</sup> Additionally, telework provides potential financial, accessibility, and talent acquisition benefits.<sup>208</sup> In sum, courts are nearly certain to begin to recognize telework as a reasonable accommodation in at least some capacities. While telework presents exciting opportunities for some individuals who are disabled, it also threatens to isolate others—disabled and not—from the workforce, or from their own companies and co-workers.<sup>209</sup> In order for any accommodation to become reasonable, it cannot unduly burden fellow workers, and so it is key that moving forward employers and employees keep an open mind as to what may in fact be a reasonable accommodation.<sup>210</sup> Employers should consider both the effects of telework on physically and mentally impaired individuals, as well as employees who are not disabled. To best accommodate everyone, employers should partner with technology platforms that offer accessible features, but they should also consider flexible work schedules to accommodate for partial in-person work.<sup>211</sup> Providing training on accommodations to all employees and supporting non-disabled employees' decision to telework may be one way of promoting a mutually beneficial workplace, but at the same time employers should remain free to choose the work format that works best for them and their teams. Some employers may choose to have teams or functions that move entirely remote,<sup>212</sup> but given the

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206. See Hancock, *supra* note 150, at 165; see also *Execs Expect Work Remote Trend to Continue*, *supra* note 36 (stating that 37% of companies have found that employee productivity has increased as more employees telework).

207. See Low, *supra* note 30.

208. See Routley, *supra* note 33; see also Low, *supra* note 30 (arguing that technological advances, such as Zoom, have made it easier for disabled individuals to participate in the workplace and education).

209. Shur, *supra* note 111, at 1–2.

210. *McMillian v. City of New York*, 711 F.3d 120, 128–29 (2d Cir. 2013) (giving *McMillian* the chance to prove that a modified work schedule was a reasonable accommodation); see also Hancock, *supra* note 150, at 162 (stating that advocates for changing perceptions of the traditional workplace have pushed Congress to revise employment and labor laws).

211. See Low, *supra* note 30; see also *JAN*, *supra* note 128, at 5 (stating that flexible schedules may help disabled employees who struggle with attentiveness and concentration); see also Gill, *supra* note 116 (stating that masks may make it difficult for individuals who rely on lip reading for communication); see also Leary, *supra* note 120 (urging event organizers to use technology to grant access to disabled individuals).

212. Dong, *supra* note 33.

practical limitations of a compartmentalized approach<sup>213</sup> it would be prudent to allow employers to take charge in adopting such a policy as opposed to thrusting it upon them. We have entered a new age of work, but that does not mean that we either need to or should entirely reinvent how all people work.

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213. *See infra* Part IV (arguing that telework can be a reasonable accommodation when other employees will not be impacted by the accommodation, thus employers continue to have the capacity to deny accommodation requests when other employees would suffer).