

## The Post-Pandemic Era of “Flexibility Fatigue” and ADA Implications: What Employers Need to Know When Making the Shift Back to the Office

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### Introduction

COVID-19 completely changed the way we grocery shop, the way we attend doctor’s appointments, and the way we work. Specifically, COVID-19 created a new era of remote work for both employers and employees. Three years into the pandemic, it’s clear that many people have made these changes and have no plans to revert back to the way things were. However, as companies attempt to transition back to the “true” office environment, their employees are challenging the movement. This article will address the current state of tension between management and the workforce and how it’s important to keep in mind that while workplace flexibility has changed, the Americans with Disabilities Act (“ADA”) remains the same. Thus, employers with “flexibility fatigue” should be mindful of policies or denials of requests for remote work that could put them on the wrong side of the ADA.

### What Exactly Does “Flexibility Fatigue” Mean?

The new phrase “flexibility fatigue” encompasses the frustration of employers or organizations with employees who have had semi-remote or fully remote work schedules for the last few years. Some employer concerns related to remote work include lack of employee oversight, a limited ability to provide feedback, and the inability to evaluate employee performance in a remote setting. For these reasons, many of these employers or organizations demand more boundaries and structure to remote or hybrid work, or demand their employees return back to the office altogether.

### A Brief ADA Refresher

The Americans with Disabilities Act of 1990 acknowledges disability as a source of discrimination, similar to “race, color, religion, sex, or national origin” within the Civil Rights Act of 1964. Title I of the ADA both prohibits employment discrimination on the basis of disability and requires employers to provide reasonable accommodations, absent undue hardship. Reasonable accommodations are changes to workplace environments that allow people with disabilities to complete essential job tasks, or essential functions. The phrase “undue hardship” refers to an employer’s significant difficulty or expense, which is determined on an individual basis.

### How is Flexible Work a Hot Topic in the ADA Context?

Courts continue to sort out whether remote work arrangements could be a reasonable accommodation for workers with disabilities. One argument is that remote work may benefit workers with disabilities such as a chronic illness; the opposing argument is that a hybrid or remote work option may not best suit the organization, and that this should not become the default accommodation.

However, the pandemic demonstrated the possibility for a number of positions to be performed at home. Because of this, remote work accommodation requests have also become more difficult for employers to refuse. Nevertheless, the basic principles of the ADA remain: the interactive

process, where the employer and the employee engage in a “flexible, cooperative” exchange of information relevant to the request, and that employers don’t have to grant a request to work from home if it means eliminating essential job functions. Even if an accommodation is not an employee’s preference (i.e. remote or hybrid work), it will be deemed effective if it allows an employee to perform his or her essential functions.

## **What are Some Factors to Consider When Identifying Essential Functions?**

Employers may want to consider the following factors when identifying essential functions of an employee’s position:

- What is the purpose of a given job?
- How long does an employee spend performing a particular function?
- If a function were to be removed from an employee’s duties, how would that function be accounted for?
- Is an employee’s duty specialized?
- What does the history look like for employees in the same position?

Employers should be mindful of what they consider an essential job function, because they may incorrectly assume that in-person events like annual company retreats are considered an essential function when they are not. On the flip side, employers should be especially careful when denying an accommodation request for remote work on the basis that all essential job functions can’t be performed remotely if the employee has been working remotely for any period of time, as demonstrated by the case below. Factors to consider in this regard include:

- Was the remote work successful?
- Was the remote work effective?
- Is consistent and predictable in-person attendance an essential function?

## ***EEOC v. ISS Facility Services, Inc., No. 21-0378 (N.D. Ga. Sept. 7, 2021)***

On December 20, 2022, the U.S. Equal Employment Opportunity Commission (“EEOC”) announced that it had settled with a facility management company after alleging that the company had refused to let a disabled employee at high risk for catching COVID-19 work part-time from home, in violation of the ADA. In March 2020, the employee was diagnosed with hypertension and obstructive lung disease, which caused her frequent coughing and shortness of breath. From March to June 2020, company employees worked on rotating schedules, one day at the plant and four days at home. After the company required all employees to return to the plant five days a week, the employee asked to work from home two days per week. The company denied the employee’s request, and the EEOC sued claiming the company violated the ADA by denying her a reasonable accommodation.

Employers who permitted remote work in the past, and indeed benefitted from it, should be prepared to explain their decision to withdraw or deny such arrangements going forward. These employers should also be prepared for a fact-specific examination of a job’s essential functions. Clearly, blanket assumptions about the “essentialness” of in-person work will be harder to depend on.

## What Does This Mean for Employers Facing “Flexibility Fatigue?”

Even though COVID-19 created a new era of remote work, the ADA remains the same. It is expected that the issues discussed in this article will be increasingly litigated as we enter this new post-pandemic era, and further guidance is issued. Until then, employers making the shift back to in-office environments or faced with a remote work accommodation request should be mindful of the ADA implications that their decisions may have.

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