

Is On-Site Work Attendance an Essential Job Function?



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Telework is a relatively new phenomenon. How it applies to the concept of essential job function is fairly clear, for now... There is general case law consensus that on-site attendance is an essential function of most jobs. The vast majority of case law comes from the 4th, 5th, 6th, and 7th Circuit Court of Appeals. *Credeur v. Louisiana*ⁱ (2017) is a recent decision affirming that a Department of Justice litigation attorney could not regularly work from home because of the strain it places on coworkers and the employer. In other cases, courts have ruled that employees cannot effectively perform their job without on-site attendance.ⁱⁱ Specifically, jobs that require high levels of interaction and teamwork are viewed as requiring on-site work attendance and unsuitable for telework options.ⁱⁱⁱ

The Rocky Mountain region has limited case law on the issue. The 9th Circuit covers several Rocky Mountain states and ruled in a 2012 case, *Samper v. Providence St. Vincent Medical Center*,^{iv} that on-site attendance was required for a neonatal nurse diagnosed with fibromyalgia because a neonatal nurse is the “epitome” of a job requiring on-site attendance.

On the other hand, the COVID-19 pandemic has created a surge of research into the viability of telework. Available research describes how companies have used telework during the pandemic and the relevant plans for the future.^v For example:

- Before the pandemic, employees worked about 5% of workdays from home.
- During the pandemic, 40% of survey respondents worked from home.
- Post-pandemic projections show 15% to 22.2% of workdays will be worked from home.^{vi}

The data shows that the pandemic induced a huge shift to telework and will likely leave employers offering 3-4 times more telework options than before the pandemic.

Web connectivity platforms like Zoom and MS Teams have become mainstream since March 2020. These technologies grew, in part, because businesses needed them to adapt to telework arrangements. Now that companies have experienced reliable and effective telework options, telework will likely continue to gain popularity for both employees and employers. Further, companies incurred costs to acquire telework

technology and now have an incentive to keep using it. It is reasonable to expect that post-pandemic legal cases will incorporate this experience into decisions related to on-site attendance as essential, particularly for those jobs that do not require in-person service or exchange of physical goods. This experience may be used to redefine how employees engage in high levels of interaction and teamwork, thus requiring a reconsideration of *how* an employee performs an essential function.

What legal impact does the question have on employment options for people with disabilities?

The Americans with Disabilities Act (ADA) ensures that people with disabilities are not subject to discrimination. When an employer does not grant an accommodation, courts use a multi-part test to determine if discrimination has occurred.^{vii} The test requires the employee to prove that they are (1) disabled and (2) qualified for the position. The employer is required to (1) show that the proposed accommodation will impose undue hardship upon them.

Sticking with the second part of the employee test, to be qualified, the employee must be able to complete essential functions of the job with or without an accommodation.^{viii} Courts use a variety of factors to determine whether a job function is essential, but the **primary factor is whether the employer sees the function as essential.**^{ix} The employer, not the courts nor the employee get to define essential function. Worksite experience in 2020-2021 is providing employers with ample information to rethink their definition and how it applies to various job roles.

Summary

While there are limited decisions concerning whether working from the office is an essential job function, courts currently agree that it is. The legal consensus is likely due to the novelty and ever-changing nature of telework technology. However, recent research projects a significant shift to telework in the future. How will the large-scale adoption of telework technology impact employment options for people with disabilities? How will courts address the question of whether on-site work attendance is essential or not? Well, it's safe to say that "the jury is still deliberating." The facts of the "case" continue to change as our society develops and adopts increasingly sophisticated communication technologies.

We begin where we started. Is on-site work attendance essential? The answer is likely 'yes' when the job requires a physical exchange of goods or services. It is likely 'maybe' if the job requires a high level of interaction or team work. But methods for interpersonal interaction and team work are changing and improving at a rapid pace. So, the legal answer is what it usually is, "it depends."

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

ⁱⁱ *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 948 (7th Cir. 2001); (Quoting *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994).

ⁱⁱⁱ *E.E.O.C v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015).

^{iv} *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. 2021).

^v Barrero, Jose Maria, Nicholas Bloom, and Steven J. Davis. *Why working from home will stick*. No.w28731. National Bureau of Economic Research, 2021; Altig, David, Jose Maria Barrero, Nicholas Bloom, Steven J. Davis, Brent Meyer, and Nicholas Parker. "Surveying business uncertainty." *Journal of Econometrics* (2020).

^{vi} Lower end from Altig et al. 2020 "SBU"; higher end from Barrero et al. 2021 "SWAA"

^{vii} *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 811 (6th Cir. 2020).

^{viii} *Prince v. Centura Health*, 2018 Colo. (Quoting 42 U.S.C.A § 12111).

^{ix} *Grear v. Miller & Newberg, Inc.*, 2016 U.S. Dist; see also 29 C.F.R. § 1630.2(n)(3).