
Hybrid Workplaces: Potential CAA Issues
Office of Congressional Workplace Rights
Office of the General Counsel
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advancing workplace rights, safety & health, and accessibility in the legislative branch
OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS
UNITED STATES CONGRESS

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Welcome

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Presenters

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Overview

- Americans with Disabilities Act/Rehabilitation Act
- Family and Medical Leave Act
- Title VII
- Labor-Management Relations

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ADA/Rehab Act

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Background

Unless it would be an undue burden, it is discriminatory to not make **reasonable accommodations** to the known physical or mental limitations of an **otherwise qualified individual** with a disability who is an applicant or employee.

- Reasonable accommodations
- Qualified individual
  - Essential functions

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Takeaway #1

An employer temporarily modifying essential job functions at the height of the COVID pandemic does not mean these functions are not essential.

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***Geter v. Schneider Nat'l Carriers, Inc.*, No. 22-11285, 2023 WL 7321610 (11th Cir. Nov. 7, 2023)**

- In response to the pandemic, transportation and logistics company temporarily reallocated job duties and modified protocols so certain employees could work remotely.
- Geter requested to continue working remotely, arguing that the company's pandemic response showed that physical presence in the office was not necessary.
- The Eleventh Circuit disagreed. "The bare feasibility of temporarily suspending a function in response to the COVID-19 pandemic does not demonstrate that the function was not essential."

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***Stanley v. Phelon*, No. 23-731-CV, 2024 WL 1453872 (2d Cir. Apr. 4, 2024)**

- Stanley worked at a college where he and many other staff worked at home for a time in response to the pandemic.
- His accommodation request for continued remote work was denied because the essential functions of his job could not be performed remotely.
- The Second Circuit held against him and noted "Stanley's job responsibilities might have changed as the pandemic progressed and schools opened for in person classes."

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Takeaway #2

An employer is not required to reallocate an essential function to an on-site employee to accommodate an employee who cannot work in person.

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***Gibson v. Gables Residential Servs., Inc.*, No. 21-CV-2952 (DLF), 2024 WL 1239667 (D.D.C. Mar. 22, 2024)**

- Community manager requested to work from home
- Presence in the office was necessary to perform her essential job functions (such as office support, maintaining files, and meeting with residents), so she was not qualified for her position as a matter of law
- Certain job duties could be performed from home, and she argued that tasks requiring in person work could be done by others
  - ADA does not require employers to reallocate essential functions

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***Kinney v. St. Mary's Health, Inc.*, 76 F.4th 635 (7th Cir. 2023)**

- Kinney and other employees were directed to work remotely for a time because of the pandemic. When ordered back on site, she refused and requested to continue remote work.
- Kinney performing required tasks remotely would require another employee to perform on-site monitoring.
- "Accommodations" that would allow the employee to avoid an essential function, rather than help them accomplish it, are not reasonable.

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Takeaway #3

An employer is not required to provide an employee's preferred accommodation, as long as the accommodation chosen is effective. In some cases, this issue arises when the employee's medical documentation does not specifically require telework or explain how telework will accommodate their disability.

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***Smith v. Shelby Cnty. Bd. of Educ.*, No. 23-5815, 2024 WL 3622387 (6th Cir. Aug. 1, 2024)**

- School returned to in-person instruction in 2021. Smith requested to continue to teach remotely, submitting doctor's letters "recommending and requesting" this.
- School board proposed alternate accommodations involving him teaching remotely from an isolated location within the school.
- The Sixth Circuit found that Smith caused the breakdown in the interactive process, since the school board proposed alternative accommodations which took into consideration the restrictions communicated by his doctors.

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***Nguyen v. Bessent*, No. 23-1220, 2025 WL 502073 (4th Cir. Feb. 14, 2025)**

- Treasury Department employee's doctor wrote that she needed to be in a low-stress environment and advised this could be achieved by transferring her or allowing telework.
- The department chose to transfer Nguyen, so was not liable for failing to offer telework.

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FMLA

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Takeaway

Remote work is not "leave" within the meaning of the FMLA.

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***Garland-Gonzalez v. Universal Grp., Inc.*, No. 19-1998, 2024 WL 3252657 (1st Cir. July 1, 2024)**

- Employee was terminated after taking what she alleged was FMLA-protected leave to care for her husband.
- The court held that she did not notify her employer of her need for leave when she notified her supervisor she would be working remotely to care for her husband.

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***Kemp v. Regeneron Pharms., Inc.*, 117 F.4th 63 (2d Cir. 2024)**

- Employee alleged FMLA interference in conjunction with her working remotely for 15 days to care for her daughter.
- The Second Circuit affirmed dismissal, noting that the FMLA "does not entitle employees to work remotely or make it unlawful for an employer to punish an employee who works remotely."

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Title VII

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Title VII Discrimination – Prima Facie Case

- Typical formulation requires plaintiff to show that:
  1. they are a member of a protected class;
  2. they suffered an **adverse employment action**; and
  3. the action gives rise to an inference of discrimination.
- "Adverse employment action"
  - Pre-*Muldrow* – "significant", "serious", or "tangible" harm, or an "ultimate employment action"
  - *Muldrow v. City of St. Louis, Mo.*, 601 U.S. 346 (2024) – "some harm", "some 'disadvantageous' change in a term or condition of employment"

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Pre-*Muldrow* Telework Cases

- *Terry v. Perdue*, No. 20-2016, 2021 WL 3418124 (4th Cir. Aug. 5, 2021) – "[T]he loss of one telework day did not change the terms and conditions of [plaintiff's] employment."
- *Price v. Wheeler*, 834 F. App'x 849 (5th Cir. 2020) – The agency's temporary revocation of plaintiff's telework privileges was not an adverse action because it did not "resemble an 'ultimate employment decision.'"
- *Staggers v. Becerra*, No. CV ELH-21-0231, 2021 WL 5989212, at *17 (D. Md. Dec. 17, 2021) – Removal of the plaintiff's telework privileges, without more, did not rise to the level of an adverse employment action. Plaintiff failed to allege any "consequence or negative effect" from the revocation of his hybrid schedule.

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Wilson v. Noem, No. 20-CV-100 (GMH), 2025 WL 1000666 (D.D.C. Apr. 3, 2025)

- Plaintiff alleged race discrimination, based in part on the denial of his request to telework. He did not have an approved telework schedule or a vested right to telework.
- "Although rescinding or suspending an employee's approved telework schedule or refusing to permit an employee to engage in telework to which he is otherwise entitled may well be an adverse employment action under [the *Muldrow*] standard, merely refusing an employee's request to telework is not, because there is no 'identifiable term or condition of employment' that has been harmed by the denial."
- Plaintiff's telework-based claim therefore failed, because he could not show that the denial of his telework request caused harm to a term or condition of his employment.
- Note: under D.C. Circuit precedent, the same showing is required under both the private-sector and federal-sector provisions of Title VII to establish an adverse employment action.

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Dixon v. Blinken, No. CV 22-2357 (RDM), 2024 WL 4144105 (D.D.C. Sept. 11, 2024)

- Plaintiff usually teleworked on Mondays, but asked to change his telework day during one week when the Monday was a federal holiday. His request was denied, and he alleged that this was because of sex discrimination, as a similarly situated female coworker had been granted a similar request to change a telework day that fell on a federal holiday.
- The agency argued that a single lost telework day was *de minimis* and therefore not an adverse action.
- The court disagreed and denied the agency's motion to dismiss the discrimination claim. Under *Muldrow* a plaintiff need only show that he was treated worse than someone outside his protected class, not how much worse he was treated.

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***Miller v. O'Malley*, No. 20 C 2118, 2024 WL 4240443 (N.D. Ill. Sept. 19, 2024)**

- Plaintiff's teleworking privileges were revoked after a performance appraisal, and his applications to resume teleworking were denied. He alleged that these denials were based on sex discrimination and retaliation.
- Citing *Muldrow*, the court held that a reasonable factfinder could conclude that the plaintiff's inability to telework "transformed the terms and conditions of his work and left him 'worse off' than he would have been if [he] didn't have to commute into the office every day."
- The court denied the employer's motion for summary judgment on plaintiff's telework-based discrimination claim. Not only did he provide evidence that the revocation of his privileges caused some harm and therefore counted as an adverse action, but he also presented evidence that similarly situated female employees were allowed to telework.

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Title VII Retaliation – Prima Facie Case

- Typical formulation requires plaintiff to show that:
  1. they engaged in protected activity under Title VII;
  2. they suffered a **materially adverse action**; and
  3. the action was causally related to the protected activity.
- "Materially adverse" means that it would dissuade a reasonable worker from making or supporting a charge of discrimination.
- *Muldrow* did not change the standard for establishing a prima facie case of retaliation, but in fact the Supreme Court emphasized that the Title VII anti-retaliation provision only applies when the employment action causes harm "significant" or "serious" enough to deter an employee from engaging in protected activity.

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Retaliation Cases Involving Telework

- *Wilson v. Noem*, No. 20-CV-100 (GMH), 2025 WL 1000666 (D.D.C. Apr. 3, 2025) – As with the plaintiff's discrimination claim, the court distinguished between the revocation of an existing telework arrangement – which "may constitute a materially adverse employment action and support a retaliation claim" – and the denial of an initial telework request.
- *Miller v. O'Malley*, No. 20 C 2118, 2024 WL 4240443 (N.D. Ill. Sept. 19, 2024) – "A reasonable juror could find that the loss of telework would dissuade a reasonable worker from engaging in activity protected by Title VII. … The ability to telework changes the structure of an employee's workday."
- *Overfield v. Kansas*, No. 23-3057, 2024 WL 1611473 (10th Cir. Apr. 15, 2024) – Being required to telework was not materially adverse. There was insufficient evidence that the challenges the plaintiff faced working from home were serious enough to dissuade a reasonable worker from engaging in protected activity.

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Bargaining Over Changes to Telework

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Bargaining Over Changes to Telework

- Changing the number of days employees can telework is a change to conditions of employment which requires prior notice to the union and an opportunity to bargain over the impact and implementation of the decision. *IRS, New Orleans Dist. Off.*, 1 F.L.R.A. 896, 900-01 (1979).
- Whether employing offices have a duty to bargain over the number of telework days depends on the functions of the job and the specific language in the union's proposal. Such proposals are more likely to be negotiable if they allow management to revoke telework agreements in the event of abuse or if necessary for their objectives.
- There is no *per se* management right to assign employees to work at a specific location. *HHS, CMS, Baltimore, Md.*, 57 F.L.R.A. 704 (2002).

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***NTEU v. FLRA*, 1 F.4th 1120 (D.C. Cir. 2021)**

- The D.C. Circuit held that the FLRA erred by finding a union proposal to increase the number of telework days non-negotiable.
- The proposal increased the maximum number of telework days, but reserved management's discretion to revoke it any time for employee abuse or for the needs of the agency.
- The FLRA held that the proposal would increase "computer and telephone-based supervision" which would limit management's "right to determine the methods used to evaluate and supervise its employees."
- The D.C. Circuit vacated and remanded, holding that the proposal's wide latitude to management did not guarantee telework for any employee.

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Federal Service Impasses Panel (FSIP)

- *NFFE Local 476*, 23 FSIP 39 (2023) – Returning to the office after COVID shutdowns, the union proposed minimum of three in-office days per pay period and the agency proposed four. The Panel found for the union because the agency was unable to show why one extra day in the office was necessary.
- *SEC*, 23 FSIP 3 (2023) – Returning from COVID, the union proposed full-time telework with management right to in-office presence when necessary. The agency proposed a minimum two days in-office per pay period. The Panel found for the agency because under the union's proposal, commute time would be during work hours, reducing productivity, and management bearing the commute cost created too much budgeting uncertainty.

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Union Access to Meetings

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Union Access to Meetings in a Hybrid Workplace

- Investigative interviews and formal discussions both require unions to be present and permitted to play an "active part" in the meeting. *Dept. of Justice, Bureau of Prisons, Safford, Ariz.*, 35 F.L.R.A. 431, 440 (1990).
- If holding a meeting over telephone or videoconference, employing offices should ensure that union representatives can effectively represent the bargaining unit by:
  - Asking questions;
  - Reviewing the same documents presented to employees who may be present in person;
  - In the case of investigative interviews, union representatives must have the ability to counsel employees before and after they answer a question.
- A hybrid workplace may make it harder to find union representatives if the employing office needs to conduct an investigative interview or formal discussion quickly. Employers have a duty to wait until a union representative is available, but that duty is not unlimited.

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INS, N.Y. Dist. Off., 46 F.L.R.A. 1210 (1993)

- The union and management agreed that the union's president and vice president would travel to meet with management for regular consultations.
- A week before the trip, management notified the union that it needed to conduct investigative interviews while the president and vice president were away for the consultations.
- The president and vice president were the union's designated representatives for interviews, but other reps were available.
- The employees under investigation refused to submit to the interview without the president or vice president, and the agency suspended them.
- The FLRA held that the suspensions were permitted under the statute. The agency acted appropriately when it did not postpone the interview and suspended the employees for refusing to cooperate.

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INS, N.Y. Dist. Off., cont'd

- Importantly, the agency gave the union a full week to decide how to represent the employees at the investigative interviews. Moreover, the agency never restricted the union's ability to choose which representatives to send to which event: nothing stopped the union president or vice president from canceling the trip to attend the investigative interviews.

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Changes to Workplace Environment

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Changes to the Workplace Environment

- Implementing or adapting to a hybrid workplace may lead to changes to the physical environment. Alterations like moving an employee's jobsite or purchasing new furniture may trigger a duty to bargain with the union if the change to conditions of employment is more than *de minimis*.
- To preempt disputes about the negotiability of an office move, parties may elect to include relocation as an item in their collective bargaining agreements. The decision, as well as the impact and implementation of the decision, to change allocation of space, furniture, and equipment are generally negotiable subjects of bargaining unless the employing office can show that the proposal implicates the technological relationship to the furtherance of the office's work. 5 U.S.C. § 7106(b)(1); *Dep't of Lab., OSHA*, 21 F.L.R.A. 658, 660 (1986).

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***U.S. Army Rsrv. Components Pers. & Admin. Ctr.,, St. Louis, Mo.*, 20 F.L.R.A. 117 (1985)**

- The agency moved 23 employees out of a 1500-person bargaining unit to a different area on the same floor. There was no evidence that the move changed employees' duties in any way.
- The FLRA found that the office relocation was *de minimis*. Therefore, the agency had no duty to bargain over the move or its impact to the bargaining unit.

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***SSA Baltimore, Md.*, 24 F.L.R.A. 403 (1986)**

- The agency reorganized the physical office, changing how employees conducted intake for new claimants – moving them behind plexiglass and having them conduct longer interviews in a separate room instead of at their personal desks.
- The agency claimed that any changes resulting from the reorganization were *de minimis*, and that the changes related to management's right to determine internal security practices.
- The FLRA disagreed, ordering the agency to bargain with the union over its negotiable proposals relating to the impact and implementation of the change.

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***Dep't of the Treasury, IRS, Chicago, Ill.*, 33 F.L.R.A. 147 (1988)**

- The IRS was ordered to bargain with the union over the impact and implementation of its decision to relocate its security office 30 miles away from the bargaining unit.
- The security office investigated misconduct among the bargaining unit and hosted investigative interviews.
- The FLRA found that the inconvenience to the bargaining unit and the union representatives who would have to travel to the office for the interviews made the impact of the change more than *de minimis*.

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Questions?

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