

# DIGITAL DIVIDE—DISPARATE IMPACT? THE IMPACT OF MODERN RECRUITING AND WORKPLACE PRACTICES THAT RELY ON BROADBAND

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## INTRODUCTION

For many of us, it is difficult to imagine a life without the internet. Everything in our lives is tied to it. With the prevalence of telemedicine, e-commerce, online education, remote work, online news sources, and more, the inaccessibility of broadband service can quickly cause people to fall behind in every aspect of their life. Despite the importance of reliable, high-speed internet in the modern world, there are millions of Americans that lack access.

Most often, it is rural and low-income Americans who lack broadband connection.<sup>1</sup> The inaccessibility of broadband can even impact one's experience in the workforce. Those without access may struggle to find and apply for jobs, and they certainly will not have the ability to work from home. This Article explores the lack of broadband accessibility and its impact on employer hiring practices and remote work policies. It also summarizes certain federal and state funding programs designed to improve access to broadband.

## I. WHAT IS BROADBAND?

The definition of “broadband” has evolved over time. In 2015, the Federal Communications Commission (“FCC”) redefined broadband as a connection to the internet allowing download speeds of at least 25 Mbps and upload speeds of at least 3 Mbps—an increase from the prior standard requiring only 4 Mbps upload speed and 1 Mbps download speed.<sup>2</sup> Recently, FCC chair Jessica

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1. *See infra* Part II.

2. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, 1377, 1377 n.4 (2015); *see also*

Rosenworcel announced her intent for the FCC to revise the current definition and increase minimum required speeds.<sup>3</sup>

The first working internet prototype was created in the 1960s, but any semblance of the internet as we know it did not appear until the 1990s with the creation of the World Wide Web.<sup>4</sup> At that time, the primary mode of access to the World Wide Web was by dial-up network.<sup>5</sup> To connect to the internet with dial-up, consumers connect a dial-up modem to their home telephone line and call a public access number that connects them online.<sup>6</sup> Today's dial-up modems only reach a maximum speed of 0.056 megabits per second,<sup>7</sup> whereas modern fiber to the home reaches speeds higher than a gigabit per second.<sup>8</sup> As a result, most people no longer use dial-up to connect to the internet. New technologies developed and replaced dial-up, but none better than fiber-optic broadband connections.

Fiber-optic cables are made up of bundles of hair-thin glass strands.<sup>9</sup> These cables are able to quickly transmit data at speeds over a gigabit per second.<sup>10</sup> Contrast this with the speed of copper cable used for decades to deliver traditional telephone service, which is at least twenty times slower.<sup>11</sup> While other broadband technologies may struggle during peak hours or are susceptible to weather conditions, fiber-broadband is not.<sup>12</sup> Its reliability and speed make it one of the preferred options for broadband services. According to the Fiber Broadband Association, without deploying new networks, other broadband technologies' bandwidth cannot be increased, but fiber-optic networks bandwidth can be

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*id.* at 1418 tbl. 4 (noting 54,560,019 Americans, or 17% of the population, lack access to 25 Mbps/3 Mbps Broadband).

3. Press Release, Fed. Comm'n Comm'n, Chairwoman Rosenworcel Proposes to Increase Minimum Broadband Speeds (July 15, 2022), <https://www.fcc.gov/document/chairwoman-rosenworcel-proposes-increase-minimum-broadband-speeds> [https://perma.cc/ZSW8-6NF3].

4. Evan Andrews, *Who Invented the Internet?*, HISTORY (Oct. 28, 2019), <https://www.history.com/news/who-invented-the-internet> [https://perma.cc/2KN6-VCK2].

5. Bradley Mitchell, *Is Dial-Up Networking Still a Thing?*, LIFEWIRE (June 30, 2021), <https://www.lifewire.com/definition-of-dial-up-817779#:~:text=Dial%2Dup%20networking%20technology%20allows,still%20available%20in%20some%20markets> [https://perma.cc/3X7J-KLXH].

6. *Id.*

7. *Id.*

8. *What Is Fiber Broadband?*, FIBER BROADBAND ASS'N, <https://www.fiberbroadband.org/page/what-is-fbth> [https://perma.cc/B5UW-V9T4] (last visited Jan. 13, 2023).

9. Diana Goovaerts, *Fierce Fundamentals: What Is Fiber Broadband*, FIERCE TELECOM (May 16, 2022, 10:00 AM), <https://www.fiercetelecom.com/broadband/fierce-fundamentals-what-fiber-broadband> [https://perma.cc/YW7K-GXEF].

10. *What Is Fiber Broadband?*, *supra* note 8.

11. Tom Gerencer, *Top 10 Advantages of Fiber Optic Internet Connections*, HP (Apr. 21, 2020), <https://www.hp.com/us-en/shop/tech-takes/top-10-advantages-fiber-optic-internet-connections> [https://perma.cc/9JNC-8HWK].

12. *Id.*

increased, making it “futureproof.”<sup>13</sup> Fiber to the home is broadband access that directly connects the home to broadband internet connections from a central location via fiber-optic cable.<sup>14</sup> These cables have higher bandwidth capacities than DSLs or coaxial wires and are faster.<sup>15</sup> This allows users to “stream higher-quality content and have more devices connected to the internet simultaneously.”<sup>16</sup> Fiber to the home can meet increased internet connectivity demands and are expected to keep up with technological advancements, as “[f]iber cables have virtually unlimited capacity.”<sup>17</sup>

## II. THE DIGITAL DIVIDE

The gap between Americans connected to broadband versus those who are not is referred to as the “digital divide.”<sup>18</sup> Although fiber broadband access is growing rapidly, fiber service all the way to the home is not yet widely available. A recent Fiber Broadband Association study shows that fiber broadband access to the home is expanding rapidly (growing 12% in 2021), but that only reached 43% of U.S. households in 2021.<sup>19</sup> Not only is fiber-optic broadband to the home not widely available in rural areas, there is a larger problem rural communities face: the lack of *any* broadband services.<sup>20</sup> Many rural and low-income Americans are unable to reliably work from home, attend online classes, complete homework, or even access healthcare, solely because they cannot access high-speed internet. All Americans need to get connected to keep up—it is no longer a luxury to access the internet, it is a necessity.

In general, low income and rural Americans are victims of the digital divide.<sup>21</sup> The United States Census Bureau classifies “rural” as anything that is not urban,

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13. *What Is Fiber Broadband?*, *supra* note 8.

14. *Fiber to the Home*, OSP INSIGHT, [https://get.ospinsight.com/the-ultimate-guide/fiber-to-the-home#:~:text=Fiber%20to%20the%20Home%20\(FTTH\)%20refers%20to%20the%20use%20of,wires%20with%20lower%20bandwidth%20capacities](https://get.ospinsight.com/the-ultimate-guide/fiber-to-the-home#:~:text=Fiber%20to%20the%20Home%20(FTTH)%20refers%20to%20the%20use%20of,wires%20with%20lower%20bandwidth%20capacities) [<https://perma.cc/9C4H-2WTJ>] (last visited Jan. 13, 2023).

15. *Id.*

16. *Id.*

17. *Id.*

18. *White House Tries to Close the Digital Divide in Rural America with More Broadband Access*, PBS NEWS HOUR (May 9, 2022, 6:30 PM), <https://www.pbs.org/newshour/show/white-house-tries-to-close-the-digital-divide-in-rural-america-with-more-broadband-access> [<https://perma.cc/43X6-4UGJ>].

19. Press Release, Fiber Broadband Ass’n, *Fiber Broadband Enters Largest Investment Cycle Ever* (Jan. 5, 2022), <https://www.fiberbroadband.org/blog/fiber-broadband-enters-largest-investment-cycle-ever> [<https://perma.cc/N6VD-6F96>].

20. Anna Read & Lily Gong, *States Considering Range of Options to Bring Broadband to Rural America*, PEW CHARITABLE TRS. (Mar. 29, 2022), <https://www.pewtrusts.org/en/research-and-analysis/articles/2022/03/29/states-considering-range-of-options-to-bring-broadband-to-rural-america> [<https://perma.cc/8ERQ-JNDX>].

21. *Id.*

and generally is an area with less than 2,500 people.<sup>22</sup> After the 2010 Census, 97% of America was considered rural, but only around sixty million people, or 19% of the population, lived in these rural areas.<sup>23</sup> The White House has noted that more than 30 million Americans live in rural areas where there is no broadband infrastructure providing “minimally acceptable speeds.”<sup>24</sup> Of these 30 million rural Americans, a quarter of them are minorities.<sup>25</sup>

In 2018, 58% of rural Americans believed that access to high-speed internet was a problem in their area.<sup>26</sup> Contrast this with urban and suburban Americans, the majority of whom do not think high-speed internet service is a problem for them or their community. Broadband access is a problem for both high- and low-income rural Americans due to the lack of broadband infrastructure in rural areas.<sup>27</sup> But even if there is a provider offering sufficient service, affordability is a real problem in rural areas due to the high cost and lack of competition.<sup>28</sup> One estimate states that broadband service costs \$50-70 a month.<sup>29</sup> This does not include additional fees, such as installation, cancellation, or equipment rental fees, nor does it include taxes or surcharges.<sup>30</sup> Broadband networks are expensive to build, which contributes to the high cost of service, especially in low density areas.<sup>31</sup> When services are unaffordable, low-income households are impacted the most.

The Population Reference Bureau classifies low-income as families of two adults and two children making less than \$52,492, or below 200% of the federal

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22. *Rural America*, U.S. CENSUS BUREAU (2010), <https://mtgis-portal.geo.census.gov/arcgis/apps/MapSeries/index.html?appid=49cd4bc9c8eb444ab51218c1d5001ef6> [<https://perma.cc/2CD5-ZGDG>]. This includes all people, housing, and territories that are not in an urban area. “Urbanized areas” have 50,000 or more people, whereas “urban clusters” range from 2,500 to 49,999 people. *Id.*

23. *Id.*

24. *President Biden’s Bipartisan Infrastructure Law*, THE WHITE HOUSE, <https://www.whitehouse.gov/bipartisan-infrastructure-law/#internetaccess> [<https://perma.cc/PTZ9-6BSE>] (last visited Jan. 13, 2023).

25. DW Rowlands & Hanna Love, *Mapping Rural America’s Diversity and Demographic Change*, BROOKINGS (Sept. 28, 2021), <https://www.brookings.edu/blog/the-avenue/2021/09/28/mapping-rural-americas-diversity-and-demographic-change/> [<https://perma.cc/NN7K-RXLS>].

26. Monica Anderson, *About a Quarter of Rural Americans Say Access to High-Speed Internet Is a Major Problem*, PEW RSCH. CTR. (Sept. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/> [<https://perma.cc/9KWE-5726>].

27. *Id.*

28. *Id.*

29. Anna Read, *How Can the United States Address Broadband Affordability?*, PEW CHARITABLE TRS. (Apr. 29, 2022), <https://www.pewtrusts.org/en/research-and-analysis/articles/2022/04/29/how-can-the-united-states-address-broadband-affordability> [<https://perma.cc/P76D-6JT7>].

30. *Id.*

31. *Id.*

poverty level.<sup>32</sup> In 2020, 89.7 million people, or 27.5% of the population, could be considered low-income.<sup>33</sup> Low-income families are more likely to be “smartphone-only,” meaning the only device they own that can access the internet is a smartphone.<sup>34</sup> Only having a smartphone can make it more difficult to do tasks that normally would be done on larger screens, such as applying for jobs and completing school work and professional work.<sup>35</sup>

### III. EMPLOYER PRACTICES AND DISPARATE IMPACT

Americans without broadband face more difficulties looking for a job, applying for work, and advancing their careers.<sup>36</sup> With the prevalence of remote work, online applications, and online hiring procedures, employers may be missing qualified candidates simply because they lack broadband access. Employers that offer remote work options to employees may also be inadvertently treating employees differently based on access to broadband. These are both business problems and potential legal problems. Employment discrimination laws do not directly protect rural or low-income residents from discrimination, but they do prevent discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information.<sup>37</sup> Many of these protected groups are groups who are disadvantaged by the digital divide.<sup>38</sup> Thus, it is important for

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32. Lillian Kilduff, *How Poverty in the United States Is Measured and Why It Matters*, POPULATION REFERENCE BUREAU (Jan. 31, 2022), <https://www.prb.org/resources/how-poverty-in-the-united-states-is-measured-and-why-it-matters/> [https://perma.cc/UXU2-KRKP].

33. *Id.*

34. Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <http://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/> [https://perma.cc/K7YL-4KRE].

35. *Id.*

36. Aaron Smith, *Lack of Broadband Can Be a Key Obstacle, Especially for Job Seekers*, PEW RSCH. CTR. (Dec. 28, 2015), <https://www.pewresearch.org/fact-tank/2015/12/28/lack-of-broadband-can-be-a-key-obstacle-especially-for-job-seekers/> [https://perma.cc/FH3V-P8BC].

37. *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/prohibited-employment-policiespractices> [https://perma.cc/HT43-RPJH] (last visited Jan. 9, 2023); 3. *Who Is Protected from Employment Discrimination?*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, [https://www.eeoc.gov/employers/small-business/3-who-protected-employment-discrimination#:~:text=Applicants%2C%20employees%20and%20former%20employees,\(including%20family%20medical%20history\)](https://www.eeoc.gov/employers/small-business/3-who-protected-employment-discrimination#:~:text=Applicants%2C%20employees%20and%20former%20employees,(including%20family%20medical%20history)) [https://perma.cc/KR5E-QVF8] (last visited Jan. 9, 2023).

38. According to the Pew Research Center in 2021, 25% of Hispanic Americans are smartphone-only, which demonstrates not only that lower-income Americans are less likely to have multiple devices, but also that minority populations are disproportionately affected by the affordability of electronic devices and high-speed internet services. Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.*, PEW RSCH. CTR. (July 16, 2021), <https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband->

employers to be aware of the impact their policies have on protected groups so they can: (1) take advantage of the full labor pool; and (2) avoid potential employment discrimination claims.

Disparate impact occurs when employers have selection procedures that, while facially neutral, have the effect of disproportionately excluding people based on race, color, religion, sex, or national origin. Procedures that have a disparate impact are prohibited by the Title VII of the Civil Rights Act of 1964 unless they are “job related for the position in question and consistent with business necessity” and there is not a less discriminatory alternative.<sup>39</sup> The Equal Employment Opportunity Commission (“EEOC”) enforces employment discrimination laws for employers with at least fifteen employees for all discrimination claims except age, which requires the employer to have twenty employees.<sup>40</sup> Employers can unintentionally discriminate against their employees through their practices and procedures, which can open them up to potential liability.

#### *A. Employer Practices and Policies*

Many employers have moved their hiring practices entirely online. Online hiring and recruitment is convenient, cost-effective, saves time, and can reach a wider audience.<sup>41</sup> But despite these benefits, there are negative aspects of online recruitment that cannot be ignored. Most notably, online hiring practices overlook those without access to a computer or reliable high-speed internet service.<sup>42</sup> Depending on the hiring practice, those without access may be closed off completely to positions they are otherwise qualified for just because they cannot access the internet to learn about openings and apply online. It is easy to get

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adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/ [https://perma.cc/9FFT-KRAV]. This is consistent with income statistics, which reveal that Black and Hispanic Americans are more likely to be in poverty and classified as low-income than White or Asian Americans. John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html> [https://perma.cc/7VCS-HPJG]; see also EMILY A. SHRIDER ET AL., U.S. DEP’T COMMERCE & U.S. CENSUS BUREAU, *INCOME AND POVERTY IN THE UNITED STATES: 2020* (Sept. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf> [https://perma.cc/T9P7-B8LM].

39. 42 U.S.C. § 2000e-2(k).

40. *Employers*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers> [https://perma.cc/72QT-G8S2] (last visited Jan. 9, 2023); 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b).

41. Maria Crisol De Leon, *Pros and Cons of Online Recruitment in the Digital Age*, MEDIUM, <https://medium.com/the-looking-glass/pros-and-cons-of-online-recruitment-in-the-digital-age-4a899b0e3299> [https://perma.cc/4XJN-MEVG] (last visited Jan. 9, 2023); Lainie Petersen, *Advantages & Disadvantages of the Online Application Process for Employees*, CHRON (Jan. 28, 2019), <https://smallbusiness.chron.com/advantages-disadvantages-online-application-process-employees-23507.html> [https://perma.cc/LU5X-6X97].

42. Petersen, *supra* note 41.

caught up in the benefits of online recruitment while ignoring the barrier it creates, which primarily impacts low-income and rural Americans. Completely online hiring practices exclude minorities at a disproportionately higher rate because many low-income Americans are minorities.<sup>43</sup>

### *B. Liability for Disparate Impact Under Title VII*

Employer practices that, while facially neutral, have the effect of disproportionately excluding people based on race, color, religion, sex, or national origin, may constitute disparate impact discrimination.<sup>44</sup> Companies can be liable for disparate impact discrimination even if they *do not intend* to discriminate.<sup>45</sup> Thus, it is a lower bar than disparate treatment claims.<sup>46</sup>

Disparate impact claims are successful when an employer imposes unnecessary eligibility requirements on employees or applicants.<sup>47</sup> For example, the Supreme Court found a disparate impact when an employer required a high school diploma and certain intelligence test scores for certain jobs, which were not significantly related to successful job performance and disqualified Black applicants at a substantially higher rate than White applicants.<sup>48</sup> The plaintiff makes out a prima facie case by establishing that the employment practice has an adverse impact on a protected class.<sup>49</sup> Then, the defendant has the opportunity to show that the practice “is job-related and consistent with business necessity.”<sup>50</sup> Employment practices can create a disparate impact if they substantially exclude members of a protected class and that practice is unrelated to business necessity.<sup>51</sup>

### *C. Hiring Practices and Disparate Impact*

While certain hiring practices can help determine whether applicants can perform their job duties, these practices must be job-related and necessary if they do have a disparate impact.<sup>52</sup> Online hiring for remote positions is job-related, because potential employees must have reliable internet access to work from home. The analysis would likely end there, and there would not be a viable disparate impact claim. For in-person positions, it is less likely that the EEOC

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43. Creamer, *supra* note 38.

44. 42 U.S.C. § 2000e(k)(1).

45. Kirby v. Colony Furniture Co., 613 F.2d 696, 703 (8th Cir. 1980).

46. Discriminatory intent is required for disparate treatment claims. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

47. See Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 583 (7th Cir. 2000) (“The concept of disparate impact was developed and is intended for cases in which employers impose eligibility requirements that are not really necessary for the job for which the applicant is being hired, such as requiring that applicants for a job as a dishwasher have a high school education.”).

48. Griggs v. Duke Power Co., 401 U.S. 424, 430-36 (1971).

49. See Price v. City of Chicago, 251 F.3d 656, 659 (7th Cir. 2001).

50. *Id.*

51. See *id.*

52. 42 U.S.C. § 2000e-2(k).

would find that online hiring practices are job-related because the ability to access the internet at home is not related to in-person jobs. However, the employer may be able to show the practice has a business necessity. Even if it was job-related and consistent with a business necessity, a less discriminatory alternative would be accessible in-person hiring. Thus, if an employer *only* used online hiring practices, then it could open the door to a disparate impact claim.

#### *D. Remote Work and Disparate Impact*

Remote work is increasing in popularity.<sup>53</sup> In 2020, the COVID-19 pandemic took the world by storm and sent nearly everyone except “essential workers” online. Employees had no choice but to work from home as they tried to keep healthy and social distance. Employers had to find a way for employees to do their jobs remotely overnight.<sup>54</sup> The prevalence of technologies such as Zoom, Microsoft Teams, Slack, and even email made this switch possible,<sup>55</sup> although it was not easy, especially because not everyone in the workforce had a high level of digital literacy.<sup>56</sup>

Since the pandemic, there has been an increase in remote work.<sup>57</sup> According to the U.S. Bureau of Labor Statistics, sixty percent of companies that had remote or hybrid work policies during the pandemic are planning on keeping them.<sup>58</sup> While remote work can cause practical problems for employers, employees like the flexibility that working remotely gives them.<sup>59</sup> Following the height of the COVID-19 pandemic, workers started resigning in droves and finding new positions with greater flexibility, more predictable work schedules, and a company culture that aligns with their values.<sup>60</sup> Many companies were all but

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53. Rani Molla, *Many People Don't Want to Work Unless It's from Home*, VOX (June 24, 2021, 8:20 AM), <https://www.vox.com/recode/22543409/remote-work-from-home-jobs-supply-demand-hiring-platforms> [<https://perma.cc/9NGE-BLNN>].

54. See Colleen McClain et al., *The Internet and the Pandemic*, PEW RSCH. CTR. (Sept. 1, 2021), <https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/> [<https://perma.cc/TM99-8M3R>].

55. See Jonathan Greig, *Downloads of Zoom, Slack, and Microsoft Teams Skyrocket as Enterprises Move to Remote Work*, TECHREPUBLIC (Mar. 16, 2020, 12:43 PM), <https://www.techrepublic.com/article/downloads-of-zoom-slack-and-microsoft-teams-skyrocket-as-enterprises-move-to-remote-work/> [<https://perma.cc/74N2-DHS7>].

56. Amanda Bergson-Shilcock, *The New Landscape of Digital Literacy*, NAT'L SKILLS COAL. 1, 5 (May 20, 2020), <https://nationalskillscoalition.org/resource/publications/the-new-landscape-of-digital-literacy/> [<https://perma.cc/7GP9-XAS6>]; McClain, *supra* note 54.

57. See *supra* notes 54–57 and accompanying text.

58. Robin Madell, *Pros and Cons of Working from Home*, U.S. NEWS (June 30, 2022, 4:36 PM), <https://money.usnews.com/money/blogs/outside-voices-careers/articles/pros-and-cons-of-working-from-home> [<https://perma.cc/4XL2-KTQP>].

59. See Molla, *supra* note 53.

60. Jeanne Meister, *The Great Resignation Becomes the Great Reshuffle: What Employers Can Do to Retain Workers*, FORBES (Apr. 19, 2022, 7:38 AM), <https://www.forbes.com/sites/>

begging to hire new employees and many who became unemployed during the pandemic did not rush to fill open positions.<sup>61</sup> While this has settled down, not every industry has recovered.<sup>62</sup> As a result, employers are forced to reevaluate their remote work and hybrid policies in order to attract candidates or retain employees.<sup>63</sup>

Unlike pure online hiring practices, it is unlikely that remote and hybrid work policies could serve as the basis for a successful disparate impact claim. It is worth noting that this specific issue is unexplored in the law, and there are no cases specifically about disparate impact and remote work policies to provide as guidance. Working from home requires the employee to have reliable internet service to complete his or her job duties. Certainly, policies that allow employees to work remotely have a disparate impact on employees who are excluded due to a lack of broadband access. As discussed above, this could disproportionately exclude employees who are part of a protected class. However, due to the benefits discussed above, employers likely can demonstrate that a sufficient business necessity exists to allow some or all employees to work remotely even if it results in disparate impact. While there may be a less discriminatory alternative to have everyone work full time in an office, that alternative must be feasible and meet employment objectives to support a disparate impact claim.<sup>64</sup> It seems unlikely a court would determine that an employer should require all employees to report to a central office in person one hundred percent of the time as a reasonable alternative to prevent a disparate impact.

#### *E. Remote Work: The Haves and the Have-Nots*

Although remote and hybrid work policies are not likely to serve as the basis of a successful disparate impact claim, it is important for employers to understand how these policies can impact their work force because they can cause practical problems. Remote and hybrid work policies are attractive to many employees. They provide flexibility and increase work-life balance by cutting out commutes and allowing employees to spend more time with their families. For those completely remote, it allows them more freedom when deciding where to live (as

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jeannemeister/2022/04/19/the-great-re-shuffle-of-talent-what-can-employers-do-to-retain-workers/?sh=7a60465b4cf3 [https://perma.cc/7TM5-UMB5].

61. Lindsay Cates & Richard Hartnett, *Businesses Struggle to Find and Keep Workers Amid Record-High Job Openings*, U.S. CHAMBER COM. (Sept. 2, 2021), <https://www.uschamber.com/workforce/businesses-struggle-find-and-keep-workers-amid-record-high-job-openings> [https://perma.cc/TB97-DCGE].

62. See Sarah Chaney Cambon, *Snapshot of Jobs Market as It Reaches Pandemic Recovery Milestone*, WALL ST. J. (Aug. 5, 2022, 1:59 PM), <https://www.wsj.com/articles/snapshot-of-jobs-market-as-it-reaches-pandemic-recovery-milestone-11659722394> [https://perma.cc/F4HY-CTHQ].

63. See Eric Friedman, *Hiring and Recruitment Trends to Expect in 2022*, FORBES (Feb. 15, 2022, 7:45 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2022/02/15/hiring-and-recruitment-trends-to-expect-in-2022/?sh=7542d5db279e> [https://perma.cc/X8NP-XDZR].

64. See *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993).

long as that location has fast and reliable internet access).<sup>65</sup> Allowing employees to work from home can increase productivity, performance, engagement, retention, and even profitability.<sup>66</sup> For rural areas with broadband access, remote work can improve the community's economy and allow those in the community to apply for positions they otherwise would not have applied to due to the length of commute.<sup>67</sup> Thus, these policies have benefits to employees, employers, and can even benefit rural communities.

However, remote and hybrid work policies can cause tension in the workplace. Working from home is not an option for some positions or some employees.<sup>68</sup> For example, someone who lives in a rural community with no broadband access is unable to work from home, and it is impossible for people with certain jobs, such as utility line workers, retail workers, or healthcare professionals to work from home.<sup>69</sup> When an employer only permits certain employees to work from home, it can create resentment from those who want the benefits that remote or hybrid work can bring.<sup>70</sup> This can impact the company culture or the employees' morale. Additionally, when employees work from home full-time or part-time, there is less collaboration and in-person contact between employees.<sup>71</sup> It may be more difficult for employees to stay focused, and they must be self-motivated to get work done.<sup>72</sup> Businesses with employees that lack access to broadband need to weigh these pros and cons when determining how they want to proceed with remote work policies and who will benefit from them, even though there is unlikely to be a viable disparate impact claim.

#### *F. Affirmative Action Plans and Access to Broadband*

Some employers, such as federal contractors, are subject to affirmative action

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65. Madell, *supra* note 58.

66. Laurel Farrer, *5 Proven Benefits of Remote Work for Companies*, FORBES (Feb. 12, 2020, 4:09 PM), <https://www.forbes.com/sites/laurelfarrer/2020/02/12/top-5-benefits-of-remote-work-for-companies/?sh=371d1c6416c8> [<https://perma.cc/2Y9V-MEAW>].

67. Skylar Baker-Jordan, *Work From Home Isn't Just for Elites. It's the Revolution Rural America Needs*, NEWSWEEK (Jan. 12, 2022, 1:12 PM), <https://www.newsweek.com/work-home-isnt-just-elites-its-revolution-rural-america-needs-opinion-1668675> [<https://perma.cc/G65W-42VR>].

68. Mimi Nguyen, *Research Shows Working From Home Doesn't Work. Here's How Employers Should Tackle the Problem*, TIME (Aug. 13, 2021, 4:18 PM), <https://time.com/6088110/remote-work-structured-hybrid-research/> [<https://perma.cc/6Z44-G79R>].

69. 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/UX8H-HDVC>].

70. Alex Christian, *The Simmering Tension Between Remote and In-Office Workers*, BBC (Apr. 11, 2022), <https://www.bbc.com/worklife/article/20220408-the-simmering-tension-between-remote-and-in-office-workers> [<https://perma.cc/GZQ6-D5SX>].

71. *See id.*

72. Madell, *supra* note 58.

requirements.<sup>73</sup> A company subject to these requirements must have a written document outlining how it will ensure that all applicants and employees have equal opportunity during hiring and employment.<sup>74</sup> There are three federal laws that require contractors with at least fifty employees to have a written affirmative action plan if they meet the contract value threshold. Under Executive Order No. 11,246, employers with a federal contract exceeding \$50,000 must develop an affirmative action plan.<sup>75</sup> The two other federal laws that require an affirmative action plan, the Vietnam Era Veterans' Readjustment Assistance Act<sup>76</sup> and Section 503 of the Rehabilitation Act of 1973<sup>77</sup> protect veterans and those with disabilities, respectively. Companies that are required to have affirmative action plans, or who voluntarily have diversity and inclusion goals in place should consider whether online only recruiting or remote work practices impact their internal goals or ability to comply with affirmative action requirements.

First, when employers recruit heavily online, they are excluding those without internet access. Mostly, this impacts rural and low-income residents. This practice can have the effect of minimizing the diversity of the application pool because low-income Americans are disproportionately minorities.<sup>78</sup> If employers' hiring practices are unintentionally reducing the application pool's diversity, it will be harder to meet the goals of affirmative action plans, as well as internal diversity and inclusion goals. Not only can online hiring practices open employers up to disparate impact claims, but they can jeopardize their ability to meet the goals outlined in affirmative action plans.<sup>79</sup>

Next, employers using a purely remote work environment will necessarily be excluding workers who do not have access to broadband. Because minorities are less likely to have broadband access, they may be less likely to apply or accept a remote or hybrid position for which they might otherwise be qualified. While this may not create a viable disparate impact claim, it does negatively impact the

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73. *Affirmative Action*, U.S. DEP'T LABOR, <https://www.dol.gov/general/topic/hiring/affirmativeact#:~:text=For%20federal%20contractors%20and%20subcontractors,efforts%2C%20and%20other%20positive%20steps> [https://perma.cc/57G9-4VK4] (last visited Dec. 29, 2022).

74. *Affordable Action Frequently Asked Questions*, U.S. DEP'T LABOR, <https://www.dol.gov/agencies/ofccp/faqs/AAFAQs> [https://perma.cc/DMJ2-TCEK].

75. Exec. Order No. 11,246, 41 C.F.R. § 60-2.1 (1977).

76. Pub. L. No. 93-508, 88 Stat. 1578 (codified as amended at 38 U.S.C. § 4212).

77. Pub. L. No. 93-112, § 503, 87 Stat. 355 (codified as amended at 41 C.F.R. § 60-741.1 (2023)).

78. Creamer, *supra* note 38.

79. Employers found to be in violation of an affirmative action plan during a compliance evaluation or complaint investigation may have to pay remedies including correcting the violation and making the victim whole, which can include reinstatement or back-pay. *Federal Contract Compliance Manual: 8A01 Remedies*, U.S. DEP'T LABOR: OFF. FED. CONT. COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/manual/fccm/8a-introduction/8a01-remedies> [https://perma.cc/QH7B-G84F] (last visited Jan. 13, 2023). But employers who repeatedly violate affirmative action plans and discriminate may incur sanctions, which could result in a fine or the termination of their federal contract. *Id.*

employer's ability to meet affirmative action plan obligations or its own internal diversity and inclusion goals.

*G. The Bottom Line: Employer Practices and Disparate Impact*

Discrimination laws protect employees from unequal treatment based on their status as a protected class, and when employees are treated unequally based on their access to broadband, it may disproportionately affect people in a protected group. While there is no EEOC guidance and no reported cases on this issue, it seems possible this disproportionate treatment could lead to a complaint that online hiring practices or a remote work policy has a disparate impact on a protected class. This risk for employers and the practical problem for employees could be mitigated by better and more affordable access to broadband. The good news is there is funding available to spur deployment of broadband infrastructure to assist families to help with affordability.

#### IV. LEGISLATION AND FUNDING TO FIX THE DIGITAL DIVIDE

Federal and state programs are important because broadband requires substantial investment in infrastructure, but projected revenues from low density rural or low income areas may not provide incentive for broadband providers to go into these communities to expand access. The installation of fiber-optic networks is expensive and labor-intensive, and so providers must optimize their deployment plans.<sup>80</sup> Fiber-based broadband service is provided in some locations by national and local communications providers, but in some parts of the country, including Indiana, rural electric membership cooperatives (“REMCs”) are beginning to offer service.<sup>81</sup> REMCs across the country are building out broadband to provide services to at least six million households that are currently in areas without broadband service, and REMCs will play an integral role in expanding broadband access to homes in many states.<sup>82</sup>

Government assistance has been and still is important to expand access of utilities to rural Americans. In the 1930s, the Rural Electrification Administration was created under the New Deal by President Roosevelt.<sup>83</sup> The Rural

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80. Rachele Dragani, *You Can Find Out If Your Home Is Fiber-Ready (We'll Show You How)* FRONTIER (Nov. 4, 2021), <https://blog.frontier.com/2021/11/you-can-find-out-if-your-home-is-fiber-ready-well-show-you-how/> [<https://perma.cc/L74W-KC43>].

81. Chris Velazco, *Is Your Internet Service Unreliable? There May Be Fiber in Your Future*, WASH. POST (Aug. 4, 2022, 7:00 AM), <https://www.washingtonpost.com/technology/2022/08/04/what-is-fiber-internet-explained-infrastructure/> [<https://perma.cc/AL4H-AQGL>]; *Fiber Internet Expands in Rural Indiana*, HOOSIER ENERGY (June 22, 2018), <https://www.hoosierenergy.com/energylines/fiber-internet/> [<https://perma.cc/PC8D-GR76>].

82. *Broadband*, NAT'L RURAL ELEC. COOP. ASS'N, <https://www.electric.coop/issues-and-policy/broadband> [<https://perma.cc/WQ3B-BGFN>] (last visited Feb. 1, 2023).

83. *History: The Story Behind America's Electric Cooperatives and NRECA*, NAT'L RURAL ELEC. COOP. ASS'N, <https://www.electric.coop/our-organization/history> [<https://perma.cc/5L9A-HWYH>] (last visited Jan. 13, 2023).

Electrification Act provided federal funds for the installation of electrical distribution systems to rural America.<sup>84</sup> While larger utilities were uninterested in the expansion to low density rural areas, electric cooperatives took advantage of these funds and worked to expand services into rural America.<sup>85</sup> The Rural Electrification Administration has now morphed into Rural Utilities Service under the United States Department of Agriculture, and it seeks to provide, water, electric, and telecommunications infrastructure to rural communities.<sup>86</sup> If the success of these efforts is any indication, bolstering funding for rural broadband access should help reduce the digital divide.

#### *A. Federal Support for Broadband Expansion*

The federal government has recognized the inherent disadvantage that comes with the inability to access broadband and has been trying to get all Americans connected to high-speed services.<sup>87</sup> Recent federal legislation provides funding to lessen the digital divide. The Infrastructure Investment and Jobs Act (“IIJA”) was signed into law on November 15, 2021.<sup>88</sup> Among other things, the IIJA includes \$65 billion to expand broadband access with the goal of connecting every American to a reliable, high-speed network.<sup>89</sup> The legislation has an affordability focus, with one goal being to lower prices to increase the number of Americans who can afford internet access.<sup>90</sup>

In the IIJA, Congress directed the Federal Communications Commission (“FCC”) to create rules regarding digital discrimination. The FCC formed the Task Force to Prevent Digital Discrimination to promote equal access to broadband “regardless of zip code, income level, ethnicity, race, religion, or national origin.”<sup>91</sup> Digital discrimination occurs when these factors are considered when determining where to expand and build broadband networks.<sup>92</sup> While several of these categories are considered protected classes, it is notable that this language expressly protects rural and low-income Americans, who are not directly protected from discrimination.

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84. *Id.*

85. *Id.*

86. *Rural Utilities Service*, U.S. DEP’T AGRIC., <https://www.rd.usda.gov/about-rd/agencies/rural-utilities-service> [<https://perma.cc/BMN8-AUE6>] (last visited Jan. 13, 2023).

87. See Joy Wiltermuth, *Biden’s Infrastructure Plan Includes \$100 Billion to Expand Fast Internet to Rural, Poorer Areas*, MARKETWATCH (Apr. 1, 2021, 4:34 PM), <https://www.marketwatch.com/story/how-bidens-infrastructure-plan-could-rescue-rural-america-11611261713> [<https://perma.cc/7V9V-A52F>].

88. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

89. See *id.* § 40105.

90. *President Biden’s Bipartisan Infrastructure Law*, *supra* note 24.

91. *Task Force to Prevent Digital Discrimination*, FED. COMM’NS COMM’N, <https://www.fcc.gov/task-force-prevent-digital-discrimination> [<https://perma.cc/V4BG-JV95>] (last visited Jan. 13, 2023).

92. *Id.*

Included in the IIJA is the Digital Equity Act, which designates \$2.75 billion across three grant programs with a goal of increasing digital equity and inclusion.<sup>93</sup> These grants help states develop, fund, and implement digital equity programs.<sup>94</sup> The Digital Equity Act looks for projects that will help low-income households, the elderly, incarcerated individuals, veterans, people with disabilities, people with language barriers, racial and ethnic minorities, and rural populations—all of which are less likely to be connected to broadband services.<sup>95</sup> Also included in the IIJA is the Broadband Access, Equity, and Deployment program. The IIJA provided this program with \$42.45 billion going to states and territories to finance broadband deployment projects, with priority on fiber-optic projects that will directly connect to the end user because fiber is the technology that will best meet evolving connectivity needs.<sup>96</sup> With the financing from these two programs, fiber broadband technology can be expected to become accessible to groups the Digital Equity Act seeks to help.

The IIJA is just one of the recent programs with a goal of closing the digital divide. The Affordable Connectivity Program is an FCC benefit program that provides a \$30 subsidy for internet access to qualifying households, as well as a one-time \$100 stipend to purchase a laptop, desktop computer, or tablet.<sup>97</sup> Congress designated \$14 billion to this program to help expand broadband access to those who cannot afford it.<sup>98</sup> However, experts expect the funding to run out in 2024 if Congress does not designate more funds to the program.<sup>99</sup> Thus, rather than acting as a long-term solution, the program serves as a short-term boost to affordability and accessibility.

The Affordable Connectivity Program is available for households below two hundred percent of the federal poverty line or if a member of the household participates in an assistance program including, but not limited to Medicaid, WIC, or public housing.<sup>100</sup> According to White House experts, an estimated forty-eight

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93. *Digital Equity Act Programs*, INTERNET FOR ALL, <https://www.internetforall.gov/program/digital-equity-act-programs> [<https://perma.cc/L4XB-8QG8>] (last visited Jan. 13, 2023).

94. *Id.*

95. *Id.*

96. NAT'L TELECOMMS. & INFO. ADMIN., U.S. DEP'T COMMERCE, NOTICE OF FUNDING OPPORTUNITY, BROADBAND EQUITY, ACCESS, AND DEPLOYMENT PROGRAM 14 n.9 (2022), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf> [<https://perma.cc/S48D-48DW>].

97. *Affordable Connectivity Program*, FED. COMM'NS COMM'N, <https://www.fcc.gov/acp> [<https://perma.cc/Q2B4-BFJE>] (last visited Dec. 27, 2022).

98. *Emergency Broadband Benefit*, FED. COMM'NS COMM'N (May 9, 2022), <https://www.fcc.gov/broadbandbenefit> [<https://perma.cc/XE5W-CSSX>]. “The Affordable Connectivity Program replaced the Emergency Broadband Benefit on December 31, 2021.” *Id.*

99. RyMarcattilio, *The Fate of the Affordable Connectivity Program*, CMTY. NETWORKS (May 19, 2022), <https://muninetworks.org/content/fate-affordable-connectivity-program> [<https://perma.cc/75UH-72HG>].

100. *Affordable Connectivity Program*, *supra* note 98.

million households, or forty percent of the population, qualify for the program.<sup>101</sup> But as of July 21, 2022, only around thirteen million people were enrolled.<sup>102</sup> This begs the question: why are so many eligible households foregoing this benefit?

Perhaps the low enrollment can be attributed, in part, to the very problem the program seeks to solve. Applicants must apply online or print and mail-in an application. For households without high-speed internet access, this is inaccessible because it forces them to go elsewhere where they can get access to the online application or print a hard copy. This can also be a problem for people who are smartphone-only because it can be difficult to complete applications online without a computer. Furthermore, when applications are only online, people must have the skills to navigate the application process. This, again, disproportionately affects victims of the digital divide because they are most likely to lack access to the internet or the digital skills needed to apply online.<sup>103</sup> In addition to the challenge of applying, many households are simply unaware that the Affordable Connectivity Program exists as an option for them.<sup>104</sup>

### *B. Indiana State Support for Broadband*

Broadband access is also an important issue in the eyes of Indiana state government. Purdue University estimates that Indiana could “gain billions in economic benefits over 20 years with full deployment of broadband into rural areas.”<sup>105</sup> To that end, Indiana has implemented the Broadband Readiness Pilot Program, where Indiana communities create a vision of the future of broadband and determine how that vision will be achieved and generally how it supports broadband expansion.<sup>106</sup> Under the program, the Office of Community and Rural Affairs designated up to \$50,000 to five certified Indiana “broadband ready communities,” which enable “an understanding of their current broadband conditions and needs, create a long-term broadband plan in their community, and identify options for achieving that vision.”<sup>107</sup> Another Indiana program, Next

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101. *FACTSHEET: Vice President Harris Marks Important New Milestone in Administration’s Efforts to Cut Costs for American Families*, THE WHITE HOUSE (July 21, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/21/fact-sheet-vice-president-harris-highlights-milestone-of-1-million-new-participants-on-reducing-high-speed-internet-cost-for-americans/> [https://perma.cc/L2C2-88LL].

102. *Remarks by Vice President Harris on the Affordable Connectivity Program*, THE WHITE HOUSE (July 21, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/21/remarks-by-vice-president-harris-on-the-affordable-connectivity-program/> [https://perma.cc/88JN-A226].

103. *Digital Equity Act Programs*, *supra* note 94.

104. Goovaerts, *supra* note 9.

105. *Funding and Program Resources: Indiana*, IND. BROADBAND, <https://www.in.gov/indianabroadband/funding-and-program-resources/indiana/> [https://perma.cc/P38P-W8F7] (last visited Jan. 10, 2023).

106. *Id.*

107. *Id.*; *Broadband Readiness Planning Grant Pilot*, IND. SENATE REPUBLICANS (Sept. 19,

Level Connections Broadband Program, has the goal of increasing access to reliable and affordable broadband service for every Hoosier. This program invests \$270 million to improve broadband access and adoption, and providers serving one hundred or more subscribers for three or more years are eligible.<sup>108</sup> Finally, Indiana has implemented the Indiana Connectivity Program to connect residents and businesses without broadband service and will assist service providers by helping fund the expansion in those areas.<sup>109</sup>

#### CONCLUSION

The need for broadband access will only increase as technology evolves. Technology increases productivity, convenience, speed, and the ability to connect with the world. It is increasingly important for everyone to be connected to reliable, affordable, and fast internet service, but until it is made available to everyone, there will continue to be a digital divide that disproportionately impacts rural and low-income Americans.

While governments and broadband providers work together to fund and expand affordability and access, employers must consider the benefits and problems lack of broadband can cause for their employees and candidates. It is already difficult for those without broadband to function in daily life, and employers may need to be sympathetic to those difficulties while creating practices and policies that will work best for their companies. Despite the vast federal and state support recently directed toward deployment of broadband infrastructure, access for rural and low-income Americans will not improve overnight. In the meantime, employers need to look at how their practices and policies can impact those without access, and what implications that can have for the employers themselves.

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2018), <https://www.indianasenatepublicans.com/broadband-readiness-planning-grant-pilot> [https://perma.cc/3AA2-CEH8].

108. *Next Level Connections*, IND. OFF. CMTY. & RURAL AFFS., <https://www.in.gov/ocra/nlc/> [https://perma.cc/4ECK-3V2B] (last visited Jan. 10, 2023).

109. *Indiana Connectivity Program*, IND. OFF. CMTY. & RURAL AFFS., <https://www.in.gov/ocra/broadband/icp/> [https://perma.cc/UMM5-JTHS] (last visited Jan. 10, 2023).