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Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform

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Millions of Americans are under intense pressure to balance work and family responsibilities. The feeling of overwork is rampant, with nearly half of employees feeling overworked or overwhelmed by their workplace responsibilities. This Article argues for a suite of legal protections that would allow working families, especially single-parent and low-income families, basic access to the rights and protections of flexible work. These protections include amending FLSA rules to better protect non-exempt workers from intrusions into their non-working time, as well as expanding the use of the FMLA to encourage more use of flexible leave. This article also recommends adoption of right-to-request legislation, enabling employees to request a flexible schedule and have that request meaningfully evaluated by their employer without fear of retaliation.

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INTRODUCTION

Nearly half of U.S. employees feel overburdened by their workplace obligations.¹ Many are constrained by the time and place of their working hours and cannot balance their working time with their personal and family time.² Working mothers who ask for time off to attend to family responsibilities risk being perceived as insufficiently committed to their career.³ Working fathers fear taking paternity leave because of financial pressures and social stigma.⁴ Low-income workers of both genders face substantial overtime work without notice, receive little or no sick time, and risk retribution if they request control over their own schedules.⁵

What many employees want, and what too few employers grant, is a measure of control over their working time. This employee control over working time is known as flextime and it allows the employee at least some choice over how, when, and where work obligations are completed.⁶ Even though flextime would bring relief to many workers, family-friendly legal protections for beleaguered families remain insufficient.

This Article argues for changes to the current regulations addressing flextime. It argues for a number of legal reforms that would allow working families, especially single-parent and low-income families, basic access to the rights and protections of flexible work. Part I asserts that inflexible work imposes a social cost, with particular burdens placed on women and low-wage workers. Part II claims that, while efforts have been made to obtain flextime protections under established laws, current employment regulatory regimes are insufficient to protect employees from the consequences of employer-imposed working time. Part III argues against a current pending initiative in Congress, the Working Families Flexibility Act (“WFFA”), which, instead of facilitating helpful flextime, would actually shift more working time control into the hands of the employer.

Part IV argues for alternative reforms to grant employees the right to flexible working time. It first argues for the incorporation of flextime

1. ELLEN GALINSKY, STACY S. KIM & JAMES T. BOND, *FAMILIES & WORK INST.*, *FEELING OVERWORKED: WHEN WORK BECOMES TOO MUCH* 6 (2001).

2. *See id.*

3. *See, e.g.,* Rebecca Korzec, *Working on the “Mommy Track”: Motherhood and Women Lawyers*, 8 HASTINGS WOMEN’S L.J. 117, 117-18, 130 (1997).

4. Chuck Halverson, Note, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN’S L.J. 257, 261-65 (2003).

5. Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL’Y 445, 449-53 (2012).

6. Candace Saari Kovacic-Fleischer, *United States v. Virginia’s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII*, 50 VAND. L. REV. 845, 906 n.340 (1997); *see also* *Workplace Flexibility Toolkit*, U.S. DEP’T OF LABOR, <http://www.dol.gov/odep/workplaceflexibility> (last visited Sept. 18, 2015) (“Essentially, flexibility enables both individual and business needs to be met through making changes to the time (when), location (where), and manner (how) in which an employee works.”).

reforms into established legal regimes. The Fair Labor Standards Act (“FLSA”) should be amended to better protect employees against employers’ off-shift intrusions to do work at home, especially given the rise of portable technology enabling this practice. Further, the Family and Medical Leave Act (“FMLA”) should be substantially expanded to include more workers that need its protections, and expanded to include more flex-friendly personal needs within the definition of “leave.”

In addition to statutory reform, Part IV also presents a novel legislative solution: a hybrid statutory flextime model based upon emerging “right-to-request” legislation, which enables employees to request flextime without retaliation and requires employers to consider the request and decide promptly whether to implement it. The model then buttresses the right-to-request framework with key concepts established by the Americans with Disabilities Act (“ADA”). These ADA concepts will strengthen the right-to-request process for employees and incentivize employers to engage in genuine dialogue. This hybrid solution represents a feasible and practical reform that provides workers meaningful access to flexible work. Part IV then anticipates and responds to criticisms of this reform proposal. The Article concludes that legal reforms in the area of flexible work can help sustain a productive workforce and a healthy society.

I.

INFLEXIBLE WORK IMPOSES A SOCIAL COST, ESPECIALLY ON WOMEN AND LOW-WAGE WORKERS

Inflexible work places a burden on a number of employees, rendering them unable to achieve a work-life balance, inhibiting appropriate child care, and impeding on the preferred use of personal time for medical visits, elder care, or other familial obligations. While many workers experience a climate of inflexible work, low-wage workers are the most vulnerable.⁷ Many low-wage workers find making ends meet challenging.⁸ Low-wage workers are disproportionately faced with the broader demographic challenges of the rise in single parenting, two working spouses, and extended care for elderly parents.⁹

Low-wage workers could most benefit from the freedom that flextime provides, but low-wage workers are even less likely than their higher-paid counterparts to have access to flexible schedules.¹⁰ Such workers are in fact

7. See Betsy Gwin, *Lessons for Anti-Poverty Advocates From the Workplace Flexibility Movement: Improving Flexibility in Low-Wage Work and Access to Work Supports*, 18 GEO. J. ON POVERTY L. & POL’Y 265, 268-70 (2011).

8. *Id.*

9. Liz Watson & Jennifer E. Swanberg, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation*, 3 AM. U. LAB. & EMP. L.F. 380, 380-82 (2013).

10. *Id.* at 380-83.

the most likely to work in jobs that are rigidly scheduled.¹¹ When their jobs do vary, they vary with unpredictability, not flexibility. “Flexible” time for low-wage workers means having little warning when overtime is necessary and when an expected shift will be cancelled.¹² Technology can exacerbate the problem as employers use computer planning to rapidly add, subtract, or shift hours within the same day to respond to fluctuating consumer or production demand.¹³ Such additions or cancellations may impact workers by creating uncertainty about how many hours, and by extension how much pay, they will receive each week. Short notice about an additional shift can also inhibit a worker’s ability to pick up children from school, find a babysitter, and attend personal and medical appointments.¹⁴

When unexpected personal issues arise requiring flexible time, low-wage workers generally have fewer resources to manage their lives than other workers. In 2005, seventy-five percent of low-income workers had no access to paid sick leave.¹⁵ Forty percent of low-wage workers reported having no paid sick days, vacation days, or personal days.¹⁶ Moreover, those who have paid leave may not be able to use it until they have earned the right by working for their employer for an extended period.¹⁷

Inflexible work also disproportionately impacts women. Men tend to have more access to flexible employment than women.¹⁸ Managers are more likely to grant flexible schedules to high-status men who use such flexibility to advance their careers.¹⁹ Furthermore, stigma against women for using flextime—whether expressed through direct job loss or through indirect impairment of one’s career growth in the firm—may cause women to take more non-standard jobs, such as part-time work that may allow flexibility to accommodate demands of work and family.²⁰ This effect is

11. Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. POVERTY L. & POL’Y 1, 9 (2012).

12. Watson, *supra* note 9, at 399-401.

13. *Id.* at 399.

14. *Id.* at 399-400.

15. Runge, *supra* note 5, at 451.

16. *Id.*; see also Gregory Acs, *A Good Employee or a Good Parent? Challenges Facing Low-Income Working Families*, 4 U. ST. THOMAS L.J. 489, 498 (2007) (“[Low wage jobs] simply do not offer . . . the same level of pay, benefits and flexibility as those held by moderate-income families.”); Bornstein, *supra* note 11, at 9.

17. Runge, *supra* note 5, at 451-52.

18. Michael Selmi & Sonia Weil, *Can All Women Be Pharmacists?: A Critique of Hanna Rosin’s The End of Men*, 93 B.U. L. REV. 851, 864 (2013) (citing *Press Release, Workers on Flexible and Shift Schedules in May 2004*, BUREAU OF LAB. STAT. (July 1, 2005), <http://www.bls.gov/news.release/pdf/flex.pdf>).

19. Victoria L. Brescoll, Jennifer Glass & Alexandra Sedlovskaya, *Ask and Ye Shall Receive? The Dynamics of Employer-Provided Flexible Work Options and the Need for Public Policy*, 69 J. SOC. ISSUES 367, 381 (2013).

20. See Rosemary Owens, *Engendering Flexibility in a World of Precarious Work*, in PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY 329, 329-30 (Judy Fudge & Rosemary Owens

only exacerbated for women in low-wage employment. Middle- and upper-income women may have better financial resources and greater access to employer-based benefits, such as unpaid job-guaranteed leave from work, than lower-income women.²¹

The liability exposure for such gendered treatment is substantial. Plaintiffs in one gender discrimination lawsuit²² relied on various arguments, including “maternal wall” bias, to support their claims.²³ Plaintiffs obtained a \$250 million damage award from the jury as a result.²⁴ As evidence of such bias, one litigant produced evidence that a male manager said “first comes love, then comes marriage, then comes flextime and a baby carriage” in reference to his preference to not hire young women.²⁵ Female managers can discriminate as well. When a top-performing female saleswoman requested time off to care for her son’s ear infection, “her female supervisor threw a phone book on the saleswoman’s desk and ordered her to find a pediatrician who was open after hours.”²⁶

This does not mean men are immune from the consequences of inflexible work. Fathers frequently report being “openly mocked” or “passed over for promotions” because of taking time off for family obligations.²⁷ Caregiving is traditionally perceived as a feminine obligation, and men seeking flextime to parent or care for their children or elderly parents may be penalized and perceived as non-masculine.²⁸ However, those who are often least able to accommodate inflexible work—low-wage workers of both genders who lack bargaining power to resist such working conditions—disproportionately bear the burden of an inflexible work society.

eds., 2006); Tara S. Bernard, *The Unspoken Stigma of Workplace Flexibility*, N.Y. TIMES (June 14, 2013),

21. Runge, *supra* note 5, at 472.

22. *Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243, 271 (S.D.N.Y. 2007) (certifying lawsuit for pregnancy discrimination as a class action).

23. Joan C. Williams & Amy J.C. Cuddy, *Will Working Mothers Take Your Company to Court?*, HARV. BUS. REV. (Sept. 2012), <https://hbr.org/2012/09/will-working-mothers-take-your-company-to-court>. Maternal wall bias is “bias against one subset of employees: caregivers, particularly working mothers.” *Id.*

24. *Id.* The average verdict in family responsibilities cases before this one was only \$570,000. *Id.*

25. *Id.*; *Velez*, 244 F.R.D. at 267.

26. Williams & Cuddy, *supra* note 23.

27. *Id.*

28. See generally Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703 (2011).

II.

CURRENT LEGAL REGIMES INADEQUATELY SAFEGUARD ACCESS TO FLEXIBLE WORK

A variety of employment protections prohibit discrimination, harassment, retaliation, and other practices, but little attention is paid to flexible work. This Part appraises the three most applicable employment laws, the FLSA, FMLA, and ADA, and, for varying reasons, finds each insufficiently protective of employees' control of working time.

A. The Fair Labor Standards Act is Too Outmoded to Adequately Protect Flexible Work

The FLSA is arguably the statutory authority with the most apparent relevance to flexible working time. The purpose of the FLSA is to ban working conditions that infringe upon a minimum standard of living necessary for personal health and well-being.²⁹ President Franklin D. Roosevelt perceived the FLSA as a centerpiece of the New Deal that would end "intolerable hours."³⁰ Implicit in that purpose is "a reasonable quality of life outside the workplace."³¹

However, the FLSA's statutory language was not primarily directed toward improving work-life balance, but rather the narrower issues of a just hourly wage and tolerable working conditions. Although the FLSA rules interpreting this concept are detailed, the FLSA's most prominent provisions require that eligible employees are paid an overtime rate for hours worked over forty hours per week.³² These provisions also require that nonexempt workers be paid no less than an established minimum wage.³³

The regulatory agencies responsible for interpreting the FLSA discuss flextime with a *laissez-faire* approach. The majority of flexible work

29. 29 U.S.C. § 202(a)-(b) (2012); *see also* *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (explaining that FLSA protects "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others"), *superseded on other grounds by statute*, 29 U.S.C. § 254 (2012). The Court emphasized that workers are not "mere chattels or articles of trade." *Tenn. Coal*, 321 U.S. at 597.

30. PRESIDENT FRANKLIN D. ROOSEVELT, ADDRESS OF THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 458, at 4 (3d Sess. 1938). President Roosevelt also sought to end what he called "starvation wages." *Id.*

31. Craig A. Cunningham, Note, *Mind the Gap: A Legal and Economic Analysis of Stockbroker Overtime Eligibility Under the Fair Labor Standards Act*, 2009 U. ILL. L. REV. 1243, 1246 (2009); *see, e.g.,* Kathryn S. Crouss, Note, *Employment Law—Welcome to the Jungle: Salespeople and the Administrative Exemption to the Fair Labor Standards Act*, 34 W. NEW ENG. L. REV. 205, 209 (2012).

32. 29 U.S.C. § 207 (2012); *see also* Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 2-3 (2001); Amanda Walck, Comment, *Taking it All Off: Salazar v. Butterball and the Battle Over Fair Compensation Under the FLSA's "Changing Clothes" Provisions*, 89 DENV. U. L. REV. 549, 553-54 (2012).

33. 29 U.S.C. § 206 (2012).

schedules, including flexible start and end times, core hours with flex hours, and compressed workweeks, are all permissible under the FLSA.³⁴ The Department of Labor (“DOL”) interprets the FLSA as not directly regulating flexible schedules; instead, the DOL defers to employer-employee agreements regarding flexible schedules.³⁵

This deferential approach enables inflexible schedules that many workers disfavor. Employers can impose whatever type of working schedule they wish. These schedules may be unnecessarily chaotic or burdensome to the workers who are subjected to them. Employers have no obligation to consider the needs of their workforce and the consequences of their scheduling decisions on workers’ families and society. If a worker desires a modest scheduling request for a pressing personal reason, an employer is able to reject the request without consequence.³⁶

Furthermore, even if the FLSA focused on flexible work, it is currently too narrow to apply effectively to workers who would need its protection. The FLSA only applies to non-exempt workers, meaning workers who are in executive, administrative, or professional positions are exempt from coverage under the act.³⁷ A number of selected working groups, even though they would normally be considered laborers, are also exempt from the FLSA’s protections.³⁸ During the era of the FLSA’s passage, white-collar workers were a small group of elites who were expected to work nine-to-five hours and not experience overtime.³⁹ These exemptions are not technicalities today. As many as twenty-six million workers, 27% of all workers, are white-collar workers not covered under the FLSA.⁴⁰ The

34. GEORGETOWN UNIV. LAW CTR., PUBLIC POLICY PLATFORM ON FLEXIBLE WORK ARRANGEMENTS 23 (2010), http://scholarship.law.georgetown.edu/pub_rep/2.

35. *Flexible Schedules*, U.S. DEP’T OF LABOR, <http://www.dol.gov/compliance/topics/wages-other-flex.htm> (last visited Jan. 18, 2014).

36. See, e.g., Rachel Arnov-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1106 (2010) (noting in ADA context that “courts routinely hold that requests to work from home, alter attendance requirements, or change work schedules are unreasonable and have consistently denied claims based on an employer’s failure to provide these types of accommodations”).

37. 29 U.S.C. § 213 (2012) (“The provisions of section 206 . . . shall not apply with respect to any employee employed in a bona fide executive, administrative, or professional capacity . . .”); see also Tareen Zafrullah, *Are You Violating the FLSA by Misclassifying Workers as Exempt Administrative Employees?*, 19 IND. EMP. L. LETTER 4 (2008).

38. 29 U.S.C. § 213; see also David K. Montgomery et al., *The Fair Labor Standards Act, “White Collar” Exemptions, & Fairpay 2004: A Survey of Recent Decisions with Emphasis on the Sixth Circuit*, 32 N. KY. L. REV. 651, 657 n.44 (2005) (listing these exempt laborers).

39. Ashley M. Rothe, Comment, *Blackberrys and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?*, 54 ST. LOUIS L.J. 709, 728 (2010) (citing Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 32 (2001)).

40. *Fair Labor Standards Act, White-Collar Exemptions Need Adjustment for Today’s Work Place: Hearing Before the Subcomm. on Workforce Prots. & H. Comm. on Educ. and the Workforce*, 106th Cong. 1 (2000) (statement of Cynthia M. Fagnoni, Director of Education, Workforce, & Income

percentage of white-collar workers has grown steadily over the past fifty years and is only likely to increase.⁴¹ A statute that exempts coverage for so many will not be able to provide flextime protections for a modern workforce.

As a result, non-exempt workers have been forced to file lawsuits for recovery of their lost personal time. For example, in *Agui v. T-Mobile, Inc.*,⁴² employees claimed that the employer required them to review and respond to employer-issued smart-phones.⁴³ These communications occurred at all hours and without overtime compensation.⁴⁴ Employees sued, claiming overtime wages under the FLSA for the ten to fifteen hours per week spent on employer emails, texts, and phone calls.⁴⁵ The employer entered into a confidential settlement agreement less than one year after the lawsuit's filing.⁴⁶

Similarly mistreated employees filed an action in *Rulli v. CB Richard Ellis, Inc.*⁴⁷ In this case, the employer gave smart-phones and other devices to the employees and required them to use the phones beyond normal working hours and without compensation.⁴⁸ The plaintiff alleged this violated the FLSA.⁴⁹ According to plaintiff's counsel, workers received text messages from supervisors while watching a movie or eating dinner, and had to respond within fifteen minutes and with no expectation of compensation.⁵⁰ The employer settled the claims prior to the issuance of a published opinion.⁵¹

When a published opinion appeared, the results offered limited satisfaction. In *Rutti v. Lojack Corp., Inc.*,⁵² an employee alleged that commuting time in company vehicles and uploading data to the company after he returned home constituted FLSA-compensable time.⁵³ The court

Security Issues, Health, Education, & Human Services Division), <http://www.gao.gov/new.items/he00105t.pdf>.

41. Marc Cenedella, *Great News! We've Become a White-Collar Nation*, BUSINESS INSIDER (Jan. 17, 2010), <http://www.businessinsider.com/great-news-weve-become-a-white-collar-nation-2010-1>.

42. Complaint, No. 09-2955 (E.D.N.Y. dismissed May 4, 2010).

43. *Id.* at 9.

44. *Id.*

45. Steven M. Guitierrez & Joseph Neguse, *Emerging Technologies and the FLSA*, 39 COLO. LAW. 49, 51 (2010). According to the plaintiffs, a manager stated that such activities were "standard business practices." *Id.*

46. *Id.*

47. Complaint, No. 2009CV00289 (E.D.Wis. dismissed Sept. 8, 2011).

48. *Id.* at 4.

49. *Id.* at 8.

50. *Id.* (quoting plaintiff's attorney, Nola Hitchcock).

51. Anna M. Pepelnjak, *Employee Use of Smartphones: FLSA Implications*, WEISS BERZOWSKI BRADY LLP (Sep. 14, 2011), <http://www.wbb-law.com/multimedia/blog/employee-use-smartphones-flsa-implications>.

52. 596 F.3d 1046 (9th Cir. 2010).

53. *Id.* at 1048-50.

found that the employee's commuting time was non-compensable even as a condition of employment involving a work vehicle.⁵⁴ However, the court found that the post-workday requirement to upload transmissions might be compensable.⁵⁵ The transmissions were part of the employees' regular work and necessary to business operations.⁵⁶ The court stated:

Rutti asserts that the transmissions take about 15 minutes a day. This is over an hour a week. For many employees, this is a significant amount of time and money. Also, the transmissions must be made at the end of every work day, and appear to be a requirement of a technician's employment. This suggests that the transmission [sic] "are performed as part of the regular work of the employees in the ordinary course of business"⁵⁷

The appellate court concluded that "at least on summary judgment, the district court could not determine that this activity was not integral to Rutti's principal activities."⁵⁸ However, the court qualified its conclusion with the statement that "split second absurdities" or "trifles" in time beyond scheduled working hours are non-compensable.⁵⁹ This is a gap that should be closed under the FLSA.

This "split second" qualification enables employers to continue using employee's personal time.⁶⁰ The "split-second absurdities" phrase originates from 1946.⁶¹ During that industrial period, split seconds were immeasurable. Workers had no access to immediate-response technology. Today, small fractions of time matter, as gigabytes of data can be transferred in moments. Such time is meaningful in a modern society that speaks comfortably in small fractions of time.

Yet, the *Rutti* court imposed on employees up to ten minutes of non-compensable working time each day.⁶² The court noted that most other

54. *Id.* at 1051.

55. This finding would be conditioned on determining whether such activities were so brief as to be considered non-compensable de minimis time. *Id.* at 1058-59; *see also* *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act."). *See generally* Amanda M. Riley, *The De Minimis Rule: Trifles of Time*, 45 ORANGE COUNTY LAW. 18 (2003); Jeff Nemerofsky, *What is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315 (2002).

56. *Rutti*, 596 F.3d at 1058 (quoting *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 401 (5th Cir. 1976)).

57. *Id.* at 1059 (citation omitted).

58. *Id.* at 1058.

59. *Id.* at 1056-57.

60. This may be a slippery slope that allows employers to further infringe on worker's personal time. *See generally* Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469 (1999).

61. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act.").

62. *Rutti*, 596 F.3d at 1058.

courts have found such a daily time loss to be de minimis.⁶³ The court reasoned that “practical administrative difficulty” would arise with recording such minute periods of time.⁶⁴ Interestingly, the court mainly relied on *Lindow v. United States* for its discussion of de minimis time.⁶⁵ *Lindow* was decided in 1984.⁶⁶ There is no need for courts to live in an era where incremental periods of time cumulating to an hour a week or more are outside the bounds of permissible compensation.⁶⁷ Where it is feasible to track working time with precision, the FLSA de minimis exception should not allow employers to unnecessarily encroach on employees’ personal time.

B. The FMLA’s Statutory Language Is Too Narrow to Accommodate Flextime Leave

The FMLA requires employers with fifty or more employees to grant up to twelve weeks of unpaid leave in one year for certain reasons—such as caring for a child, spouse, parent, or oneself due to a serious medical condition.⁶⁸ When an employee returns from leave, the employer must provide that employee with the same or equivalent position, compensation, and benefits.⁶⁹ Congress embraced laudatory goals, hoping to lessen the burden on working women and support “national interests in preserving family integrity” by encouraging a proper balance between employer needs for efficiency and employees’ needs to care for families.⁷⁰

However, the FMLA has been less successful in facilitating flexible schedules to balance work-life responsibilities. The FMLA has been interpreted too narrowly to be applicable to the pressing need for flexible time. The closest the FMLA comes to flextime is in its language describing permitted employee leave. Regulations interpreting the FMLA do state that “[e]ligible employees may take FMLA leave on an intermittent or reduced schedule basis.”⁷¹ Intermittent leave means separate blocks of time due to a single qualifying reason.⁷² Reduced schedule leave means a schedule that reduces the employee’s usual weekly working hours or hours in a

63. *Id.*

64. *Id.* at 1056-57.

65. *Id.*; see *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984).

66. *Lindow*, 738 F.2d 1057.

67. But, there is certainly evidence that courts would continue to treat such small periods as non-compensable today. See *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014) (holding that time spent donning and doffing required protective gear is not compensable under the FLSA).

68. 29 U.S.C. §§ 2611(4)(A)(i), 2612(a)(1) (2012).

69. *Id.* § 2614(a).

70. *Id.* § 2601.

71. 29 C.F.R. §§ 825.203, 202(a) (2014).

72. *Id.* § 825.202(a).

workday.⁷³ Reduced schedule leave can also mean a change in the employee's schedule for a period of time, such as from full-time to part-time.⁷⁴ However, neither the interpretations of the FMLA nor the statutory language itself sufficiently embraces flextime as an appropriate request for family and medical leave. Alternative scheduling like flextime is not treated as a core part of the FMLA's scope and coverage.⁷⁵

While the Supreme Court and the Circuits have yet to fully consider the applicability of the FMLA to flextime, decisions at the District Court interpret the FMLA narrowly. In *Giles v. Christian Care Centers, Inc.*,⁷⁶ Giles requested a flexible schedule because her spouse suffered a back injury. Giles argued that her request for a flexible schedule constituted a legally sufficient request for FMLA leave.⁷⁷ The court concluded that her request for a flexible schedule was not a sufficient request for FMLA leave, and thus Giles did not meet the requirements of the FMLA.⁷⁸ Giles also argued that the flexible schedule granted to her by her supervisor also constituted leave, and the court also rejected that argument, stating that it constituted neither intermittent leave nor reduced schedule leave under the FMLA.⁷⁹

Similarly, in *Ranade v. BT Americas*,⁸⁰ Ranade argued that her employer violated the FMLA when it denied her the twenty-hour-per-week flexible schedule that she preferred.⁸¹ The employer instead required her to work a standard reduced-hours work schedule of equivalent time.⁸² The court concluded that the employer was obligated to offer Ranade continuous full-time leave or a mutually agreed reduced schedule.⁸³ The

73. *Id.*

74. *Id.*

75. See Michelle A. Travis, *What a Difference a Day Makes, or Does it? Work/Family Balance and the Four-Day Work Week*, 42 CONN. L. REV. 1223, 1250 (2010) (discussing one way to implement an alternative scheduling model through amendment of the FMLA).

76. No. CIV. A. 3:96-CV-2168, 1997 WL 786256, at *3 (N.D. Tex. Dec. 11, 1997).

77. *Id.*; see also *Chappell v. Bilco Co.*, 675 F.3d 1110, 1116 (8th Cir. 2012) ("A claim under the FMLA cannot succeed unless the plaintiff can show that he gave his employer adequate and timely notice of his need for leave Adequate notice requires enough information to put the employer on notice that the employee may need FMLA leave.") (citations omitted) (quoting *Rynders v. Williams*, 650 F.3d 1188, 1196 (8th Cir. 2011)) (alteration in original); 29 U.S.C. § 2613(a) (2012) (stating that such leave may need to be supported by a certification from a health care provider if the employer requests).

78. *Giles*, 1997 WL 786256, at *3.

79. *Id.* at *3 n.11.

80. No. 1:12-CV-01039, 2013 WL 5818019 (E.D. Va. Oct. 28, 2013), *aff'd*, 581 F. App'x 182 (4th Cir. 2014).

81. *Id.* at *2.

82. *Id.*

83. *Id.* (citing 29 C.F.R. § 825.117 (2013) (stating that employees must attempt to schedule part-time leave to avoid disruption of employer operations and allowing employers to assign an alternative position that accommodates the employee's reduced leave schedule)).

court stated that the employer's offer of a reduced fixed schedule was "entirely reasonable" and that Ranade's flexible schedule request was "haphazard" and not manageable for the employer.⁸⁴ Ranade's FMLA claim was dismissed.⁸⁵

The FMLA concepts of permissible leave are insufficient to capture the needs of modern working time in at least three ways. First, intermittent scheduling, taking leave in separate blocks of time due to a single qualifying reason, is not an ideal fit for flexible work. Families may need substantial blocks of time for single, long-term events, but many of the work-life balance needs that arise demand short-term and changing accommodations. A babysitter may cancel at the last minute due to illness. An unexpected appointment with a school demands the parent's presence in the middle of the day. Elderly parents may need unexpected transportation or personal care. As previously explained, the FMLA's intermittent scheduling option insufficiently protects families who must adapt to short-term and immediate medical, familial, and personal needs.

Second, reduced scheduling may impose a substantial penalty. Reduced leave envisions a steady reduction in the usual number of hours per workweek. Such a reduction would be of limited value to employees who may need a reduction in hours in one week, but may be fully willing and able to serve the full hours, indeed even extra hours to compensate, in the following week. Reduced leave as currently interpreted under the FMLA does not envision variable hours of this nature.

Third, FMLA's reduced scheduling also appears to contemplate a reduction from full-time to part-time scheduling as the standard schedule modification.⁸⁶ Reduction to part-time status, particularly on a permanent or semi-permanent basis, may not be a solution for many who need flexible work. Part-time work deprives employees, particularly low-wage employees, of needed income to acquire basic necessities. In addition, part-time work imposes a job penalty. Women who work part-time, for example, make 21% less per hour than their full-time counterparts.⁸⁷ This part-time penalty makes such a solution even less attractive from a flextime perspective. The FMLA remedy of part-time work is not feasible for many workers.

84. *Id.* at *3.

85. *Id.* at *5.

86. See 29 C.F.R. § 825.202(a) (2014) ("A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.").

87. Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms*, 76 *FORDHAM L. REV.* 1941, 1958 n.88 (2008).

*C. The ADA Grants Some Flextime Rights, but Has a Distinct
Mandate That Limits Broad Effect*

Of the three major employment statutes cited in this Article, the ADA comes closest to offering sufficient protections for access to flexible work. For example, in *Ward v. Massachusetts Health Research Institute*,⁸⁸ the employer required its employees to complete daily time sheets pursuant to a flextime schedule that permitted employees to start work at any time between 7:00 and 9:00 am and end work once their seven and one-half hours were completed. Ward, suffering from arthritis stiffness and pain in the morning hours, often arrived later than 9:00 am to complete his seven and one-half hours.⁸⁹ After receiving negative supervisory reviews, Ward submitted to his employer that he suffered from arthritis and requested a modified work schedule to accommodate his disability.⁹⁰ His employer rejected the requested accommodation, reasoning that the two-hour start-time window under the current flextime schedule was sufficiently flexible.⁹¹

After being discharged, Ward sued under the ADA.⁹² His employer contended that maintaining a predictable schedule with constant supervision was an essential function of Ward's job, but the court concluded that "existence of a flexible schedule that permits Ward to work from 7:00 a.m. [to] 3:00 p.m. or 9:00 a.m. [to] 5:00 p.m., regardless of his supervisor's schedule, creates the obvious impression that MHRI is not bothered by some periods of unsupervised work."⁹³ The court declined to hold that Ward's request for a flexible schedule was per se unreasonable.⁹⁴ The court also stated that the employer needed to submit some evidence that the schedule would impose undue hardship in order to deny the request.⁹⁵ The court found genuine disputes of material fact regarding Ward's claim and allowed the case to proceed to trial.⁹⁶

The plaintiff in *Valle-Arce v. Puerto Rico Ports Authority*⁹⁷ found similar relief. Valle-Arce requested and received a flexible work schedule as an accommodation for her Chronic Fatigue Syndrome ("CFS"), which kept Valle-Arce from sleeping more than four hours a night and forced her to suffer with persistent pain and weakness.⁹⁸ Years later, a subsequent

88. 209 F.3d 29, 31 (1st Cir. 2000).

89. *Id.*

90. *Id.* at 32.

91. *Id.*

92. *Id.*

93. *Id.* at 35.

94. *Id.* at 36.

95. *Id.*

96. *Id.* at 38.

97. 651 F.3d 190 (1st Cir. 2011).

98. *Id.* at 193-94.

supervisor questioned her flexible schedule accommodation that was permitted by a previous manager.⁹⁹ This supervisor harassed Valle-Arce on a weekly basis about her schedule, served written reprimands for attendance, and denied her other accommodations that would have eased her symptoms.¹⁰⁰ Valle-Arce was ultimately discharged.¹⁰¹

At trial, the district court found for the employer, concluding that Valle-Arce was not a “qualified individual” under the ADA because her attendance at work was an “essential function” of the job.¹⁰² Her absences from work meant that she was not fulfilling the essential functions of her job as necessary for ADA protection.¹⁰³ The district court also ruled as a matter of law that the employer’s questioning of Valle-Arce’s time cards and memoranda to Valle-Arce stating agency policy did not constitute harassment.¹⁰⁴

The appellate court found that the trial court failed to consider evidence that Valle-Arce’s flexible work schedule would have enabled her to perform the essential functions of the job, specifically attending work.¹⁰⁵ The stress of going to work late, and being harassed for that lateness, exacerbated her medical problems, which in turn led to many of her absences.¹⁰⁶ An expert psychiatrist on behalf of Valle-Arce testified that she would have been able to attend regularly if granted the reasonable accommodation of a flexible schedule.¹⁰⁷ The fact that the accommodation was eventually granted did not protect her employer as it was only permitted after many months of delay.¹⁰⁸ The appellate court vacated the trial court’s judgment and remanded the case for further proceedings.¹⁰⁹

Although encouraging precedent exists displaying a willingness to accept flextime as a reasonable accommodation under the ADA, there are still signs that flextime may not be receiving the protection it deserves. In *Ezikovich v. Commission on Human Rights and Opportunities*,¹¹⁰ Ezikovich requested a “no fixed start to work schedule” to accommodate CFS, the

99. *Id.* at 194.

100. *Id.* at 194-95. Such accommodations would have been a printer in her office, air conditioning, and proximity to the washroom. *Id.*

101. *Id.* at 197.

102. *Id.* at 197-98 (citing 42 U.S.C. §§ 12112(a), 12111(8) (2012)).

103. *Id.* at 197.

104. *Id.*

105. *Id.* at 200.

106. *Id.*

107. *Id.*

108. *Id.* at 200-01.

109. *Id.* at 202.

110. 750 A.2d 494 (Conn. App. 2000).

same diagnosis attributed to Valle-Arce.¹¹¹ Her employer denied the request and instead offered to accommodate with a modified work schedule that had reduced hours and for a time allowed her to work in an office closer to Ezikovich's home.¹¹² Ezikovich sued, claiming that she should have been allowed a no-fixed-start flexible schedule as an accommodation.¹¹³ The court concluded that the part-time schedule offered by her employer was an effective accommodation and denied Ezikovich's disability claim.¹¹⁴

Allowing a part-time schedule, as *Ezikovich* did, as a sufficient accommodation limits the effectiveness of flexible scheduling. Part-time work may not provide low-income workers sufficient compensation. Furthermore, part-time work imposes a disproportionate wage penalty that low-income workers cannot readily afford.¹¹⁵ A request for flextime under the ADA should not result in part-time work that for many proves financially unsustainable.

Although the ADA has permitted flextime scheduling, one cannot place upon the ADA the burden of solely protecting flexible working time. The ADA has a "clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities."¹¹⁶ The mandate of the ADA is not to advance work-life balance for employees generally. Most flextime requests appear only as a consequence of ADA requests for an accommodation. One cannot cite a statutory regime for stinginess in an area it was not intended to apply.

As a result, an unusual situation exists where the ADA, whose purpose is least directed toward accommodating flexible scheduling, is also the statute that appears to have the greatest receptivity toward flexible work arrangements in the workplace. By contrast, the structure of the FMLA, whose purposes include lessening the burden on working women and balancing the "national interests in preserving family integrity,"¹¹⁷ offers little to incorporate flexible scheduling needs. The FMLA needs to be more elastic to be effective.

Similarly, the venerable FLSA would also seem to hold significant potential for flextime work as it is a statute that directly addresses issues of

111. *Id.* at 496. Before that time, Ezikovich was granted the opportunity to work out of a more convenient office and was also able to report to work when she was able, usually between 11:00am and noon, with the informal consent of her supervisor. *Id.* at 496 & n.1.

112. *Id.* at 496. Ezikovich would retain her full-time employee status under this proposed arrangement. *Id.*

113. *Id.* at 499.

114. *Id.* The court elaborated that attendance at work was an essential function of the job and that the inability to attend work on a regular basis did not satisfy such essential functions. *Id.* at 499 n.5.

115. Barry T. Hirsch, *Why do Part-Time Workers Earn Less? The Role of Worker and Job Skills*, 58 INDUS. & LAB. REL. REV. 525, 525 (2005).

116. 42 U.S.C. § 12101(b)(1) (2012).

117. 29 U.S.C. § 2601(b)(1) (2012).

working time. However, the FLSA is simply too outdated to incorporate modern accommodations. The FLSA is also unlikely to be expanded to include millions of professional employees who would benefit from flexible schedules but are currently exempt from coverage under the Act.¹¹⁸ There is a significant need to introduce flextime protections, beyond what current statutory frameworks can offer, and the next Part evaluates the latest effort in Congress to bridge the gap.

III.

THE WORKING FAMILIES FLEXIBILITY ACT: A FLEXTIME SOLUTION?

While efforts have been made in the past to legislate workplace flexibility, the most controversial provision currently being considered in Congress is the Working Families Flexibility Act (“WFFA”). The WFFA allows employers to pay their employees with time off when they work overtime instead of compensating with time-and-one-half pay as required by the FLSA.¹¹⁹ Some legislators have praised the WFFA as “commonsense legislation [that] will help American workers better balance the needs of family and the workplace.”¹²⁰ The WFFA has also received the strong support of employer-interest groups such as the National Federation of Independent Business,¹²¹ and a number of other employer-representative organizations.¹²²

118. See *infra* Part II.A.

119. Working Families Flexibility Act, H.R. 1406, 113th Cong. (2013), <https://www.govtrack.us/congress/bills/113/hr1406/text>; see generally Lane C. Powell, *Flexible Scheduling and Gender Equality: The Working Families Flexibility Act Under the Fourteenth Amendment*, 20 MICH. J. GENDER & L. 359 (2013). It is important to remember that H.R. 1406 is not the first legislation to carry this name, as other bills have been proposed in the past also known as the Working Families Flexibility Act that seek substantially different goals. See, e.g., Richman, *supra* note 36, at 1108-1112 (discussing a bill known as the Working Families Flexibility Act, which grants, among other rights, the right for employees to request a change in their employment terms without fear of reprisal); see also Working Families Flexibility Act, H.R. 1274, 111th Cong. § 3(a) (2009). As this earlier bill remains dormant, and the more recent WFFA remains a live issue, the discussion here will focus on the latter act. Working Families Flexibility Act, H.R. 465, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/465>.

120. *Providing Working Families Flexibility*, U.S. HOUSE EDUCATION AND THE WORKFORCE COMMITTEE, <http://edworkforce.house.gov/yourtime/> (last visited Nov. 19, 2015). Similar praise has been given to the Senate version of the WFFA, the Family Friendly and Workplace Flexibility Act, which was characterized as a “common-sense measure that would help reduce scheduling burdens for workers.” Daniel Wilson, *GOP Sens. Float Bill to Let Workers Swap OT for Comp Time*, LAW360 (Oct. 31, 2013), <http://www.law360.com/articles/485215>.

121. Caitlin M., *Key Vote in Support of H.R. 1406, The Working Families Flexibility Act*, NFIB.COM (May 8, 2013), <http://www.nfib.com/article/key-vote-in-support-of-hr-1406-the-working-families-flexibility-act-62820/>. An apparent template letter for submission to Congressional representatives states the following:

NFIB strongly supports legislation to remove obstacles that prevent employers from providing increased flexibility to their employees. H.R. 1406 simply allows private-sector employers to offer a benefit that is currently enjoyed by employers and employees in the public sector. This

Commentators and employee-representative groups, however, have criticized the WFFA. Few employees can afford to give up the overtime pay that so many of them—particularly those working low-wage jobs—rely upon to maintain subsistence necessities.¹²³ Critics allege that the positive response from employers to the WFFA supports the contention that firms will use the WFFA not to facilitate flexible work schedules, but rather to avoid paying overtime and circumvent the protections of the FLSA.¹²⁴ The Act also gives an additional incentive for employers to impose or retract last-minute scheduling changes that can destabilize working families.

The details of what some call the dubiously-named¹²⁵ WFFA supports the conclusion that the Act is primarily designed to protect employer interests. Supporters of the WFFA highlight the voluntary nature of the compensatory time, noting that it permits employees to get paid overtime on request.¹²⁶ However, this option may be an ineffective one as there are no special protections in the WFFA for employees who chose overtime pay. Low-wage employees will be expected to take compensatory time instead of overtime. As the Act contemplates that the waiver of mandatory compensatory time would take place by agreement before work begins,¹²⁷ the waiver will be part of standard boilerplate language in employment

legislation would allow employees the choice of taking time-and-a-half compensatory time as payment for overtime. It is important to stress that if an employer chooses to offer compensatory time, the offering is completely voluntary for employees, and at any time employees can change their mind and receive overtime compensation in cash.

According to an NFIB poll, an overwhelming number of small-business owners favor reform of the Fair Labor Standards Act (FLSA) to allow for more flexibility in the workplace and H.R. 1406 would provide such flexibility. H.R. 1406 is a family-friendly, commonsense piece of legislation that is a win-win for employers and employees. *Id.*

122. See Letter from American Hotel & Lodging Association et al., to Hon. John Boehner and Hon. Nancy Pelosi (May 7, 2013), <http://www.cupahr.org/advocacy/positions/CTC-Letter-of-Support-HR-1406.pdf> (“Now, more than ever, employees seek greater control over their time. The Working Families Flexibility Act would give employees more control over their time by giving them the option of paid time off in lieu of overtime payments.”). The letter is supported by nineteen business organizations and seventy-two human resources groups, which are mainly local branches of the Society of Human Resource Management. *Id.* at 2-3.

123. Judith Warner, *When ‘Flex Time’ Means Ripping Off Workers*, TIME (May 3, 2013), <http://ideas.time.com/2013/05/03/when-flex-time-means-ripping-off-workers/>.

124. *Id.* (“[T]here’s every reason to assume that, if they can legally do it, employers will rush to request that employees take their extra compensation in time off instead of expensive overtime pay.”).

125. See *id.* (referring to the Act as “treacherously named”); Nantiya Ruan, *Same Law, Different Day: A Survey of the Last Thirty Years of Wage Litigation and its Impact on Low Wage Workers*, 30 HOFSTRA LAB. & EMP. L.J. 355, 362 n.52 (2013) (referring to the act as “confusingly named”).

126. Rex Huppke, *Is the Working Families Flexibility Act Really Flexible?*, CHI. TRIB. (Apr. 22, 2013) (“It’s voluntary from the beginning for the employer and the employee And if it doesn’t go right, there’s a cash-out provision. Within 30 days you get to cash out if it’s not working out. There are sort of built-in safety valves.”) (quoting Todd Stacy, spokesman for WFFA sponsor Rep. Martha Roby), http://articles.chicagotribune.com/2013-04-22/business/ct-biz-0422-work-advice-huppke-20130422_1_comp-time-compensatory-time-perfect-world.

127. H.R. 1406 § 2.

contracts.¹²⁸ Unlike, for example, the ADA, which allows verbal requests for reasonable accommodation,¹²⁹ the WFFA permits only written requests that monetary compensation be provided.¹³⁰ This seemingly simple requirement can be a concern for employees who, out of fear of retaliation, may want to avoid creating a written record of requests that can be used against them to deny retention or promotion. Whereas a casual oral request for overtime pay may be requested, granted, and disregarded over time, a formal written demand can remain in an employee's personnel folder indefinitely.

Furthermore, the power to choose when compensatory time is taken is unbalanced. Section 7 of the Act states that the use of compensatory time "shall be permitted by the employee's employer to use such time within a reasonable period after making the request"¹³¹ The employee receives the compensatory time, but cannot determine when such time can be used. That discretion rests with the employer. The employer need only grant the compensatory time within an ambiguous "reasonable period" after the employee submits the request.¹³² Employee time off without any control of when that time can be used, or whether the employee can choose overtime instead, contradicts basic notions of flexible work.

The WFFA also has a readily available exception for employers who do not wish to grant compensatory time. The Act gives employers the power to deny the use of compensatory time if it "unduly disrupt[s] the

128. These standard contract terms are not generally negotiable in practice. Eduard A. Lopez, *Mandatory Arbitration of Employment Discrimination Claims*, 4 EMP. RTS. & EMP. POL'Y J. 1, 25 (2000) ("[M]ost employment contracts involve a vast disparity in bargaining power and consist of non-negotiated terms dictated by the employer"). This non-negotiability effect has arisen most prominently in arbitration clauses, which in practice force employees without meaningful negotiation to relinquish their right to judicial resolution of legal disputes. See Sen. Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 292 (2002) ("Despite the appearance of a freely negotiated contract, in reality, mandatory arbitration clauses in employment contracts often amount to a non-negotiable requirement that prospective employees relinquish their rights to redress in a court of law."); L. Ali Khan, *Arbitral Autonomy*, 74 LA. L. REV. 1, 48 (2013) ("The autonomy paradigm does not benefit persons desperately looking for jobs, who have little negotiating power to modify boilerplate arbitration clauses embedded in employment contracts."); Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1258 (2002) ("Giving up one's right to a judicial forum versus giving up one's job is hardly a voluntary choice, particularly when such clauses have become boilerplate language in employment contracts. Such a 'choice' is naturally coercive and therefore involuntary.")

129. E.g., *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) ("The EEOC's manual makes clear, however, that . . . the notice [for a reasonable accommodation] does not have to be in writing, be made by the employee, or formally invoke the magic words 'reasonable accommodation'"); see also *Kravits v. Shineski*, No. 10-861, 2012 WL 604169, at *7 (W.D. Pa. Feb. 24, 2012) (permitting a verbal request for a reasonable accommodation).

130. H.R. 1406 § 2(s)(3)(E).

131. *Id.* § 2(s)(7)(B).

132. *Id.*

operations of the employer.”¹³³ The notion of undue disruption is not defined, but can be interpreted as a substantially lower threshold of inconvenience than the “undue burden” phrase applicable as a defense to an accommodation in the ADA. The courts would be left to decide what threshold of operational disruption is sufficient for an employer to deny the issuance of compensatory time, and those workers who would most depend on employer’s discretion, low-wage workers, would likely be the ones least able to pursue litigation to protect their interests. The WFFA offers no provision for employees to refuse the employer’s decision regarding when compensatory time can be used and when it “unduly disrupts” the operation of their families.

There is little support to conclude that the WFFA would sufficiently meet the needs of employees seeking control over or flexibility in their schedules. As one expert remarks, the WFFA “should be called the Employer Flexibility Act, because at every turn here, the employer gets to decide”¹³⁴ Unfortunately, there are no substantial reforms on the horizon from Congress that would deliver the protections modern workers need. The next Part proposes a series of reforms that, if adopted, would make genuine protection for flexible working time a reality.

IV.

TOWARD MEANINGFUL LEGAL REFORM OF FLEXTIME PROTECTION IN THE WORKPLACE

Working time is an area that is in need of reform, and current Congressional efforts insufficiently protect employees’ interests. When employees attempt to reconcile work and family obligations, employers have little obligation to respond to these concerns. While voluntary initiatives implementing flextime could benefit employees,¹³⁵ a broader suite of reforms is necessary to protect vulnerable working populations.

The following Part argues for such reforms. It first argues for reforms within existing statutory frameworks, namely the FLSA and the FMLA. Specifically, this Part argues that the FLSA needs to better protect off-work leisure time against unexpected, and often uncompensated, employer intrusion. This Part also contends that a series of changes to the FMLA, included expanded coverage and improved definitions of what constitutes

133. *Id.*

134. Huppke, *supra* note 126 (quoting Judith Lichtman, senior adviser for the National Partnership for Women & Families). Lichtman further states: “[The WFFA] pretends to provide a set of options to employees. But even if they elect to take the comp time instead of wages, when they can take it is fully at the discretion of the employer. You have no ability to take that leave when you need it. The employer can decide.” *Id.*

135. See, e.g., *Why Employers Need Workplace Flexibility*, SLOAN CTR. ON AGING & WORK AT BOS. COLL., http://workplaceflexibility.bc.edu/need/need_employers (last visited May 28, 2014).

“leave,” will give employees the protection they need under a statute whose purpose was in part to protect work-family balance. This Part will also introduce a new hybrid flextime regime, based upon a combination of a right-to-request framework and key elements of the ADA accommodation process. This Part also anticipates and responds to potential criticisms. It argues that such a reform will strike the most effective balance between employees’ interests in flexible work time and employers’ interests in an efficient organization.

A. The FLSA Work Time Rules Should Better Reflect Modern Uses of Technology at Work

Congress should amend the FLSA to better protect the personal time of employees in an age of portable technology. FLSA regulations permit employers to impose unpaid work on employees when the work time is de minimis,¹³⁶ and such a broadly interpreted exception is no longer necessary. The rule applies “where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.”¹³⁷ The most recent case the regulation uses to justify this interpretation is from 1955.¹³⁸

The industrial realities of the modern workplace have changed, and the de minimis exception should permit compensation of work time that is feasibly measurable. Modern technologies can track periods of time that courts once dismissed as trifles.¹³⁹ Time-tracking technology is readily available for smart-phones and other devices. When employees receive an assignment outside of normal work hours, they can record the time spent on the task. Work that already uses technology can simultaneously complete

136. 29 C.F.R. § 785.47 (2014) (“In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis.”).

137. *Id.* Fortunately, however, the value of fractional work assessed as not de minimis decades ago in the regulation can still be used today. The regulation cites holdings from the time of enactment: “See *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981, 987 ([8th Cir.] 1952), . . . holding that working time amounting to \$1 of additional compensation a week is ‘not a trivial matter to a workingman,’ and was not de minimis; *Addison v. Huron Stevedoring Corp.*, 204 F. 2d 88, 95 ([2d Cir.] 1953), . . . holding that ‘[t]o disregard workweeks for which less than a dollar is due will produce capricious and unfair results.’” *Id.* One dollar of additional working time a week is equivalent to \$8.73 today. See Inflation Calculator, <http://www.dollartimes.com/calculators/inflation.htm> (last visited May 28, 2014). With the federal minimum wage currently being \$7.25 per hour, \$8.73 represents approximately 1.2 hours of lost time per week. See *Wages: Minimum Wage*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited Nov. 19, 2015). The cases cited by the regulation conclude such value is not de minimis, and this indeed should remain so today.

138. 29 C.F.R. § 785.47.

139. See generally *Riley*, *supra* note 55; *Nemerofsky*, *supra* note 55.

the assigned task as well as record the time taken for the task to be completed. This does not mean that employers will be forced to calculate paychecks by the second each pay period. Such fractional time can be cumulated and compensated for once it reaches a sufficiently significant amount, such as a half-hour or hour of the worker's pay.

This monitoring of fractional time is also likely to change employer behavior. A positive change, from the perspective of the employee, will be that employers will know that tasks outside of work time of even a brief period of time will be a compensable cost. Brief but daily tasks assigned to large numbers of employees outside of work time can cumulate into significant payroll costs for the firm. Employers should be less cavalier when assigning such tasks as a result.

There is a possibility, however, that requiring compensation for off-work time may not have such an effect. An employer may view the assignment of the off-work task as worth the cost. For a discrete event, a five to ten minute assignment is a negligible price for getting something done off hours. The psychological cost of the off-shift task for the worker, however, is substantially greater. When a task is assigned during normal work hours, it occurs during the flow of the work day where work is expected. One assignment transitions into another and the employee expects to concentrate entirely on work during his or her shift. The effort of the task is essentially equal to the time the task requires. Off-shift interruptions, however, are more burdensome. Employees receiving assignments that require immediate attention during a family meal, a personal activity, or time with children force that employee to mentally transition almost immediately from the personal to the professional. That transition has a psychological cost. Such interruptions disrupt the recovery and relaxation process that is a necessary part of work-life balance. This is no slight inconvenience. An employee's inability to separate herself from work for sustained periods of time has been associated with increased fatigue, cardiovascular disease, and problems with sleep.¹⁴⁰ Interruptions to an employee's leisure, if frequent and demanding enough, can bring a harmful work environment into the employee's home. To mitigate this problem, non-exempt employees could be given the right to refuse work outside of working hours without fear of retaliation. Exceptions could be made to the right to refuse through an employer establishing a business necessity. If the employer established such a necessity, the off-work obligation could

140. See, e.g., Mark Cropley & Lynne J. Millward, *How Do Individuals 'Switch-Off' From Work During Leisure? A Qualitative Description of the Unwinding Process in High and Low Ruminators*, 28 LEISURE STUDIES 333 (2009); Torbjörn Åkerstedt et. al., *Mental Fatigue, Work, and Sleep*, 57 J. PSYCHOSOMATIC RES. 427 (2004); Poul Suadicani et al., *Are Social Inequalities as Associated with the Risk of Ischemic Heart Disease a Result of Psychosocial Working Conditions?*, 101 ATHEROSCLEROSIS 165 (1993).

command an overtime premium or be separately negotiated. Employers should not be banned from off-shift contact of workers to complete tasks, but any work assigned should be backed by necessity and subject to compensation or premium compensation.

B. The FMLA Should be Expanded to Encourage Greater Use of Leave

Whereas the age and structure of the FLSA do not make the Act ideally suited for major revisions to incorporate protections for flexible work time, the FMLA is not shouldered with such structural and temporal baggage. The FMLA was signed into law by President Clinton in 1993 with implementing regulations following over the next two years.¹⁴¹ By the mid-1990s, fifty-five years after the passage of the FLSA, the compensation of the modern workforce had already taken hold. Women had long entered the workforce in substantial numbers and there had been a significant increase in single-parent families over the previous decades.¹⁴² In addition, Congress and society at large had become much more aware of the challenges of balancing work and family life. Congressional motivations cited family pressures and related issues as the underlying purposes of the FMLA.¹⁴³ Whereas the FLSA envisions fixed shifts, set overtime, and a single-worker, father-headed, household,¹⁴⁴ the FMLA speaks in terms of a modern workforce that needs leave for children, serious medical illnesses, and major responsibilities where no parent stays at home as a dedicated caregiver.

However, while the structure and purposes of the FMLA reflect a modern economy, the FMLA's scope does not sufficiently encompass today's worker needs. This may be because passage of the FMLA was hard fought, with resistance from business groups that likely reduced the potential breadth of the FMLA.¹⁴⁵ The result is an FMLA that today can be amended so that more employees can lessen the burden of inflexible work.

141. Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 477 (2011).

142. See e.g., Bill O'Hare, *The Rise—and Fall?—of Single-Parent Families*, POPULATION REFERENCE BUREAU (July 2001), <http://www.prb.org/Publications/Articles/2001/TheRiseandFallofSingleParentFamilies.aspx>.

143. 29 U.S.C. § 2601 (2012).

144. As Representative Judy Biggert stated, the FLSA “has been frozen for more than sixty years, locked in a time where women worked in the home, most families had only one wage earner, and nobody went to their kids’ soccer games.” 149 CONG. REC. H4207-05 (daily ed. May 19, 2003) (statement of Rep. Biggert).

145. See Natasha Bhushan, Note, *Work-Family Policy in the United States*, 21 CORNELL J.L. & PUB. POL’Y 677, 687 (2012). Furthermore, research conducted since the passage of the FMLA reveals that parental leave decreases turnover and increases employee loyalty. *Id.*

The following proposed reforms can improve the effectiveness of the FMLA toward flexible work.

1. Amend the FMLA to Include Flexible Leave

One solution, a more aggressive reform, would be to amend the FMLA to include an additional category of permissible leave. The FMLA currently permits employees to take three types of unpaid leave: (1) a single block of leave of up to twelve weeks, (2) intermittent leave that can be taken in separate periods due to a single illness or injury, and (3) reduced leave in which an employee is typically made to work on a part-time basis.¹⁴⁶ The FMLA could be amended to incorporate an additional class of leave under the FMLA-flexible leave.

Flexible leave would expand the concept of intermittent leave to allow for not only short-time unpaid leave for qualifying reasons, but also for an expanded qualification of reasons not previously incorporated under the Act. Flexible leave could include non-emergency adult and child care, such as illness of a child arising from the common cold, which is not covered because it does not constitute a serious medical illness.¹⁴⁷ Flexible leave could also include activities related to a child's education or school-related activities such as attending a parent-teacher conference, which are also not covered as qualifying reasons for FMLA leave.¹⁴⁸ Another characteristic of flexible leave could be allowing employees flexibility in when they arrive at work, but then requiring completion of a full workday after arrival.¹⁴⁹ A variant would be enabling an employee to work around a core time and modifying the start and end hours of the day, taking leave as needed for qualifying reasons.

2. Lower the FMLA Coverage Threshold to Twenty-Five Employees

Currently, the FMLA only applies to workers in firms with fifty or more employees. That threshold is too high. Relieving firms with less than fifty employees from FMLA obligations excludes 40% of the U.S. workforce from coverage.¹⁵⁰ This threshold particularly impacts women and poor families who are more likely to work for smaller employers that are

146. *Hoffman v. Prof'l Med Team*, 394 F.3d 414, 418 (6th Cir. 2005) (citing 29 U.S.C. §§ 2612(a)(1), 2611(9) (2000); 29 C.F.R. §§ 825.800, 825.203(a) (1995)).

147. See 29 C.F.R. § 825.113(d) (2014) (defining "serious health condition" as "involv[ing] inpatient care . . . or continuing treatment").

148. Kirsten K. Davis, *Extending the Vision: An Empowerment Identity Approach to Work-Family Regulation as Applied to School Involvement Leave Statutes*, 16 WM. & MARY J. WOMEN & L. 613, 630 (2010).

149. See Halverson, *supra* note 4, at 274.

150. Jennifer Ludden, *FMLA Not Really Working for Many Employees*, NAT'L PUB. RADIO (Feb. 5, 2013), <http://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees>.

not required to offer FMLA coverage.¹⁵¹ With more than half of low-wage workers employed by small businesses,¹⁵² the fifty-employee threshold represents a gap in effectiveness for people the FMLA was intended to benefit most.

This threshold did not appear to be carefully considered.¹⁵³ The first bill proposed in Congress offered no exemption for small businesses.¹⁵⁴ Every firm was obligated to comply with its requirements regardless of size.¹⁵⁵ After each revised bill was introduced, the size exemption grew larger and larger until it reached the exemption level of fifty employees.¹⁵⁶ The likely reason was the pressure from business groups.¹⁵⁷ No Congressional study of the impact of this threshold on low-income workers was completed.

Specifically, pursuant to a number of proposals,¹⁵⁸ and the leadership of state statutes,¹⁵⁹ the threshold for coverage of the FMLA should be reduced to twenty-five employees. This reform would enable millions of employees to enjoy the benefits of the FMLA, particularly low-income employees, who have been long excluded and could greatly use the access to leave. This amendment would not unduly burden employers of that size. For decades the ADA and Title VII have comfortably required employees

151. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 U. KAN. L. REV. 355, 377 (2010).

152. Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERK. J. LAB. & EMP. L. 1, 43 (2007).

153. *Id.* at 42-43.

154. *Id.* at 42.

155. *Id.*

156. *Id.*

157. *See id.* at 42 n.223.

158. Richard S. Stevens, Note, *The Family and Medical Leave Act of 1993: Proving or Defending a Claimed Violation*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 253, 267 (1999) (explaining that in the 1990s "there [wa]s some support by Congressional Democrats, the National Partnership for Women and Families, and even President Clinton for legislation to increase coverage of the FMLA by including all companies with at least twenty-five employees"); Joseph Willis, *The Family and Medical Leave Act of 1993: A Progress Report*, 36 BRANDEIS J. FAM. L. 95, 106-07 (1997-98). For an example of legislative reform, see 145 CONG. REC. E49 (daily ed. Jan. 6, 1999) (statement of Rep. William Clay). Representative Clay stated:

Experience has . . . shown that the protections afforded by the law are not only beneficial, but are essential in enabling workers to balance the demands of work and home when faced with a family or medical emergency. In short, we have now had sufficient experience under the law to justify extending the law to employers of 25 or more employees.

Id.; see also Family and Medical Leave Enhancement Act of 2011, H.R. 1440, 112th Cong. (2011). President Obama also proposed lowering the FMLA threshold to twenty-five employees in his first Presidential campaign. Verna L. Williams, *The First (Black) Lady*, 86 DENV. U. L. REV. 833, 849 n.95 (2009).

159. *E.g.*, OR. REV. STAT. § 659A.153(1) (2014) (twenty-five employee threshold); ME. REV. STAT. tit. 26 § 843(3)(C) (2014) (fifteen employee threshold); VT. STAT. ANN. tit. 23 § 471(3) (2014) (same).

with fifteen or more workers to comply with their requirements.¹⁶⁰ Some states have already enacted their own laws with coverage thresholds as low as fifteen employees.¹⁶¹ There is little reason to believe such an amendment to the FMLA would unduly disrupt the workplace.

3. Broaden the FMLA's Coverage to Include More Part-Time Workers

Coverage requirements should also be broadened to include more part-time workers and the probationary period should be reduced. Currently, the FMLA only covers employees who work for a covered employer for at least twelve months and at least 1,250 hours of service.¹⁶² Like the employee threshold requirement, these limitations were not in the original draft of the bill.¹⁶³ They were added at the request of pro-business interests who did not want to pay benefits to workers who were only employed for a short time.¹⁶⁴ Yet these limitations disproportionately impact the very workers who could benefit from flexible FMLA leave the most: low-income workers who are the most likely to have short-term employment and thus be excluded.¹⁶⁵ These limitations need not remain in their current form in the FMLA.

4. Expand the Meaning of "Family" Under the FMLA

The concept of family should be expanded under the FMLA. The social definition of family has changed substantially over the preceding decades. Grandparents and in-laws take on increased parenting responsibilities.¹⁶⁶ There has been a rise in the number of same-sex couples and families.¹⁶⁷ Close friends more often partake in family life as "voluntary kin" who share the burden of medical directives, wills, and other important responsibilities.¹⁶⁸ These non-traditional families and family members experience the same family burdens and pressures as their nuclear predecessors.

The FMLA should be reformed to incorporate a wider range of recognized family members that better reflects how society views family life. In 2008, for example, Congress amended the FMLA to allow twenty-

160. Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

161. See sources cited *supra* note 159.

162. 29 U.S.C. § 2611(2)(A) (2012).

163. O'Leary, *supra* note 152, at 43-44.

164. *Id.* at 44.

165. *Id.* at 43-45.

166. See, e.g., Christine Facciolo, *More than 2.5 Million Grandparents Take on Role of Parent*, USA TODAY (Apr. 12, 2012), <http://usatoday30.usatoday.com/news/health/wellness/story/2012-04-12/rise-of-grandparents-grandfamilies/54206854/1>.

167. See e.g., Natalie Angier, *The Changing American Family*, N.Y. TIMES (Nov. 25, 2013), <http://www.nytimes.com/2013/11/26/health/families.html>.

168. *Id.*

six weeks of unpaid leave for family members who are caring for wounded service members.¹⁶⁹ The definition of family member included not only the traditional roles of son, daughter, parent, or spouse, but also included any “next of kin” as qualifying family members.¹⁷⁰ The FMLA should be further expanded to incorporate such family members as domestic partners, parties to a civil union, grandparents, or family in-laws. Such individuals could benefit from workplace flexibility as robustly as any member of a traditional nuclear family.

5. *Revise What Events Constitute FMLA Leave*

Perhaps the most important reform relevant to workplace flexibility is the expansion of what constitutes qualifying FMLA leave. The FMLA currently permits leave for the birth, care, or adoption of a child.¹⁷¹ It also permits leave to care for a parent, spouse, child, or one’s own serious health condition.¹⁷²

However, the FMLA excludes many uses that would help workers seeking flexible working time. FMLA regulations state that “unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.”¹⁷³ These are the kinds of medical leave, particularly in the context of caregiving, that would make workplace flexibility desirable for working families. Common ailments do not need to arise to the level of a serious medical condition to be debilitating for an employee or a member of her family. Regardless of whether a child has the common cold or a serious medical problem, a parent still needs to take that time off from work. Employees faced with difficult choices sometimes go to extreme measures to satisfy both employer and family obligations. One woman left her sick child at home and was relegated to calling every fifteen minutes to check in with her child.¹⁷⁴ Another mother admitted to dissolving aspirin in a baby’s bottle in order to force down a fever so that the day care would accept her child.¹⁷⁵ Work requirements should not force workers into deception or unusual measures to satisfy their work and personal obligations.

FMLA leave should also be expanded to include non-medical needs related to children and family that are the hallmarks of family life.

169. 29 U.S.C. § 2612(a)(3) (2012).

170. *Id.*

171. *Id.* § 2612(a)(1)(A)-(B).

172. *Id.* § 2612(a)(1)(C)-(D).

173. 29 C.F.R. § 825.113(d) (2014).

174. Gillian Flynn, *Making a Business Case for Balance*, WORKFORCE, Mar. 1997, at 68, 70.

175. *Id.* at 70-71.

Currently, such needs are not given a priority and workers are forced to find a way to reconcile competing pressures. For example, men in one firm were forced to lie about meeting a client so they could attend their children's activities, creating a culture of fathers who fear retribution for disclosure of familial needs.¹⁷⁶ Such familial needs could include child's school or educational activities, routine non-emergency medical visits, and even leave to address the effects of domestic violence or sexual assault.

The narrow coverage of the FMLA leave encourages a workplace culture of finding extreme ways to shoulder conflicting obligations or are forced to engage in subterfuge by incorporating flexibility into their lives outside of formal workplace channels. Some states have already adopted expanded uses of FMLA leave without unusual controversy.¹⁷⁷ There is little barrier to expanding the FMLA to incorporate these flextime-friendly uses into the categories of permissible leave.

C. Enact a Hybrid Flextime Statute Merging the Right-to-Request Framework and Key Components of the ADA Accommodation Process

While reforms of established statutes can improve workers' conditions, an independent statute would also be effective of relieving the pressures of inflexible work. The most effective solution would be based on an emerging model known as the right-to-request flexible work.

1. The Structure of Right-to-Request Legislation

Right-to-request legislation grants an employee the right to ask for flexible work arrangements from her employer.¹⁷⁸ Such a request may only be made by qualifying employees who have worked for an employer for a required length of time.¹⁷⁹ Requests may be made for specific reasons related to childcare or other listed obligations.¹⁸⁰ Employees may only exercise the right to request on a periodic basis, such as once or twice a

176. *Id.* at 70.

177. *See, e.g.*, CAL. LAB. CODE § 230.8 (2014); MASS. GEN. LAWS ch. 149 § 52(D)(b)(1) (2014); COLO. REV. STAT. § 24-34-402.7 (2014).

178. Right-to-request legislation originated in the United Kingdom. *See* Travis, *supra* note 75, at 1247 (citing Employment Rights Act, 1996, c. 18, § 80F(1) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.)); *see also* Vincent Keter and Jim Jarrett, *Flexible Working*, Std. Note SN/BT/1086, U.K. House of Commons Library (Dec. 21, 2011) (on file with author). *See generally* DEIRDRE MCCANN, *REGULATING FLEXIBLE WORK* (2008) (examining flexible work in the United Kingdom in depth).

179. Keter & Jarrett, *supra* note 178, at 9-10.

180. *Id.*

year.¹⁸¹ By contrast, in most states a flexible scheduling request can be rejected outright and without considerations.

Right-to-request legislation modestly changes this dynamic. Under right-to-request legislation, an employee's request for flexible scheduling triggers a series of important, though modest, procedural requirements and protections. Most importantly, an employer cannot retaliate against employees for simply making the flextime request.¹⁸² This protection alone overcomes a substantial hurdle for flextime program, that of the employee who does not even inquire about alternative scheduling for fear of retaliation.

In addition, employers must meaningfully consider the request. An employer representative must promptly meet with an employee to discuss the request, and the employee has a right to be accompanied by a co-worker at that meeting.¹⁸³ Once the meeting occurs, the employer must either accept or decline the proposed flexible schedule. However, employers must articulate their rationale within a specified time in writing.¹⁸⁴ Further, employers can only base that refusal on certain specified reasons, such as the burden of additional costs, detrimental impact on performance, and insufficiency of available work during the proposed scheduled time.¹⁸⁵ If the employee does not believe the process has been properly followed, right-to-request legislation may also contain a right to appeal to an outside authority.¹⁸⁶

Leading right-to-request legislation in the United States incorporates many of these characteristics. Right-to-request legislation now exists in Vermont, which recently passed a law that protects employees who request flexible working arrangements.¹⁸⁷ Employers must consider submitted requests at least twice per calendar year per employee.¹⁸⁸ Consideration of requests means that the employer must discuss the request with the employee in good faith, propose alternatives if appropriate, and consider whether the request can be granted "in a manner that is not inconsistent with its business operations or its legal or contractual obligations."¹⁸⁹ The

181. *Id.*

182. John A. Durkalski, *Fixing Economic Flexibilization: A Role for Flexible Work Laws in the Workplace Policy Agenda*, 30 BERKELEY J. EMP. & LAB. L. 381, 397 (2009).

183. Keter & Jarrett, *supra* note 178, at 11.

184. *Id.*

185. *Id.*

186. Durkalski, *supra* note 182, at 389.

187. VT. STAT. ANN. tit. 21, § 309 (2014).

188. *Id.* § 309(a).

189. *Id.* § 309(a)-(b). "Inconsistent with business operations" includes the burden of additional costs on the employer; negative effects on employee morale, staff recruitment, or the employer's ability to meet consumer demand; and other impacts. *Id.* § 309(b)(3).

employer is also prohibited from retaliating against the employee for making a flexible schedule request.¹⁹⁰

Similarly, the City and County of San Francisco also passed an ordinance granting employees the right to request a flexible or predictable working arrangement.¹⁹¹ A flexible working arrangement can encompass a modified work schedule, part-time employment, job sharing, telecommuting, and changes in start and end times, among others.¹⁹² Employees may make two requests every twelve months.¹⁹³ Employers must respond in writing and explain the reason for the denial and state a “bona fide business reason.”¹⁹⁴ Like the Vermont law, the ordinance prohibits retaliation against employees who make the request.¹⁹⁵

2. *Advantages of the Right-to-Request Framework as a Flextime Reform*

The right-to-request framework offers multiple advantages as a regulatory solution to flextime. First, the proposal is relatively modest. The right-to-request framework allows employers to deny flextime proposals. The procedural burden is also relatively light, requiring a meeting with an employee and a written statement of acceptance or denial. The costs of conforming to this process would almost certainly be minimal. The right-to-request framework has been generally characterized as “light touch” regulation,¹⁹⁶ and that characterization is indeed true. The process imposes primarily procedural obligations, and the exposure to substantial monetary liability is low.

Second, the process of communication that is required has inherent and beneficial value. Even if the employer is under no obligation to accept the request, the process still has meaning. Right-to-request rules establish a collaborative process by which employers and employees can communicate about the request. Employees who are denied the flextime request may at least feel their voices have been heard and that their employer has taken the time to supply them with a written and reasonable explanation. The

190. *Id.* § 309(f).

191. Thomas E. Geidt, *New San Francisco Ordinance Grants Protected Status to “Caregivers” and Allows Them to Request Flexible Work Arrangements: Will Its Provisions Spread to Other Jurisdictions?*, STAY CURRENT 1, 2 (Nov. 2013), <http://www.paulhastings.com/Resources/Upload/Publications/Stay-Current-New-San-Francisco-Ordinance-Grants-Protected-Status-to-Caregivers.pdf>.

192. *Id.* at 2.

193. *Id.* Employees who experience a major life event, such as childbirth, may make a third request in that year. *Id.*

194. *Id.* at 3.

195. *See id.*

196. K. Lee Adams, *The Family Responsibilities Convention Reconsidered: The Work-Family Intersection in International Law Thirty Years On*, 22 CARDOZO J. INT’L & COMP. L. 201, 256 & n.300 (2014).

dialogue process also limits managerial discretion in that employers must engage in the process even when it is undesirable. However, the dialogue process also respects the managerial discretion of the employer to evaluate such a request in light of workplace demands. The right-to-request dialogue creates a non-threatening venue by which employer and employee can collaborate to explore a variety of flexible options and, if possible, reach a mutually acceptable agreement.¹⁹⁷

Third, the right-to-request framework is a vehicle with which to promote flextime generally. When an employee exercises their right to request, it places upon the employer a statutory obligation to follow a set of procedures to evaluate and resolve the flextime request. Although the cost of the process is likely low, the process gets the employer in the habit of not reflexively denying flextime requests. Having this required process in place may encourage employers to readily grant more reasonable flextime requests or proactively introduce flextime policies so that the employer will not need to go through the process for each employee. When employers adopt flextime more regularly, they may discover that introducing flextime into their workplace may improve company operations through such metrics as productivity and worker loyalty.¹⁹⁸ This would in turn encourage the granting of even more flextime requests, growing a still deeper culture that accepts, and perhaps even embraces, flexible work.

Finally, successful right-to-request programs will encourage further flextime legislation. Once the right-to-request framework becomes normalized, employers may realize that granting flextime is not overly burdensome. Just as most accommodations under the ADA are low-cost or cost free,¹⁹⁹ most flexible schedules will not likely place a great cost on the employer.²⁰⁰ If such scheduling is widely shown to be of limited cost and burden on firm efficiency, employers may be less aggressive in resisting future flextime-related reform. The success of the regulation might encourage state legislatures to act further on employees' behalf, creating a fifty-state laboratory that could encourage development of further regulatory innovation.

197. See Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Opportunity for Caregivers*, 1 UTAH L. REV. 25, 67-68 (2007).

198. REGUS GLOBAL GROUP, FLEXIBLE WORKING GOES GLOBAL 2 (Mar. 2011), http://www.regus.co.uk/images/Regus%20Whitepaper%20Flexible%20Working%20150311_tcm294-39644.pdf.

199. See, e.g., Beth A. Loy, *Workplace Accommodations: Low Cost, High Impact*, JOB ACCOMMODATION NETWORK 4 (2013), <https://askjan.org/media/downloads/LowCostHighImpact.pdf>; Michelle A. Travis, *Leveling the Playing Field or Stacking the Deck? The "Unfair Advantage" Critique of Perceived Disability Claims*, 78 N.C. L. REV. 901, 989 & n.370 (2000).

200. See, e.g., Deborah Zuckerman, *Reasonable Accommodation for People with Mental Illness under the ADA*, 17 MENTAL & PHYSICAL DISAB. L. REP. 311, 316 (1993) ("In general, flexible schedules . . . can be provided at little cost and with minimal disruption in the work place.").

3. Integrating Concepts from the ADA Will Improve the Effectiveness of Right-to-Request Legislation

In addition to enacting a right-to-request statute, flextime reform could be improved even further by selectively incorporating ADA concepts into any right-to-request reform. This hybrid right-to-request accommodation model would not only shore up any potential weaknesses in the right-to-request framework; it would also increase the incentives of the employer to meaningfully comply with its provisions. There are three additions from the ADA that would improve the effectiveness of right-to-request legislation.

First, the right-to-request model should adopt the “interactive dialogue” process found in the ADA, one of the most useful characteristics of that statute. The interactive process begins when the employee asserts status as a qualified disabled employee and requests an accommodation.²⁰¹ Both the employer and employee must genuinely participate in the process.²⁰² The purpose of the process is to determine the appropriate ADA accommodation within the boundaries of the employee’s need and the employer’s burden.

The right-to-request process, by contrast, only requires a meeting and a written decision from the employer. Despite this required employer-employee communication, there is a risk that the employer may simply go through the motions without genuinely engaging with the flextime request. The interactive process provision of the ADA, however, is far more robust. The ADA’s Interpretive Guidance on Title I (“Guidance”) specifically states that an employer should use a “problem solving approach” during the interactive process.²⁰³ The Guidance establishes specific stages, whereby the employer analyzes the job involved, consults with the employee to determine the nature and scope of limitations, identifies potential accommodations, considers the preferences of the employee, and selects an accommodation that is “most appropriate for both the employee and employer.”²⁰⁴

The Guidance encourages employers and employees to use a specific step-by-step process when the employer or employee lack sufficient knowledge about the tools available or the limitations involved in the accommodation.²⁰⁵ This process is no mere standardized procedure, but an individual assessment of both the job at issue and the limitations of the

201. See generally Craig A. Sullivan, *The ADA’s Interactive Process*, 57 J. MO. BAR 116 (2001).

202. E.g., *Hines v. Chrysler Corp.*, 231 F. Supp. 2d 1027, 1040 (D. Colo. 2002) (“Although it is the employee’s burden to initiate this interactive process, once initiated, the interactive process requires good faith communications from both employee and employer.”).

203. 29 C.F.R. app. 1630.9 (2014).

204. *Id.*

205. *Id.*

employee.²⁰⁶ The Guidance provides detailed directions for employers to follow and is deliberately two-way and interactive. This collaborative solution-oriented process could be layered onto the dialogue requirements for the right to request a flexible schedule, and improve it as a result.

Second, the right-to-request model should not only use the ADA's interactive process, but also incorporate obligations and sanctions from the ADA that can potentially arise from not participating genuinely in the dialogue. Courts recognize that the accommodation process requires "a great deal of communication" between employer and employee.²⁰⁷ Courts will also look for signs of a failure to participate in good faith or a failure to assist in the process of determining what accommodations are necessary.²⁰⁸ A failure to communicate may also not be acting in good faith.²⁰⁹ When this happens, "courts should attempt to isolate the cause of the breakdown and then assign responsibility."²¹⁰ The responsibility courts place on employers for failure to act in good faith is substantial. Courts will not hesitate to deny summary judgment to employers where a question exists regarding their engagement in the interactive process.²¹¹ Employers can be held responsible for the failure to provide a reasonable accommodation when the employer is responsible for breaking down the interactive process.²¹²

This increased judicial attention to the right-to-request process would encourage the employer to engage in good-faith problem-solving. The specter of liability will lie behind the dialogue process and ensure proper compliance. However, given that the requirement of good faith engagement is relatively easy for the employer to satisfy, the employer will not suffer unnecessary risk of exposure. Incorporating a similar interactive responsibility in flextime requests to that placed on ADA accommodations will result in a more balanced and engaged dialogue that, while encouraging collaborative and productive discussion, will also have the threat of sanction discouraging bad-faith disengagement.

Third, in addition to adopting ADA interactive dialogue processes and sanctions, right-to-request legislation should also incorporate an analogous ADA requirement that an employer show a threshold of harm, known as an

206. *Id.*

207. *E.g.*, *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 312 (3d Cir. 1999) (quoting *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996)).

208. *Id.*

209. *Id.*

210. *Id.* (quoting *Bultemeyer*, 100 F.3d at 1285).

211. See Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis From Who is Disabled to Who Can Work*, 34 *HAMLIN L. REV.* 469, 484 & n.89 (2011).

212. Steven Pitt et al., *Disability Under a Judicial Microscope: The Struggle to Define Rights and Remedies for Claims Brought Under the Rehabilitation Act*, 47 *N.Y.L. SCH. L. REV.* 269, 320 n.275 (2003).

“undue hardship,” before denying a request for flexible scheduling. Under the current right-to-request system, the employer merely has to articulate a business reason for the flextime denial. The employer does not have to specify the specific nature or the extent of the costs or further justify the rationale.²¹³ The employee cannot challenge the business justification for the denial, and can challenge only whether the employer followed the correct processes in reaching its decision.²¹⁴ This prevents the employee from making any substantive challenges to an employer’s reasoning. Employers can reflexively point to business problems without a real effort to accommodate. Employers can also deny flexible schedule requests for trivial inconveniences.

Incorporating an undue hardship threshold would alleviate these limitations. An employer would only be able to deny a flextime request by establishing that substantial harm would arise as a result. An undue hardship requires that an employer will suffer “significant difficulty or expense in, or resulting from, the provision of the accommodation.”²¹⁵ The concept explicitly accounts for the financial realities of the particular employer, but also does not give the employer free reign to deny requests.²¹⁶ These financial realities include the size of the firm, size of the facility, cost of the accommodation, and impact on business operations.²¹⁷ The undue hardship framework is specific, well-established, and already familiar to most employers. Such a test would empower employees to request flexible schedules while discouraging employers from rejecting them without due consideration.

D. Anticipated Criticisms to Flextime Reform and Responses

Although the introduction of flextime reform presented in this Article would provide benefits to employees, there are legitimate concerns regarding the adoption of new regulatory controls. This Part raises criticisms that may arise from this proposal and presents responses.

1. Administrative Costs of Managing Flextime

One common criticism of flextime is that it firms will be forced to bear substantial administrative costs to manage the program. While permitting flextime is not costless, firms will retain the discretion to track and manage employees as they see fit. Firms do not have to collect records in a certain

213. See MCCANN, *supra* note 178, at 91 (describing the U.K. statute).

214. *Id.* The author deems this “[t]he most striking, and unusual, procedural limitation on flexible working provisions.” *Id.*

215. 29 C.F.R. app. § 1630.2(p) (2014).

216. *Id.*

217. 42 U.S.C. § 12111(10)(B) (2012).

form, nor must firms submit records on a routine basis for regulatory review. The DOL permits employers to use a time clock, hire a timekeeper to monitor work hours, or rely on employees to write down their own time records.²¹⁸ The DOL is mainly concerned that such records are “complete and accurate.”²¹⁹

Low-cost timekeeping software is readily available. For example, the DOL’s free application, called Timesheet, enables employees to manage their own records.²²⁰ Self-management reduces tracking costs for employers and also generates informative data should a DOL investigation arise from a timekeeping dispute. More complex software can comprehensively record employee hours with relatively little additional cost.²²¹ Furthermore, there is little evidence that courts will rigidly use timekeeping software against an employer during a timekeeping dispute. For example, in *Zivali v. AT&T Mobility Inc.*,²²² a dispute arose over the use of a punch-in and punch-out software that only recorded time when workers were physically present or otherwise logged into the software.²²³ When the employees argued that the software failed to capture various work-related tasks, the court substantially deferred to the employer’s method of recording work time.²²⁴ The court concluded that the timekeeping system was permissible under the FLSA “as long as it allow[ed] for the complete and accurate recording of all time worked”²²⁵

In addition, exceptions can be embedded in flextime legislation to protect employees from unusual burdens. Rules relieving employers from the most minute and burdensome tracking requirements can be engrafted from similar FMLA standards. For example, FMLA regulations require employers to track leave time using increments no greater than that used for other types of leave.²²⁶ Such a standard would already be familiar to employers and be guided by judicial interpretations in the FMLA context.²²⁷

218. *Fact Sheet # 21: Recordkeeping Requirements under the Fair Labor Standards Act*, U.S. DEP’T OF LABOR (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs21.htm>; *see also* 29 C.F.R. § 516.1(a) (2014).

219. U.S. DEP’T OF LABOR, *supra* note 218, at 2.

220. *See Mobile Applications*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/apps/timesheet.htm> (last visited July 16, 2014).

221. *See, e.g.*, TIMEFORCE, <http://www.mytimeforce.com> (last visited July 14, 2014); TIMESTATION, <http://www.mytimestation.com> (last visited July 14, 2014); TSHEETS, <http://www.tsheets.com> (last visited July 14, 2014).

222. 784 F. Supp. 2d 456 (S.D.N.Y. 2013).

223. *Id.* at 460.

224. *Id.* The court also noted that the software allowed employees adjust their hours worked by contacting a manager and requesting a change. *Id.*

225. *Id.* at 461.

226. 29 C.F.R. § 825.205(a) (2014).

227. *E.g.*, *Mellen v. Trs. of Boston Univ.*, 504 F.3d 21, 24-25 (1st Cir. 2007); *Agbejimi v. Advocate Health & Hosps. Corp.*, No. 08C2754, 2009 WL 2589129, at *4 (N.D. Ill. 2012).

Alternatively, precision requirements for tracking can be affixed to standards prevailing in the industry regarding employee tracking. In other words, firms could be held to whatever tracking requirements are “justified by industrial realities,” a phrase that courts use to determine whether time is compensable.²²⁸ Such exceptions would relieve employers from tracking time that was unfeasible or burdensome given the realities of the firm’s environment.

Finally, tracking time may be a potential competitive advantage for the enterprise that offsets administrative costs. Time tracking may yield useful data about productivity and efficiency that firms can use to redesign their production systems and deployment of human resources. For example, UPS uses sensors on their delivery trucks that monitor when a worker starts the truck, opens a door, and buckles a seatbelt.²²⁹ UPS reported that a one minute improvement in productivity per worker per day increased results by \$14.5 million.²³⁰ Time-tracking software can also streamline internal processes, monitor quality, and assign employees to the most efficient tasks.²³¹

2. Disruptiveness of Flextime Leave on Employee Staffing

Another potential criticism is that the increased use of flextime leave will be disruptive to staffing employees on important tasks. Consistent attendance is important to many business functions, and the absence of reliable employee presence can impede the growth of new projects, deter long-term planning, and inhibit productivity. Staffing interruptions arising from leave can increase training costs necessary to get a replacement worker up to speed.

This criticism is most cogent in the context of intermittent leave. Intermittent leave is defined in FMLA regulations as “leave taken in separate blocks of time due to a single qualifying reason.”²³² Employees using FMLA intermittent leave can take the full twelve weeks of unpaid medical leave, but in small blocks of time for qualifying events. Flextime

228. See, e.g., *Hiner v. Penn-Harris-Madison Sch. Corp.*, 256 F. Supp. 2d 854, 861 (N.D. Ind. 2003) (stating that “[t]he *de minimis* rule ‘applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes [in] duration, and where the failure to count such time is due to considerations justified by industrial realities.’” (quoting 29 C.F.R. § 785.47) (alteration in original)).

229. Jacob Goldstein, *To Increase Productivity, UPS Monitors Drivers’ Every Move*, NAT’L PUB. RADIO (Apr. 30, 2014), <http://www.npr.org/sections/money/2014/04/17/303770907/to-increase-productivity-ups-monitors-drivers-every-move>.

230. *Id.*

231. E.g., Andre Smith, *Improve Profits and Productivity with Time Tracking Software*, DECODED, <http://www.decoded.com/view-post/How-Small-Businesses-Can-Improve-Profits-and-Productivity-With-Time-and-Attendance-Trackin-1> (last visited July 16, 2014); Cathedral Consulting Group, http://www.cathedralconsulting.com/content/Time_Tracking (last visited July 16, 2014).

232. 29 C.F.R. § 825.202(a) (2014).

reform would incorporate intermittent leave as an option for employees to meet shifting demands in personal or family obligations.

Intermittent leave in small increments can be disruptive for employers that are forced to monitor it.²³³ Employers may have extraordinary difficulties managing scheduling burdens to fill missing hours for attendance-critical positions such as nurses and pilots. Employers repeatedly cite intermittent leave as particularly challenging, with three out of four employers surveyed reporting that managing intermittent leave is their greatest FMLA problem.²³⁴

Employers report that the most disruptive kind of intermittent leave is unscheduled and intermittent leave arising from serious health conditions.²³⁵ An employee's regular use of intermittent leave due to migraines, for example, is unscheduled and potentially quite disruptive.²³⁶ Such leave can also unfairly burden other workers.²³⁷ The disruptiveness of unplanned intermittent leave would only be amplified if employees were also able to take such leave to accommodate flextime requests. Given the substantial problems that employers experience with intermittent leave—particularly unplanned leave—flextime reform must be carefully circumscribed to minimize further burdens on the employers.

There are three ways to circumscribe the use of unplanned flextime leave. First, any flextime reform should require that most flexible leave requests should only be granted upon sufficient notice to the employer. The FMLA, for example, requires that in most circumstances that employers receive thirty days' notice before the employee leave commences.²³⁸ Given that many uses of flextime relate to school, medical, or other personal needs that can be planned, a thirty-day standard notice requirement can be similarly workable under a flextime system.

233. See Peter Susser, *Intermittent Leave . . . Forever?*, THOMPSON'S HR COMPLIANCE EXPERT (Aug. 23, 2012), <http://prod-admin1.tmg.atex.cniweb.net:8080/preview/www/2.1042/2.1584/1.64036> (last visited May 30, 2014).

234. Maureen Minehan, *Five Steps to Managing FMLA Intermittent Leave*, HR COMPLIANCE LAW BULLETIN (Thomson Reuters/West, St. Paul, MN), Jan. 15, 2008, at art. 2; see also *Intermittent Leave Poses Greatest FMLA Challenge for Employers, Survey Finds*, WOLTERS KLUWER LAW & BUSINESS (July 31, 2008), <http://hr.cch.com/news/employment/073108a.asp> (last visited May 30, 2014). Language from the National Association of Manufacturers, in response to a request by the Department of Labor for information regarding unscheduled intermittent leave, states the problem most forcefully: "Intermittent leave is the point in the FMLA where all the unintended harmful consequences of the law come together to cause an economic nightmare for manufacturers: unchallengeable ailments, unassailable and unannounced absences, and unending burdens with no prospect of a remedy." Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35550, 35571 (Jun. 28, 2007) [hereinafter DOL Report].

235. DOL Report, *supra* note 234, at 35609.

236. *Id.*

237. See *id.*

238. 29 U.S.C. § 2612(e) (2014).

Second, flexible leave requests may be subject to the showing of a business burden by the employer. While the FMLA requires employer consent for leave taken after the birth or adoption of a healthy child,²³⁹ there is no established “undue hardship” defense like that found in the ADA by which employers can refuse FMLA requests.²⁴⁰ Under flextime reform, a limitation should be available to the employer if that employer can show an undue hardship related to the flextime leave. Required consent should be similar to that already existing for FMLA leave related to a healthy birth or adoption of a child.²⁴¹

Third, unplanned and intermittent flextime leave should only be granted when notice is not practicable. If an employee takes such leave, the employer must be notified as soon as reasonably practicable.²⁴² The employee or the employee’s representative, if the employee is unable to do so, should notify the employer.²⁴³ Examples of when such leave might arise include a medical emergency, unexpected change in circumstances, or a lack of knowledge when leave might begin.²⁴⁴

3. Overall Compliance Costs to Adopting Flextime

A potential criticism is that flextime reforms will impose an overall compliance burden on the productivity of the organization. Employers may fear that flextime will require a substantial training burden for managers, decrease morale, hinder productivity, increase absenteeism, and provoke unnecessary litigation. Such criticism has potential merit, as workplace regulatory requirements have the potential to increase compliance costs that impede smooth operations of the enterprise overall. Regulations requiring or facilitating flextime in the United States, such as innovations in Vermont and the City of San Francisco, are relatively new and lack a track record of impact on employer compliance costs. However, there are multiple reasons to believe that flextime reform will not place a substantial compliance burden on employers.

First, when employers voluntarily adopt flextime programs, they generally report positive impacts on the enterprise. Flextime programs are positively associated with job satisfaction, which in turn is linked with

239. 29 C.F.R. § 825.202(c) (2014) (“When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. . . . The employer’s agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.” *Id.*

240. See Susser, *supra* note 233.

241. See 29 U.S.C. § 2612 (b)(1) (2012).

242. 29 C.F.R. § 825.303(a) (2014).

243. *Id.*

244. 29 C.F.R. § 825.302 (2014); see also *Hopson v. Quitman Cnty. Hosp. & Nursing Home, Inc.*, 126 F.3d 635, 639 (5th Cir. 1997) (citing 29 C.F.R. § 825.302(a)-(b), (e)).

improved efficiency and productivity.²⁴⁵ The adoption of flextime also reduces employee turnover.²⁴⁶ Flextime also improves healthy employee behaviors, which in turn can reduce medical costs, decrease employee absenteeism, and improve productivity.²⁴⁷ Any gains in employee performance or morale may neutralize, or at least alleviate, the compliance costs of a flextime system.

Second, when the closest analogue to flextime reform, the FMLA, is studied to discern its regulatory burden, the costs on business do not appear to be overwhelming. A 2012 study on the FMLA commissioned by the DOL evaluated the impact of the FMLA on both covered and non-covered employees.²⁴⁸ The study found that most covered employers reported little difficulty in complying with the FMLA's requirements.²⁴⁹ Only 15% of employers reported that compliance was "somewhat difficult" or "very difficult" and fewer than 10% perceived negative impacts from the FMLA on productivity, profitability, absenteeism, turnover, and morale.²⁵⁰ Regarding abuse, only 2.5% of worksites reported suspicion of FMLA misuse and confirmed misuse was only found at 1.6% of worksites.²⁵¹ Overall, the report concluded that, although a subset of employers reported difficulties in compliance, "most employers report that complying with the FMLA imposes minimal burden on their operations."²⁵² A representative of the DOL commented that, "for two decades, granting job-protected leave has been good for employers and good for millions of workers and their loved ones. The FMLA is working."²⁵³ These results support the likelihood that flextime reforms proposed here will not be onerous to most employers.

245. See Federica Origo & Laura Pagani, *Workplace Flexibility and Job Satisfaction: Some Evidence From Europe*, 29 INT'L J. MANPOWER 539, 541, 554 (2008); Jennifer L. Glass & Ashley Finley, 12 HUM. RES. MGMT. REV. 313, 325 (2002) ("Overall, flexible work schedules have demonstrated significant positive effects across studies on . . . job satisfaction.").

246. Chan M. Hellman, *Job Satisfaction and Intent to Leave*, 137 J. SOC. PSYCH. 677, 684 (1997) ("[T]he relationship between job satisfaction and intent to leave is significantly different from zero and consistently negative for studies conducted in the United States. The more dissatisfied employees become, the more likely they are to consider other employment opportunities.").

247. Joseph G. Grzywacz et al., *The Effects of Workplace Flexibility on Health Behaviors: A Cross-Sectional and Longitudinal Analysis*, 49 J. OCCUPATIONAL & ENVTL. MED. 1302, 1306-08 (2007); Thomas J. Clifton & Edward Shepard, *Work and Family Programs and Productivity*, 25 INT'L J. MANPOWER 714, 718, 725 (2004).

248. ABT ASSOCIATES, *FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT* (Sep. 7, 2012) (revised Apr. 18, 2014) (prepared for U.S. Dep't of Labor), <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf>.

249. *Id.* at iii.

250. *Id.*

251. *Id.* at 156.

252. *Id.* at iii.

253. Press Release, *Family and Medical Leave Act Benefits Workers and their Families*, Employers, U.S. Dep't of Labor (Feb. 4, 2013), <http://www.dol.gov/opa/media/press/whd/WHD20130175.htm>.

Third, the impact of flextime reform will likely not disproportionately impact small business. Using the FMLA as an analogue, a survey examined the anticipated impact of the FMLA by smaller firms and compared it to the actual impact reported by covered businesses.²⁵⁴ The survey found that non-covered entities anticipated far greater negative business impact than what was actually reported by covered establishments.²⁵⁵ While 43% of non-covered employers predicted that the FMLA would negatively impact their productivity, only 10% of covered employers reported an actual impact.²⁵⁶ These results imply that perceptions may play a role in how small businesses perceive expected regulatory burdens.

There have also been a number of examples where lower FMLA coverage thresholds have been implemented successfully by state governments. At least nineteen states have lowered such coverage thresholds for employers.²⁵⁷ Nine states and the District of Columbia have mandated leave that is similar to the proposed flextime legislation, such as requiring the granting of leave for employees to attend a child's school-related activities.²⁵⁸ Some states, such as Connecticut, have gone as far as to require paid sick leave,²⁵⁹ a more aggressive reform than the current proposal and more expansive than what is required in most states. A survey of Connecticut employers after the law was enacted found that most employers reported a modest impact or no impact on their firm's business operations.²⁶⁰ Administrative costs were also reported as minimal.²⁶¹ While not exactly like flextime, previous similar reforms that have been implemented have imposed few costs, and it is likely that flextime reform would not be a heavy burden on most employers.

CONCLUSION

The time has not merely arrived; it is indeed overdue for meaningful flextime reform. Employees need to satisfy work and family obligations.

254. *Impact of Family and Medical Leave on Non-covered Establishments, The 2000 Survey Report*, U.S. DEP'T OF LABOR ch. 7 (2000), <http://www.dol.gov/whd/fmla/chapter7.pdf>.

255. *Id.* at 7-11 to -12.

256. *Id.*

257. Marianne DelPo Kulow, *Legislating a Family Friendly Workplace: Should it be Done in the United States?*, 7 NW J. L. & SOC. POL'Y 88, 95 (2012) (citing STATE-BY-STATE GUIDE TO UNPAID, JOB-PROTECTED EXTENDED TIME OFF LAWS, GEORGETOWN UNIV. LAW CTR. (2006), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1011&context=regulations>).

258. *Id.* at 96.

259. CONN. GEN. STAT. § 31-57r to -57w (2014).

260. Eileen Applebaum et al., *Good for Business? Connecticut's Paid Sick Leave Law*, CENTER FOR ECONOMIC RESEARCH AND POLICY 1, 2 (2013), <http://www.cepr.net/documents/good-for-buisness-2014-02-21.pdf>.

261. *Id.*

Low-wage workers manage their personal lives with limited incomes. Yet employers have little incentive to act on behalf of employees.

Unfortunately, the current prevailing legal regimes do not sufficiently protect access to flexible work. The FLSA is too limited and dated to be of much use for most employees. The FMLA was constructed for employees taking substantial blocks of leave, not precise changes to weekly schedules, and as a result has little to offer the flextime-seeking employee. The ADA, while holding promise in the encouragement of flexible schedules, has a specific mandate that does not broadly target the American workforce.

This Article proposes reforms that will help grant employees access to flexible work time. The first series of reforms argues for amendments to prevailing statutory frameworks. While such frameworks can be interpreted more broadly, and with good effect for flexible workers, the remedies available remain insufficient and incomplete. The second series of reforms argues for the creation and adoption of a flextime statute based upon a hybrid model of a right-to-request legislation enhanced by key elements of the ADA. This model strikes a balance between permitting the employer substantial discretion with which to shape its workforce while also empowering the employee to make flextime requests with a reasonable likelihood of adoption. This model also places obligations on both the employer and employee to genuinely engage the process. Employers are subject to sanctions if they inappropriately disengage from the process. The result is a framework that helps employees at a relatively low cost to employers.

Flextime is a working system that shows promise. That promise will help millions of workers achieve better work-life balance. These reforms represent only the first step in a longer process of opening the door to flexible work for employees regardless of profession, gender, or income.