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# FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS: A FRAMEWORK FOR A NATIONAL CONVERSATION<sup>1</sup>

LIZ WATSON AND JENNIFER E. SWANBERG\*

## INTRODUCTION

How to make ends meet? Answering this question is an ongoing struggle for many American families. Today, making ends meet is not just about money. It's also about time. It's about getting children off to school or child care, trying to arrange back-up child care when plans fall through, taking the car to the mechanic for repairs, catching the bus or the subway to work, caring for an elderly parent, keeping a doctor's appointment, attending a class to learn new job skills, and going to a parent-teacher conference. It's about doing all of these things, and still getting a job done.

Meeting the demands of everyday life while holding down a job has been a kitchen table issue for decades. There have always been families who struggle, but what used to be an issue for some families or some communities or certain industries now affects the vast majority of American workers and their families. These days, most of us are negotiating demands at work and demands at home, and few of us have the flexibility at work that we need to do both. For low-wage workers, who are the focus of this article, the daily struggles are often a whole lot harder. These workers are both least likely to have flexibility at work, and least

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<sup>1</sup> This article was originally published under the same title in May of 2011 online by Georgetown University Law Center at <http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf>. It has been updated for this republication.

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likely to be able to pay someone to take care of their obligations outside of work.

There is a growing recognition among businesses, employees, and government that the overall demographics and needs of the workforce have changed, with significant implications for employers, families, and communities.<sup>2</sup> While in 1970, two-thirds of married couples had one spouse at home,<sup>3</sup> women are now co-breadwinners in over two-thirds of households, and represent nearly half of all American workers.<sup>4</sup> In addition, 18% of working parents are single parents, for whom the strain of balancing work and family is even more challenging.<sup>5</sup> But working outside the home in significant numbers is not a new phenomenon among women in low-wage jobs; low-wage working women have been in the paid workforce in substantial numbers as far back as the Industrial Revolution.<sup>6</sup>

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<sup>2</sup> See, e.g., URBAN INST. & WORKPLACE FLEXIBILITY 2010, LOWER-WAGE WORKERS AND FLEXIBLE WORK ARRANGEMENTS 5, available at [http://workplaceflexibility2010.org/index.php/stakeholders/low\\_wage\\_workers/](http://workplaceflexibility2010.org/index.php/stakeholders/low_wage_workers/) (prepared for WF2010 by Shelley Waters Boots and Anna Danziger) (pointing to employees lack of input into work schedule and unpredictable work schedules as contributing factors); Kathleen Christensen & Barbara Schneider, *Evidence of the Worker and Workplace Mismatch*, in WORKPLACE FLEXIBILITY: REALIGNING 20TH-CENTURY JOBS FOR A 21ST-CENTURY WORKFORCE 2 (Kathleen Christensen & Barbara Schneider, eds., Cornell University Press 2010) (exploring the evolving needs of the current employer); see also FAMILY VALUES @ WORK, *It's About TIME: Why We Need Minimum Standards To Ensure A Family-Friendly Workplace 2* (2007), available at <http://www.aecf.org/~media/PublicationFiles/FVwork%20Full%20Report%209.pdf> (exploring the family sacrifices many workers are forced to make to keep their jobs); see also SOC. FOR HUMAN RES. MGMT., *Workplace Flexibility*, available at <http://www.shrm.org/Advocacy/Issues/WorkplaceFlexibility/Pages/default.aspx>; *Flexible Work Arrangements: Working for America's Employers and Employees*, Congressional Briefing by the FWA Collaborative (Dec. 14, 2009), available at [http://workplaceflexibility2010.org/index.php/events/flexible\\_work\\_arrangements\\_working\\_for\\_america\\_s\\_employers\\_and\\_employees](http://workplaceflexibility2010.org/index.php/events/flexible_work_arrangements_working_for_america_s_employers_and_employees) (discussing the hallmarks of beneficial flexible work agreements); see also *Our Stories: Your Constituents*, Congressional Briefing by the FWA Collaborative (Oct. 23, 2009), available at [http://workplaceflexibility2010.org/index.php/events/congressional\\_briefing](http://workplaceflexibility2010.org/index.php/events/congressional_briefing) (discussing the benefits associated with flexible work arrangements).

<sup>3</sup> See *Meeting the Needs of Today's Families*, Congressional Briefing by Workplace Flexibility 2010 (May 1, 2006), available at [http://www.workplaceflexibility2010.org/index.php/events/congressional\\_briefing5](http://www.workplaceflexibility2010.org/index.php/events/congressional_briefing5) (exploring beneficial workplace arrangements).

<sup>4</sup> Heather Boushey, *The New Breadwinners*, in THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 32 (Heather Boushey & Ann O'Leary eds., 2009), available at [http://www.americanprogress.org/issues/2009/10/womans\\_nation.html](http://www.americanprogress.org/issues/2009/10/womans_nation.html).

<sup>5</sup> FAMILIES AND WORK INST., 10 (2008) NATIONAL STUDY OF THE CHANGING WORKFORCE (NSCW) (unpublished raw data). (this analysis was conducted by Dr. Jennifer Swanberg for this report).

<sup>6</sup> See ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* 46–47 (2003) (explaining how the decreasing profitability of household work lead women, especially those in low-wage households, into the formal workforce during the industrial revolution); see also ALICE KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED: AN HISTORICAL OVERVIEW* 70 (1981) (explaining the economic value woman have provided outside the traditional employee-employer relationship).

That most women today shoulder both work and family responsibilities is only one of several changes affecting our workforce.<sup>7</sup> Our aging population is also living and working longer.<sup>8</sup> Roughly 40% of employed people in the United States report that within the past five years, they have provided “special attention or care for a relative or in-law sixty-five years old or older.”<sup>9</sup> The modern workforce includes increasing numbers of workers with health problems.<sup>10</sup> Advances in medicine and technology have allowed a greater number of people with disabilities to maintain employment.<sup>11</sup> Health problems, aging, disability, and caregiving can all give rise to the need for greater flexibility at work.

Yet most workplaces have not caught up with these realities.<sup>12</sup> The mismatch between workplace expectations and the realities of life has inspired copious research and analysis. Experts have found that this mismatch has a negative impact on workers’ psychological and mental health, children’s well-being, marriages, and employment outcomes.<sup>13</sup>

<sup>7</sup> See *Meeting the Needs of Today’s Families*, *supra* note 3 (addressing the benefits of modern workplace flexibility).

<sup>8</sup> See AARP, AARP BULLETIN SURVEY ON EMPLOYMENT STATUS OF THE 45+ POPULATION (2009), available at [http://assets.aarp.org/rgcenter/econ/bulletin\\_jobs\\_09.pdf](http://assets.aarp.org/rgcenter/econ/bulletin_jobs_09.pdf); see also MICHELLE WONG, GLORIA TOWER, TAY McNAMARA & MARCIE PITT CATSOUPHES, THE SLOAN CENTER ON AGING & WORK, COMPARISON OF STATE WORKFORCE DEMOGRAPHICS TRENDS FOR ADULTS OVER 55 (2008), available at [http://www.bc.edu/content/dam/files/research\\_sites/agingandwork/pdf/publications/SP52\\_Executive\\_Summary.pdf](http://www.bc.edu/content/dam/files/research_sites/agingandwork/pdf/publications/SP52_Executive_Summary.pdf) (executive summary) and JACQUELYN B. JAMES, JENNIFER E. SWANBERG & SHARON P. MCKECHNIE, THE CTR. ON AGING & WORK, RESPONSIVE WORKPLACES FOR OLDER WORKERS: JOB QUALITY, FLEXIBILITY AND EMPLOYEE ENGAGEMENT (2007), available at <http://www.citisesstudy.com/pdfs/IB1-OlderWorkers.pdf> (discussing older workers’ job engagement and evolving idea of retirement).

<sup>9</sup> KERSTEN AUMANN ET AL., FAMILIES & WORK INST., THE ELDER CARE STUDY: EVERYDAY REALITIES AND WISHES FOR CHANGE 4 (2008), available at [http://www.familiesandwork.org/site/research/reports/elder\\_care.pdf](http://www.familiesandwork.org/site/research/reports/elder_care.pdf).

<sup>10</sup> More than 1/3 of American adults have at least one chronic condition, and this number is estimated to rise to 50% of American adults by 2020. See CTR. ON AN AGING SOC’Y, WORKERS AFFECTED BY CHRONIC CONDITIONS: HOW CAN WORKPLACE POLICIES AND PROGRAMS HELP? (2004), available at <http://ihcrp.georgetown.edu/agingsociety/pubhtml/workplace/workplace.html> (based on analysis of the 2003 National Health Interview Survey).

<sup>11</sup> See CENSUS BUREAU, U.S. DEP’T OF COMMERCE, PUB. NO. 70-107, AMERICANS WITH DISABILITIES: 2002 (2002), available at <http://www.census.gov/prod/2006pubs/p70-107.pdf>.

<sup>12</sup> This lack of flexibility may partly explain the significant percentage of low-income mothers who are out of the workforce. Although the demographic trends of the rest of the population have changed over the last thirty years with women entering the workforce in droves, as Dr. Heather Boushey and Joan Williams note in a recent report, married low-income mothers are actually slightly more likely today than in 1979 to be out of the labor force (60% today as compared to 55% in 1979). See JOAN C. WILLIAMS & HEATHER BOUSHEY, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 7 (2010), available at <http://www.americanprogress.org/issues/2010/01/pdf/threefaces.pdf>.

<sup>13</sup> See Christensen & Schneider, *supra* note 2, at 2 (noting that a lack of flexible work arrangements will have a broad impact, beyond the employment context). A significant

In response to this conflict, some employers have taken new approaches to work, implementing flexible work arrangements (FWAs) that make it easier for their employees to be good workers and succeed in the rest of their lives. Many of these employers have found that implementing FWAs has led to significant improvements in their bottom line.<sup>14</sup>

But we have not yet seen a large-scale normative shift in the way work is organized. Less than half of employers provide all, or even most, of their employees with FWAs.<sup>15</sup> Low-wage workers are even less likely than other workers to have access to most forms of flexibility.<sup>16</sup> Indeed, rigid,

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amount of research in the field of work and family research is funded by the Alfred P. Sloan Foundation. Much of this research is available on the Sloan Work and Family Research Network at <http://wfnetwork.bc.edu>. Workplace Flexibility 2010, a project of the Alfred P. Sloan Foundation, has defined workplace flexibility as including three key components: flexible work arrangements (e.g., workplace changes such as part-time and part-year work, phased retirement, compressed workweeks, telecommuting, and flexible scheduling); Time Off comprised of different lengths of time (e.g., sick days, time off to attend a parent-teacher conference, family leave, short-term disability, and military service), paid and unpaid; and career flexibility (e.g., training for workers reentering the workforce and mechanisms that keep individuals connected to the workplace during long periods of absence). Workplace Flexibility 2010's report, *Family Security Insurance: A New Foundation for Economic Security*, provides a blueprint for establishing and financing a new national insurance program to provide wage replacement for time off for health and caregiving needs, available at <http://www.familysecurityinsurance.org/>. Workplace Flexibility 2010's *Public Policy Platform on Flexible Work Arrangements* 12, available at [http://workplaceflexibility2010.org/images/uploads/reports/report\\_1.pdf](http://workplaceflexibility2010.org/images/uploads/reports/report_1.pdf), provides a blueprint for making flexible work arrangements "the new normal" in the American workplace.

<sup>14</sup> See WORKPLACE FLEXIBILITY 2010 & URBAN INST., THE BUSINESS CASE FOR FLEXIBLE WORK ARRANGEMENTS (2008), available at <http://workplaceflexibility2010.org/images/uploads/BusinessCaseforFWAs.pdf> (compiling key findings from the research on the business case for FWAs); see also CORP. VOICES FOR WORKING FAMILIES, BUSINESS IMPACTS OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION (2005), available at <http://www.cvworkingfamilies.org/node/110>; Ellen Galinsky, James T. Bond & Kelly Sakai, 2008 National Study of Employers, FAMILIES & WORK INST. (2008), available at <http://familiesandwork.org/site/research/reports/2008nse.pdf> [hereinafter 2008 National Study of Employers]; see also Ellen Galinsky, James T. Bond & E. Jeffrey Hill, *A Status Report on Flexibility: Who Has It? Who Wants It? What Difference Does It Make?*, in WHEN WORK WORKS (2004), available at <http://familiesandwork.org/3w/research/downloads/status.pdf> [hereinafter A Status Report on Flexibility]; see also J. Landauer, *Bottom-line Benefits of Work/Life Programs*, HR FOCUS (July 1997); Joe Lineberry & Steve Trumble, *The Role of Employee Benefits in Enhancing Employee Commitment, Compensation & Benefits Mgmt.*, COMPENSATION & BENEFITS MGMT. (Winter 2000) (discussing the role of employee benefits and the loyalty and commitment derived from such benefits).

<sup>15</sup> See 2008 National Study of Employers, *supra* note 14.

<sup>16</sup> See Lonnie Golden, *The Flexibility Gap: Employee Access to Flexibility in Work Schedules*, in FLEXIBILITY IN WORKPLACES: EFFECTS ON WORKERS, WORK ENVIRONMENT AND UNIONS 38–56 (IIRA/ILO 2005); see also Jennifer Swanberg, Marcie Pitt-Catsouphes & Krista Drescher-Burke, *A Question of Justice: Disparities in Employees' Access to Flexible Schedule Arrangements*, 26 J. FAM. ISSUES 866 (2005) (stating that of all employee groups, low-wage workers tend to have the least access to flexible scheduling); see also Jennifer Swanberg, *Flexible Work Arrangements for Low-Wage Workers: A Critical Dimension of Job Quality* 15–16, presented at Flexib



unpredictable, and unstable work schedules are common among workers in low-wage jobs, as described in detail in this article.

The scheduling challenges facing workers in low-wage jobs and the lack of flexible work arrangements available in these jobs are subjects of growing concern for policymakers, workers and their advocates, and employers. These issues were taken up by the Obama Administration as part of its National Dialogue on Workplace Flexibility in 2010 and 2011. After President Obama hosted the White House Forum on Workplace Flexibility at which he promoted the importance of workplace flexibility,<sup>17</sup> the United States Department of Labor's (U.S. DOL) Women's Bureau held a series of meetings across the country highlighting workers' flexibility needs and best business practices in a range of industries, one of which focused specifically on hourly workers. Several of the other local events focused on industries employing substantial numbers of low-wage workers, including health care, retail, hospitality, restaurant and tourism, and manufacturing.<sup>18</sup>

Even after these events concluded, the issue of work-family conflict continued to grab headlines, albeit with the media attention focused on a more elite group of workers. In 2012 and 2013 there have been a series of high-profile newspaper articles on high-powered women's struggles or refusals to struggle with work-family conflict. About her departure from her position as Director of Policy Planning at the State Department in the Obama Administration, Anne-Marie Slaughter wrote that "women still can't have it all."<sup>19</sup> Marissa Mayer, the new CEO of Yahoo, kicked up a storm of controversy by ending telecommuting at Yahoo, shortly after famously working through her maternity leave.<sup>20</sup> Sheryl Sandberg's *Lean*

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Work Arrangements and Low-Wage Work: Creating Opportunity for Low-Wage Workers, Washington, D.C., July 8, 2009 (exploring options for flexibility in employment, such as time off for personal matters or flex scheduling).

<sup>17</sup> Obamas Push for Workplace Flexibility, *Forbes*, Apr. 1, 2010, available at <http://www.forbes.com/sites/work-in-progress/2010/04/01/obamas-push-for-workplace-flexibility/>. See also Press Release, WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *President and First Lady Host White House Forum on Workplace Flexibility* (Mar. 31, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/03/31/president-and-first-lady-host-white-house-forum-workplace-flexibility>; *A Conversation on Workplace Flexibility*, WHITE HOUSE (April 1, 2010, 12:53 EST), <http://www.whitehouse.gov/blog/2010/04/01/a-conversation-workplace-flexibility>.

<sup>18</sup> See *National Dialogue on Workplace Flexibility*, Dialogue Schedule, available at <http://www.dol.gov/wb/media/natldialogue3.htm#Schedule>

<sup>19</sup> Anne-Marie Slaughter, *Why Women Still Can't Have It All*, (July/August 2012), *The Atlantic*, available at <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>.

<sup>20</sup> See *Choosing Corporate Culture Over Worker Independence*, Mar. 8, 2013), available at [http://www.forbes.com/fdc/welcome\\_mjx.shtml](http://www.forbes.com/fdc/welcome_mjx.shtml); see also Jessica Grose, *How Relevant Is Marissa Mayer's Maternity Leave? Not Very*, (October 18, 2012),

*In* philosophy encouraged women to reach for leadership positions and not to assume that because they have families they should curb their ambitions.<sup>21</sup>

Around the same time that these articles were being tweeted, re-tweeted, and emailed around the country, Steven Greenhouse wrote in the *New York Times* about the plight of workers in the retail industry who report getting only a few days' notice of their work schedules, having work hours that fluctuate from week to week and simply not being scheduled for enough hours to get by.<sup>22</sup> While Greenhouse's piece did not cause a stir on par with Marissa Mayer, Anne-Marie Slaughter, or Sheryl Sandberg, it reflected a growing concern about the scheduling problems that plague low-wage work.

Moreover, curbing challenging work schedules has become a rallying cry for several grassroots workers' rights organizations. In New York City, the Retail Action Project, a grassroots campaign of retail workers, has launched the "Just Hours New York" campaign to address the problems in the retail industry of involuntary part-time work and schedules that change with no notice.<sup>23</sup> Likewise, OUR Wal-mart has made fair scheduling a centerpiece of its campaign to reform the giant retailer's employment practices.<sup>24</sup> In particular, Wal-Mart associates are waging a campaign against inflexible and unpredictable hours, and involuntary part-time work.<sup>25</sup> Restaurant Opportunities Center (ROC), an organization of restaurant workers with locations around the country, reports that some restaurant workers know when they are supposed to start their shifts, but do not know when they will be able to leave, since their shifts end when the traffic in the restaurant declines.<sup>26</sup> Similarly, some workers get only a few days' notice of their schedules, and last-minute changes to posted schedules are common.<sup>27</sup>

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available at <http://www.businessweek.com/articles/2012-10-18/how-relevant-is-marissa-mayers-maternity-leave-not-very>.

<sup>21</sup> Anne-Marie Slaughter, *Yes, You Can, Sheryl Sandberg's Lean In* (Mar. 7, 2013), available at [http://www.nytimes.com/2013/03/10/books/review/sheryl-sandbergs-lean-in.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/10/books/review/sheryl-sandbergs-lean-in.html?pagewanted=all&_r=0)

<sup>22</sup> Steven Greenhouse, *A Part-Time Life as Hours Shrink and Shift for American Workers*, Oct. 27, 2012, available at <http://www.nytimes.com/2012/10/28/business/a-part-time-life-as-hours-shrink-and-shift-for-american-workers.html?pagewanted=4&ref=stevengreenhouse>.

<sup>23</sup> See the Retail Action Project's *Just Hours New York*, available at <http://retailactionproject.org/campaigns-2/sustainable-scheduling-new/>.

<sup>24</sup> See *Our Walmart's Declaration of Respect*, available at [http://forrespect.nationbuilder.com/sign\\_the\\_declaration](http://forrespect.nationbuilder.com/sign_the_declaration).

<sup>25</sup> *Id.*

<sup>26</sup> See *Tipped Over the Edge: Gender Inequity in the Restaurant Industry*, 28, available at [http://rocunited.org/files/2012/02/ROC\\_GenderInequity\\_F1-1.pdf](http://rocunited.org/files/2012/02/ROC_GenderInequity_F1-1.pdf)

<sup>27</sup> *Id.* at 27-28.

These types of challenging work schedules cause fallout in practically every domain of some low-wage workers' lives, making it difficult to meet caregiving responsibilities, maintain child care, hold down a job, pursue education and training, or even arrange reliable transportation to and from work.<sup>28</sup>

Although access to flexibility is still quite limited, there is a growing body of research, advocacy, and promising business practices addressing scheduling practices and flexibility in low-wage jobs, and increasing awareness of the benefits to employers associated with providing flexibility.<sup>29</sup> In just the past five years, a number of reports and scholarly articles have been published on the importance of FWAs for low-wage workers and their employers.<sup>30</sup>

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<sup>28</sup> In the authors' own analysis of the NSCW, of the 40% of workers who reported being absent during the past three months, 16% of workers in jobs with standard hours, and 10% of workers in jobs with nonstandard hours reported that child care problems caused them to miss work. Of those who missed work, 40-60% reported losing pay or benefits, or being penalized in some way as a result. See also GINA ADAMS & MONICA ROHACEK, URBAN INST., CHILD CARE INSTABILITY: DEFINITIONS, CONTEXT, AND POLICY IMPLICATIONS 10 (2010) (noting that there are very close ties between employment instability and childcare instability); LISA DODSON, TIFFANY MANUEL & ELLEN BRAVO, RADCLIFFE INST. FOR ADVANCED STUDY, KEEPING JOBS AND RAISING FAMILIES IN AMERICA: IT JUST DOESN'T WORK, AN ACROSS THE BOUNDARIES REPORT 16 (2002), available at [http://www.familyvaluesatwork.org/assets/files/Keeping\\_Jobs.pdf](http://www.familyvaluesatwork.org/assets/files/Keeping_Jobs.pdf). (explaining that low-wage workers often report the intention to leave a job shortly after being hired due to scheduling and family conflicts); LISA MATUS-GROSSMAN & SUSAN GOODEN, MDRC, OPENING DOORS: STUDENTS' PERSPECTIVES ON JUGGLING WORK, FAMILY AND COLLEGE 65 (July 2002), available at <http://www.mdrc.org/publications/260/overview.html> (reporting that in a set of focus groups of students enrolled in community colleges, students identified employers' lack of flexibility with work schedules as a significant obstacle to pursuing further education); and Evelyn Blumenberg, *Transportation and Low-wage Work*, Presentation at Employment and Housing Roundtable by the Mobility Agenda, Baltimore, Maryland (July 9, 2007), available at <http://www.mobilityagenda.org/Blumenberg.pdf> (Public transportation often requires long commute times, due to travel during off-peak hours, lengthy waits, and time-consuming transfers.; see also Evelyn Blumenberg & Margy Waller, *The Long Journey to Work: A Federal Transportation Policy for Working Families*, CTR. ON URBAN & METROPOLITAN POL'Y (July 2003), at 5, [http://www.mobilityagenda.org/20030801\\_Waller.pdf](http://www.mobilityagenda.org/20030801_Waller.pdf) (showing the disparity between the percentage of poor individuals living within the central city, suburban, and non-metropolitan areas).

<sup>29</sup> See 2008 National Study of Employers, *supra* note 14.

<sup>30</sup> See, e.g., A BETTER BALANCE: THE WORK & FAMILY LEGAL CTR., THE BUSINESS CASE FOR WORKPLACE FLEXIBILITY (Mar. 2008), available at <http://www.abetterbalance.org/web/images/stories/Documents/faminess/factsheets/businesscasewflex.pdf>; James T. Bond & Ellen Galinsky, *How Can Employers Increase the Productivity and Retention of Entry-Level, Hourly Employees?*, FAMILIES & WORK INST. (Nov. 2006), available at <http://familiesandwork.org/site/research/reports/brief2.pdf>.



The recent research and reports have raised the profile of these issues to some degree, but policymakers, advocates, and employers are still far from a shared understanding of the types of scheduling challenges low-wage

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James T. Bond and Ellen Galinsky, *Workplace Flexibility and Low-wage Employees*, NSCW 2008 (2011); LISA DODSON, (The New Press 2009); Charles Grantham, Jim Ware & Jennifer E. Swanberg, *Flexible Work Arrangements for Nonexempt Employees*, WORLDATEWORK (2009), available at <http://www.worldatwork.org/waw/adminLink?id=33622>; Julia R. Henly & Susan J. Lambert, *Schedule Flexibility and Unpredictability in Retail: Implications for Employee Work-Life Outcomes* (July 2010) (working paper, University of Chicago Work Scheduling Study), available at <http://www.ssa.uchicago.edu/faculty/Henly.Lambert.Unpredictability.and.work-life.outcomes.pdf>; Susan J. Lambert, *Making a Difference for Hourly Employees*, in WORK-LIFE POLICIES THAT MAKE A REAL DIFFERENCE FOR INDIVIDUALS, FAMILIES, AND COMMUNITIES (Alan Booth & Ann C. Crouter eds., Urban Institute Press 2009), available at <http://harrisschool.uchicago.edu/centers/chppp/pdf/spring08-henly2.pdf> [hereinafter *Making a Difference for Hourly Employees*]; Susan J. Lambert, *Passing the Buck: Labor Flexibility Practices that Transfer Risk onto Hourly Workers*, 61 HUM. REL. 1203 (Sept. 2008) [hereinafter *Passing the Buck*]; Susan J. Lambert, Anna Haley-Lock & Julia R. Henly, *Work Schedule Flexibility in Hourly Jobs: Unanticipated Consequences and Promising Directions* (June 2010) (working paper, University Chicago Work Scheduling Study), available at <http://www.ssa.uchicago.edu/faculty/Lambert.Haley-Lock.Henly.Unanticipated%20Consequences%20of%20Flexibility%20in%20Hourly%20Jobs.7.2010.pdf> [hereinafter *Hourly Jobs*]; Susan J. Lambert & Julia R. Henly, *Managers' Strategies for Balancing Business Requirements with Employee Needs: Manager Survey Results*, UNIV. OF CHICAGO, SCH. OF SOC. SERVICE ADMIN. (May 2010), available at [http://news.uchicago.edu/images/assets/pdf/100831.SSA\\_work\\_scheduling.pdf](http://news.uchicago.edu/images/assets/pdf/100831.SSA_work_scheduling.pdf); Jodie Levin-Epstein, *Getting Punched: The Job and the Family Clock*, CTR. FOR LAW AND SOC. POL'Y (2006), available at [www.clsp.org/admin/site/publications/files/0303.pdf](http://www.clsp.org/admin/site/publications/files/0303.pdf); NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, LOS ANGELES WORKERS SPEAK: THE EMPLOYEE CASE FOR FLEXIBILITY IN HOURLY, LOW-WAGE JOBS, available at [http://www.nationalpartnership.org/site/DocServer/W\\_F\\_Workflex\\_LA\\_Workers\\_Voice.pdf?docID=8241](http://www.nationalpartnership.org/site/DocServer/W_F_Workflex_LA_Workers_Voice.pdf?docID=8241); AMY RICHMAN, DIANE BURRUS, LISA BUXBAUM, LAURIE SHANNON, & YOUME YAI, CORP. VOICES FOR WORKING FAMILIES, INNOVATIVE WORKPLACE FLEXIBILITY OPTIONS FOR HOURLY WORKERS (May 2009), available at <http://www.cvworkingfamilies.org/system/files/CVWF%20report-FINAL.pdf>; Jennifer E. Swanberg, Jacquelyn B. James, & Sharon P. McKechnie, *CitiSales Jobs that Work Study: Can Business Benefit By Providing Workplace Flexibility to Hourly Workers?*, CITISALES, (n.d.), available at [http://www.citisalesstudy.com/\\_pdfs/IB3-HourlyWorkers.pdf](http://www.citisalesstudy.com/_pdfs/IB3-HourlyWorkers.pdf) [hereinafter *CitiSales: Business Benefits*]; Jennifer E. Swanberg, Jacquelyn B. James, Mamta U. Ojha, Mac Werner, & Sharon P. McKechnie, *CitiSales Jobs that Work Study*, CITISALES STUDY, (n.d.), available at [http://www.citisalesstudy.com/\\_pdfs/IB1-HourlyWorkers.pdf](http://www.citisalesstudy.com/_pdfs/IB1-HourlyWorkers.pdf); Justina Victor, Evren Esen, Steve Williams, & Nancy R. Lockwood, *Workplace Flexibility in the 21st Century: Meeting the Needs of the Changing Workforce (Executive Summary)*, SOC'Y FOR HUMAN RESOURCE MGMT. (July 2009), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Documents/09-0425%20Workplace%20Flexibility%20Survey%20Report-Executive%20Summary.pdf>; Joan C. Williams & Penelope Huang, *Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-cutting Strategy in a Globalized World*, THE CTR. ON WORKLIFE LAW (2011), <http://www.worklife.law.org/pubs/ImprovingWork-LifeFit.pdf>; CORP. VOICES FOR WORKING FAMILIES, *supra* note 14; WFD CONSULTING, CORP. VOICES FOR WORKING FAMILIES, WORKPLACE FLEXIBILITY FOR LOWER WAGE WORKERS (Oct. 2006), available at <http://www.cvworkingfamilies.org/system/files/lowerwageflexreviewreport.pdf>; WILLIAMS & BOUSHEY, *supra* note 12 at 7-8.

hourly workers face, the flexible work arrangements (FWAs) that are responsive to these challenges, and how to implement them.<sup>31</sup> Though some employers have implemented FWAs for their middle and high-wage workers, many are unaware of the range of FWA options for their low-wage workers.<sup>32</sup> Policymakers also lack a framework with which to conceptualize the different types of scheduling challenges low-wage workers face and respond to these challenges.<sup>33</sup>

This article brings new insight to a dynamic field of study, advocacy, and business practices that places low-wage workers squarely in the national conversation on workplace flexibility. The scholarship in this area to date has skillfully illuminated the challenges facing workers in jobs requiring nonstandard hours and the disparities in access to flexibility among low-wage and higher-wage workers. For example, existing research has established that lower-wage workers are far more likely to work nonstandard schedules and part-time schedules than other workers, and have less access to flexibility than their higher-wage counterparts.<sup>34</sup>

The article adds to the scholarship in this area by drilling down to examine low-wage hourly workers' flexibility needs through the lenses of standard (Monday through Friday daytime schedules) and nonstandard work schedules (anything other than a Monday through Friday daytime schedule), and part-time and full-time work. Examining the scheduling challenges facing these workers at close range, we find tremendous variation within a workforce often considered to be homogeneous.

For this article, we analyzed new data and drew on existing research. Through this process, we identified three different types of scheduling challenges—rigidity, unpredictability, and instability—that often play out differently for workers on standard, nonstandard, part-time and full-time schedules. We hope that these findings will both broaden and refine the conversation on FWAs for low-wage hourly workers. Finally, this article identifies a range of voluntary employer practice and public policy options to address employees' needs for flexibility, predictability and stability.

The purposes of the article are to:

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<sup>31</sup> See THE BUSINESS CASE FOR FLEXIBLE WORK ARRANGEMENTS, *supra* note 14.

<sup>32</sup> See Lambert & Haley-Lock, et al., *supra* note 30.

<sup>33</sup> See *id.*

<sup>34</sup> Families and Work Institute's *Workplace Flexibility and Low-wage Employees*, which is based on the National Study of the Changing Workforce (2008), reports that "low-wage employees are significantly less likely (66%) to work regular daytime schedules than higher-wage employees (79%), though the majority do, and they are much more likely to be paid by the hour (86% versus 60%). They are also much more likely (32% versus 9%) to have part-time jobs."

- (1) describe and categorize the different types of scheduling challenges faced by low-wage hourly workers in jobs requiring standard and nonstandard schedules, and part-time and full-time work;<sup>35</sup>
- (2) provide a *flexible workplace solutions framework* for conceptualizing and developing new strategies for addressing scheduling challenges—including employer practices and policy solutions; and
- (3) link the scheduling challenges that low-wage hourly workers face to the broader national dialogue and policy debate on workplace flexibility policy and practice.<sup>36</sup>

#### *SCHEDULING CHALLENGES DEFINED*

Low-wage hourly workers encounter three different types of scheduling challenges—rigidity, unpredictability, and instability.

Rigidity is defined as a lack of control over the scheduling of work hours, including overtime or extra work hours, lack of input into starting and quitting times, and lack of control over break times.

Unpredictability is defined as having schedules assigned with little or no advance notice, or being required to work overtime or extra hours with little or no notice.<sup>37</sup>

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<sup>35</sup> See *Passing the Buck*, *supra* note 30, at 1224.

<sup>36</sup> As WF2010 articulated in our FWA Public Policy Platform (released in March 2009), some of the FWA needs of low-wage workers are very similar to the flexibility needs of other workers, but others are quite different. *Flexible Work Arrangements Public Policy Platform*, *supra* note 14. As Chai Feldblum, the former Co-Director and Founder of WF2010 noted early on in the initiative, articulating the needs of low-wage workers and policies and employer strategies that are responsive to those needs was one of WF2010's core objectives. Chai Feldblum, *Workplace Flexibility 2010 Power Point Presentation* (2003) (unpublished presentation) (on file with authors).

<sup>37</sup>One common form of unpredictability for part-time and full-time workers is working extra hours with little or no notice. For full-time workers, this often means working overtime (which is defined in the Fair Labor Standards Act as working more than 40 hours per week and requires time and one-half pay). 29 U.S.C. §§ 206(a)(1)(C), 207(a)(1). Part-time workers may also be asked to work extra hours. The NSCW asks both part-time and full-time workers (which it defines as working more than 35 hours per week) whether they are asked to work extra hours, capturing both those workers being required to work more than 40 hours (overtime) and those workers being required to work more hours than they are regularly scheduled to work, but less than 40. We use both terms—extra hours and overtime—throughout the report given our focus on scheduling challenges for both part-time and full-time workers.

Instability is defined as fluctuations in work hours by week, time of day, and length of shift; being subject to reductions in work hours when work is slow; and involuntary part-time work.

Using these definitions, we analyzed the 2008 *National Study of the Changing Workforce* (further referred to as the 2008 NSCW) to determine the prevalence of these problems for low-wage hourly workers.<sup>38</sup>

Our work expands on research by Susan Lambert and Julia Henly at the University of Chicago that identified several dimensions for intervening into scheduling practices, including flexibility, predictability, and stability.<sup>39</sup> We expand on this work by examining the importance of each of these dimensions to workers in jobs requiring standard and nonstandard hours, and workers on part-time and full-time schedules, and by modifying the definitions of these terms to more specifically address the range of scheduling challenges facing these workers.<sup>40</sup>

Providing flexibility for low-wage hourly workers requires a willingness to rethink traditional scheduling practices for workers on a wide range of schedules. For some workers, this might mean loosening up rigid scheduling practices by giving workers more *meaningful input into their work schedules* without jeopardizing their jobs.<sup>41</sup> For other workers, it might mean making scheduling practices that are already very loose—in the sense that the timing and amount of work varies dramatically from week to week at the employer's discretion—more *predictable and stable*, and, at the same time, providing them with opportunities for meaningful input into their work schedules.<sup>42</sup>

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<sup>38</sup> For more on the NSCW, see discussion *infra* Part I.

<sup>39</sup> See Susan J. Lambert & Julia R. Henly, THE MOBILITY AGENDA, SCHEDULING IN HOURLY JOBS: PROMISING PRACTICES FOR THE TWENTY-FIRST CENTURY ECONOMY 6, *tbl 1* (May 2009), available at <http://www.mobilityagenda.org/home/file.axd?file=2009%2F5%2Fscheduling.pdf>.

<sup>40</sup> See Lambert & Henly, *supra* note 30 (examining novel approaches in hourly wage scheduling).

<sup>41</sup> See *id.*

<sup>43</sup> See *Making a Difference for Hourly Employees*, *supra* note 30 (examining the health benefits a flexible work plan can have on individual workers).

**KEY FINDINGS:**

- 1:** Half of low-wage hourly workers work standard schedules, while the other half work nonstandard schedules.
- 2:** One in two part-time workers in a job requiring standard hours, and almost one in four part-time workers in a job requiring nonstandard hours would prefer to work full-time.
- 3:** Three key scheduling challenges — rigidity, unpredictability, and instability — affect low-wage hourly workers in jobs requiring standard and nonstandard, and part-time and full-time hours.
- 4:** Flexible workplace solutions — opportunities for meaningful input into work schedules, more predictable work schedules, and more stable work schedules — can be implemented to address each of these three challenges.

In this article, we focus on flexible work arrangements that can improve scheduling for low-wage hourly workers in each of these areas. Examples of flexible work arrangements include shift-swapping, team scheduling, self-scheduling, honoring worker preferences to work certain shifts or certain days, and seeking volunteers first for overtime, among others.<sup>43</sup>

A large proportion of low-wage hourly workers—whether working standard or nonstandard schedules, full-time or part-time hours—experience rigid, unpredictable, or unstable scheduling practices.

To illustrate, nearly half of low-wage hourly workers experience one or more of the major forms of rigid scheduling practices—lack of control in scheduling of work hours including overtime and extra work hours, inability to choose starting and quitting times, or inability to decide when to take breaks.<sup>44</sup>

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<sup>43</sup> See *Flexible Work Arrangements Public Policy Platform*, *supra* note 14. As WF2010 articulated in our FWA Public Policy Platform (released in March 2009), some of the FWA needs of low-wage workers are very similar to the flexibility needs of other workers, but others are quite different.

<sup>44</sup> These figures are based on the authors' analysis of NSCW 2008 data. The one exception to this finding is that nearly 17% of low-wage hourly workers on part-time nonstandard schedules have very little control over the scheduling of their work hours.



As one measure of unpredictability, between 20-30% of low-wage hourly workers are regularly required to work overtime or extra hours with little or no notice.<sup>45</sup> Of full-time workers in jobs requiring standard hours who are regularly required to work overtime or extra hours with little or no notice, 58% reported that they cannot refuse overtime or extra work hours without some form of backlash.<sup>46</sup>

Instability in work hours often has significant consequences for low-wage workers as fluctuations in work hours lead to fluctuations in income. More than one in four *part-time* low-wage hourly workers (on both standard and nonstandard schedules) experience a reduction in work hours requiring nonstandard schedules experience this same problem.<sup>47</sup> One in two part-time workers in a job requiring a standard schedule and almost one in four part-time workers in a job requiring a nonstandard schedule would prefer to be working full-time.<sup>48</sup>

This article is one of the first to highlight the extent to which these three different types of scheduling problems—rigidity, unpredictability, and instability—pervade the low-wage hourly workforce. We note, however, that the data on which we rely is incomplete. There is no national data available that will allow us to state conclusively the extent to which low-wage hourly workers experience unpredictable scheduling and instability in their work hours, or the consequences of these types of employer practices on employees and their families. Given the scope of the scheduling challenges we have uncovered with the existing data, we can say with certainty that the problems of rigidity, unpredictability, and instability impact substantial percentages of workers on standard and nonstandard work schedules.

#### I. STANDARD OR NONSTANDARD HOURS WORK—CRITICAL FACTORS IN THE FLEXIBILITY EQUATION FOR LOW-WAGE HOURLY WORKERS

To determine the prevalence of the three forms of scheduling challenges identified in this report, we analyzed the 2008 *National Study of the Changing Workforce* (NSCW) (hereinafter “2008 NSCW Study”), one of the only national representative studies of the U.S. workforce that provides detailed information about the quality of workers’ lives both on and off the job.<sup>49</sup> The 2008 NSCW Study studied a sample of 3,502 workers, of which 2,769 were categorized as wage and salaried workers.

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<sup>45</sup> Figures based on authors’ analysis of NSCW 2008 data.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Kenneth Matos & Ellen Galsky, “2012 National Study of Employers,” available at [http://familiesandwork.org/site/research/reports/NSE\\_2012\\_.pdf](http://familiesandwork.org/site/research/reports/NSE_2012_.pdf)

We defined “low-wage” using the social inclusion perspective, and used that definition to identify a sample of low-wage hourly workers in the 2008 NSCW.<sup>50</sup> The social inclusion perspective defines a low-wage job as paying less than two-thirds of the median wage for men.<sup>51</sup> The median wage of all male workers in the total NSCW was \$15.41.<sup>52</sup> We restricted our sample to workers paid less than \$15.41 who indicated that they were paid hourly. Using this as the cut off for determining whether workers were low-wage, we find that 24% of the overall workforce works low-wage hourly jobs.<sup>53</sup> Much of the analysis described in this article uses this sample of low-wage hourly workers (N=648).

To further understand the scheduling challenges of low-wage hourly workers, we compare workers employed in jobs generally requiring standard and nonstandard schedules. Basing our definitions on work by Harriet Presser, we define a standard schedule as a routine, Monday through Friday daytime schedule, and a nonstandard schedule as any other schedule.<sup>54</sup> Our sample of low-wage hourly workers is almost equally split between working standard schedules (n=318) and nonstandard schedules (n=330).<sup>55</sup>

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<sup>50</sup> See Heather Boushey, Shawn Fremstad, Rachel Gragg, & Margy Waller, THE MOBILITY AGENDA, UNDERSTANDING LOW-WAGE WORK IN THE UNITED STATES 2 (March 2007), available at <http://www.inclusionist.org/files/lowwagework.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> Figures based on authors' analysis of data from the NSCW 2008.

<sup>53</sup> *Id.*

<sup>54</sup> Harriet Presser, Ph.D., a sociologist from the University of Maryland has documented the incidence and implications of standard and nonstandard work in the general population. Dr. Presser defines nonstandard hours as working other than a fixed day schedule with at least half the hours worked most days in the prior week fell between 8:00 a.m. and 4:00 p.m. See HARRIET B. PRESSER, WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES (2003) [hereinafter PRESSER 24/7]; Harriet B. Presser, *Race-ethnic and Gender Differences in Nonstandard Work Shifts*, 30 WORK & OCCUPATIONS 412, 416 (Nov. 2003). We tried to adhere closely to this definition despite the limitations of the available data. Since we are unable to determine whether employees self-reported schedule was the norm for at least half the hours worked during the prior week, we may have some over-representation of employees categorized as working standard hours. Nonetheless, the available data provides a rich description of flexible work arrangements and scheduling problems among workers. Two questions from the 2008 NSCW were used to classify workers into standard and nonstandard categories: 1) Which of the following best describes your work schedule at your main job? and 2) What days of the week do you usually work? Workers who reported working a regular daytime schedule and Monday through Friday were categorized as working standard schedules, and all other workers were classified as working nonstandard schedules.

<sup>55</sup> Families and Work Institute recently published a report, *Workplace Flexibility and Low-wage Employees*, which is also based on the 2008 National Study of the Changing Workforce. See Bond & Galinsky, *supra* note 30. The two reports differ in several ways. First, while both reports rely on a social inclusion perspective to define low-

Our analysis found that roughly half of low-wage hourly workers are employed in jobs that primarily require standard schedules. The other half of low-wage hourly workers are employed in jobs requiring nonstandard schedules.<sup>56</sup> This last finding may actually underestimate the number of workers employed in jobs requiring nonstandard hours, because some employees reporting standard daytime hours may occasionally work nonstandard hours, i.e. a night, weekend rotating, or variable schedule.<sup>57</sup>

Low-wage hourly workers on standard and nonstandard schedules largely work in the same industries, but in different proportions. As noted in Table 1, the most common industry among low-wage hourly workers employed in jobs requiring standard schedules is medical services, followed by retail trades, manufacturing, and education services. For low-wage hourly workers in jobs requiring nonstandard hours, the most common industry is retail, followed by medical, manufacturing, and business services.

Table 1: Top Industries and Associated Hourly Wages by Job Type, 2008

Industry	Standard hours (n=316) %	Hourly Wage	Nonstandard hours (n=327) %	Hourly Wage
Medical services	18	\$10.60	18.3	\$9.00

wage work, the working assumptions that informed the definition of low-wage are different. The authors of the Families and Work Institute report calculated 2/3 the median wage for male workers *who are paid hourly*, whereas in this report we calculated the low-wage figure using 2/3 the median wage for *all male workers in the sample*. Second, the focus of our report is on low-wage, hourly workers, whereas, the primary objective of the Families and Institute's report is to compare low-wage and higher-wage workers. Therefore, our sample of low-wage workers includes only those workers that are paid hourly and are low-wage. In contrast, Families and Work Institutes' study sample is comprised of low-wage workers, who may be paid hourly or salaried. Third, our report is interested in studying similarities and differences between workers in jobs that primarily require standard and nonstandard schedules. As noted in the text box that describes the analysis conducted for this report, we define standard hour schedules as Monday through Friday, days, and nonstandard schedules as everything else. In contrast, Families and Work Institute appears to define standard schedules as "day schedules" and nonstandard as everything else. Due to these three primary differences between the two reports, the percentages of workers that have access to different types of flexible work arrangements or who work on standard or nonstandard schedules may vary.

<sup>56</sup> For more information, see Table 1.

<sup>57</sup> Because of the way that the 2008 NSCW asked respondents to describe their work schedule, it is possible that workers who responded to this question by stating that they regularly work a daytime schedule, may occasionally, or even on a weekly basis, work some nonstandard hours.

Industry	Standard hours (n=316) %	Hourly Wage	Nonstandard hours (n=327) %	Hourly Wage
Retail trade	14	9.30	35.7	10.20
Manufacturing	13.6	11.30	8.5	10.70
Education services	12.8	9.70		
Business services			6.4	10.40

Workers employed in low-wage hourly jobs are disproportionately white females in their early forties. Slightly more than half are married or live with a partner, and between 35-40% of low-wage hourly workers have children under the age of eighteen. Seven percent of employees in jobs with standard hours and about 10% of employees in jobs with nonstandard hours received public assistance (supplemental nutrition Assistance and or housing assistance).

Table 2: Characteristics of Low-wage Hourly Workers by Job Type

Demographic Characteristic	Standard hours (n=318) %	Nonstandard hours (n=330) %
Sex		
Male	37.7	46.9
Female	62.2	63.0
Race		
White non-Hispanic	72.0	77.6
Black non-Hispanic	15.7	9.7*
Hispanic	7.9	6.1
Other	4.4	5.8
Marital/Partner status		
Live with spouse/partner	56.8	53.9
Other arrangements	43.2	46.1
Children >18 in household		
Yes	40.9	34.5 (114)
No	59.1	65.5 (216)
Use of public assistance		
Yes	6.6	9.4
No	93.4	90.7
Age		
Mean Years (SD)	44.3 (12.7)	42 (15.9)

\* Statistically significantly different at  $p < .05$ .

Low-wage hourly workers on standard and nonstandard schedules are found in the same occupational categories, but again, in different proportions. As illustrated in Table 3, the most common occupations among low-wage earners working standard hours are production and repair, administrative support, and service. In contrast, the top occupation among low-wage hourly workers working nonstandard hours is service, followed by production and repair and sales.<sup>58</sup>

Table 3: Top Three Occupations & Hourly Wages by Job Type, 2008

Occupation	Standard hours (n=314) %	Hourly Wage	Occupation	Nonstandard hours (n=323) %	Hourly Wage
Production	31.2	\$10.60	Service	28.7	\$8.90
Admin. Support	28	10.60	Production	20.4	10.40
Service	13.3	8.40	Sales	17.9	9.20

Production/operation repair includes: production workers, machine operators, repair workers and their immediate supervisors.

The second important distinguishing feature of low-wage hourly workers' schedules is whether those schedules are full or part-time. Working full-time is more common among workers in low-wage hourly jobs on both standard and nonstandard schedules than working part-time.<sup>59</sup> However, 43% of low-wage hourly workers on nonstandard schedules work part-time compared to only 14% on standard schedules. (See Table 4).

Many part-time workers would prefer to work more hours. We categorize the problem of involuntary part-time work as schedule instability, which we discuss in depth in Part 2.

<sup>58</sup> The "Production, operation and repair" category includes all production workers, machine operators, and repair workers and their immediate supervisors.

<sup>59</sup> See *Workplace Flexibility and Low-Wage Employees*, *supra* note 30 (noting that 32% of low-wage employees but only 9% of higher-wage employees work part-time).



Table 4: Schedule Types of Workers in Low-wage, hourly jobs

Schedule type	Standard hours (n=318) %	Nonstandard hours (n=329) %
Full-time	86.5	56.5***
Part-time	13.5	43.4

p.&lt;.0001

About 45% of low-wage hourly workers working nonstandard schedules (both part-time and full-time) indicated that a daytime shift was the most common shift they were scheduled to work, followed by an evening shift, rotating shift, variable or split shift, and night shift. (See Table 5). Full-time workers in both groups average about forty hours per week, while part-time workers employed in jobs with standard hours work more hours per week than part-time workers employed in jobs with nonstandard hours (27 hours vs. 22 hours).

Table 5: Schedule Types of Employees Who Work Nonstandard Hours

Nonstandard Hours	Full-time (n=186), %	Part-time (n=143), %
Regular daytime	48.4	44.7
Regular evening	12.9	18.8
Regular night shift	11.8	5.5
Rotating shift	13.9	15.3
Split, flexible, variable or some other type of shift	12.9	15.3

Several forces are fueling the trend toward nonstandard work hours: a shift toward a service-based economy; the growth of female employment, particularly in the low-wage service sector; an increased demand for services during non-daytime hours and weekends due to the number of women employed in daytime jobs; the increase in the demand for entertainment and recreational-type activities due to the rise in single- and dual-earner households; an aging population in need of round-the-clock medical care; and a global economy that requires people to be on-call at all times.<sup>60</sup>

<sup>60</sup> See PRESSER 24/7, *supra* note 54.

### Growth Trends in Low-Wage Jobs

The U.S. DOL's occupational projections for 2008 to 2018 show that seven out of the ten occupations in which job growth is predicted are typically low-wage occupations.<sup>61</sup> The industry sectors in which economic growth is occurring—retail, service, and health care—have a high proportion of low-wage jobs.<sup>62</sup> In particular, the DOL projects that the retail sector will add 1.6 million new jobs, reaching 16.7 million by 2014, and will continue to be the dominant source of employment and the largest source of employment growth in America.<sup>63</sup> This projection tracks past growth trends: the retail and service sector accounted for more than 83% of all new jobs between 1989 and 1995.<sup>64</sup>

Many jobs in the industries and occupations with projected growth often have limited access to FWAs, and have been characterized as having rigid, unstable, and unpredictable scheduling practices that strain working families.<sup>65</sup>

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<sup>61</sup> Table 6, *The 30 occupations with the largest employment growth, 2008–2018*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, available at <http://www.bls.gov/news.release/ecopro.t06.htm> (last modified Dec. 11, 2009) (listing registered nurses, retail salespersons, home health aides, personal care aides, general office clerks, combined food preparation and serving, customer service representatives, heavy and tractor-trailer truck drivers, and laborers at the top of the DOL's projected high growth list).

<sup>62</sup> *Id.*

<sup>63</sup> *High Growth Industry Profile—Retail*, EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, available at [http://www.doleta.gov/brg/IndProf/Retail\\_profile.cfm](http://www.doleta.gov/brg/IndProf/Retail_profile.cfm) (last modified Mar. 8, 2010).

<sup>64</sup> LAWRENCE MISHEL, JARED BERNSTEIN & JOHN SCHMITT, *THE STATE OF WORKING AMERICA: 1996–1997*, 184 (Sharpe Publishers 1997).

<sup>65</sup> See Swanberg, Pitt-Catsouphes & Drescher-Burke, *supra* note 16; Lambert & Henly, *supra* note 30 (finding that pressure on front-line managers to 'schedule to demand' detrimentally affected worker's lives in terms of lack of predictability, flexibility, and rigidity).

## II. DIAGNOSING THE PROBLEM — RIGIDITY, UNPREDICTABILITY, AND INSTABILITY

### A. An Overview

Although some employees may face only one of the challenges outlined below, others may face two or more simultaneously. For example, a worker in a job with a nonstandard schedule who receives only one week's notice of her schedule may have trouble arranging child care at such late notice and may need to pick up her child from school at a time when she is scheduled to work. This same worker is likely to have very little ability to alter the time at which her shift ends so that she can pick up her child. She has both an unpredictable and a rigid schedule. She would benefit from at least two flexible workplace solutions: more predictability and more opportunities for meaningful input into her schedule.

Likewise, a worker in a nine-to-five job who generally works a full-time schedule may occasionally be required to work overtime or extra hours without notice. This worker has a schedule that is generally rigid, but occasionally unpredictable. The worker would benefit both from the ability to have more input into scheduling his overtime or extra hours, and more advance notice of the scheduling of overtime hours.

Changes in scheduling technology have fueled these challenging scheduling practices.<sup>66</sup> Some employers are now using new computer software programs to add or subtract hours within the same day or to vary schedules within the same day to respond to fluctuating consumer and production demand schedules.<sup>67</sup>

Just-in-time scheduling has become a common business strategy to help employers control labor costs.<sup>68</sup> According to the National Institute for Occupational Safety and Health, “the continued push toward lean manufacturing, with short lead times and low inventory, and the greater demand for night and evening customer service have resulted in larger fluctuations in production and service levels by hour of day, day of week, week of month, [and] month of year.”<sup>69</sup>

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<sup>66</sup> See *Passing the Buck*, *supra* note 30, at 1224 (stating “workers from predictable shifts to a system that follows the number of customers in stores through the day and week”) (internal citations omitted).

<sup>67</sup> See *id.* at 1218 (finding that newly hired workers were “most at risk for incurring last minute adjustments to posted schedules [ . . . ] and these practices closely tracked turnover rates in that turnover could be as much as 200% higher among workers with less than a year of seniority.”)

<sup>68</sup> *Id.* at 1203.

<sup>69</sup> Todd Dawson, Anneke Heitman & Alex Kerin, *Industry Trends, Costs and Management of Long Working Hours*, Presentation at Work Schedules: Shift Work and

For example, the marketing for one of the leading scheduling software products provides insight into why just-in-time scheduling may hold appeal for businesses. One company that targets its software to the manufacturing, retail, and health care industries reports that the software can be used “to enable a just-in-time workforce perfectly aligned with demand for products or services.”<sup>70</sup> The software allows stores to track sales, transactions, and customer traffic in fifteen-minute increments so that companies can fine-tune staffing levels, even within the same day, to meet workload fluctuations.<sup>71</sup> The effect of these scheduling policies and practices is to impose significant schedule rigidity, unpredictability, and instability on workers.

*i. Rigid Scheduling Practices.*

Rigidity is a problem for workers on both standard and nonstandard schedules. The very nature of “standard” work hours connotes rigidity, in that employees are generally required to report to and leave work at a set time. Workers in jobs requiring standard hours may not be able to control the timing of their work hours, adjust their starting and quitting times within a range of hours, or control their break times.<sup>72</sup> Their schedules can be very difficult to modify, either because of certain job requirements or because of supervisor expectations.<sup>73</sup> For these workers, adherence to a regular schedule is the norm, and deviating from this norm may require employers to rethink their performance measures and their overall

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Long Hours, Baltimore, Maryland (April 29–30, 2004), available at <http://www.cdc.gov/niosh/topics/workschedules/abstracts/dawson.html>

<sup>70</sup> *Kronos Targets Demand-Driven Workforce*, SOFTWAREMAG.COM (Sept. 26, 2006), <http://www.softwaremag.com/content/ContentCT.asp?P=3194>.

<sup>71</sup> Kris Maher, *Wal-Mart Seeks New Flexibility in Worker Shifts*, WALL ST. J., Jan. 3, 2007, at A1 (noting that many of Wal-Mart’s 1.3 million workers schedules will be moved to an unpredictable scheduling system in which a computer crunches an array of data to create employee’s schedules and aside from the scheduling headaches this system will have a similar impact on employee’s paychecks).

<sup>72</sup> See *Passing the Buck*, *supra* note 30.

<sup>73</sup> See Lambert & Henly, *supra* note 30; Julia R. Henly, H. Luke Shaefer & Elaine Waxman, *Nonstandard Work Schedules: Employer-and Employee Driven Flexibility in Retail Jobs*, 80 SOC. SERV. REV. 609 (Dec. 2006); Jennifer E. Swanberg, Jacquelyn B. James, Mac Werner, & Sharon P. McKechnie, *Workplace Flexibility for Hourly Lower-Wage Employees: A Strategic Business Practice Within One National Retail Firm*, 11 PSYCHOL.-MANAGER J. 5 (Mar. 2008).

management approach.<sup>74</sup> In general, these workers have very little opportunity for meaningful input into their work schedules.<sup>75</sup>

Employer adherence to routine, set schedules is a problem for some workers employed in jobs requiring nonstandard hours as well.<sup>76</sup> Some of these workers may work the same schedule from week to week with very little opportunity for input into that schedule (e.g., they may work a routine night shift or weekend shift).<sup>77</sup> Workers on unpredictable schedules who are notified of their schedules at the last minute may also experience rigidity in their inability to alter start and end times, or decide their break times.<sup>78</sup>

*a. Case In Point — Robert*

Robert is a single father of two and the primary caregiver for his elderly mother, who is in poor health. Robert works full-time as a receptionist; he answers phones and greets clients from 8:00 a.m. until 5:00 p.m. Until his mother got sick, she came in the mornings and stayed with the children until the school bus picked them up, so Robert could be at work on time. Since his mother has been sick, a neighbor has been watching the children in the mornings. But, the neighbor is occasionally late, making Robert late for work. During the past three weeks, Robert was late twice and also took several personal days off to take his mother to the doctor, for which Robert's supervisor gave him a "warning." Employees who receive three warnings are usually terminated. This situation is causing Robert a great deal of stress; he is worried that he could lose his job.

If Robert could adjust his start time to 8:30 he would likely be able to get his kids off to school and get to work on time. Unlike workers in many salaried positions, deviation from an employer-determined start time may result in threatened or actual job loss for many workers in low-wage hourly jobs.<sup>79</sup>

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<sup>74</sup> See Swanberg & James, et al, *supra* note 73 (suggesting that lower-wage and lower-income workers have fewer options and less access to flexible work arrangements than higher-wage and higher-income workers).

<sup>75</sup> See *id.* at 5 (suggesting for example that being able to even choose when (or to have some input) to take their breaks would provide needed workplace flexibility to low-wage workers).

<sup>76</sup> See Lambert & Henry, *supra* note 30, at 6–8.

<sup>77</sup> See *id.* at 7.

<sup>78</sup> *Id.*

<sup>79</sup> Dr. Jennifer Swanberg provided information about Robert from her field research on flexible work arrangements. To protect the anonymity of the people interviewed, all names have been changed.



*ii. Unpredictable Scheduling Practices.*

Workers in jobs with nonstandard schedules in many industries such as health care, retail, and hospitality may have routinely unpredictable schedules, receiving very little notice of their weekly work schedules. The requirement to work overtime with little or no notice or to work extra hours is another type of unpredictability that impacts both standard and nonstandard hourly workers.

*a. Case In Point — Karen*

Karen is a part-time package delivery person with a one-year-old. She is generally assigned four days of work per week, for one of two different daytime shifts. The particular days that she works change from week to week. She gets notice of the shifts and days she will work only a week ahead of time. Each week, after she receives notice of her work schedule, she calls friends and family to arrange her child care for the coming week. In the past year, she has been “written up” at work by her supervisor several times — at least once for missing work and a couple of times for being fifteen minutes late — all due to child care problems. Her supervisor is sympathetic to her situation, but he is required to report these infractions. Karen would love to work full-time, with a predictable set schedule. She has been in her “temporary” position for over one year; she believes she is being overlooked for full-time employment because of her child.

Having more notice of her schedule would allow Karen to line up her child care much further in advance, decreasing the likelihood of being unable to find child care at the last minute. Having more stable child care would allow her to get to work on time and reduce the chance of disciplinary action against her for being absent from or late to work.<sup>80</sup>

*iii. Unstable Scheduling Practices.*

Unstable scheduling practices are those in which work hours fluctuate by week, time of day, and length of shift. Workers in nonstandard jobs may be required to work a different schedule on different days, or the number of hours in their schedules may vary from day-to-day.<sup>81</sup> Instability also impacts workers in jobs requiring both standard and nonstandard schedules

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<sup>80</sup> The case illustrations provided for Karen and Sarah are descriptions of study participants in the Work and Family Transitions Project, a multi-year study funded by the National Institute of Mental Health, led by Dr. Maureen Perry-Jenkins, Ph.D., at the University of Massachusetts-Amherst. See M. Perry-Jenkins & J.A. Smith, *Blue-collar Blues: Work Conditions and the Mental Health of Dual-earner Parents*, Presentation at Annual Meeting of the National Council on Family Relations, Pittsburgh, PA (Nov. 2007) available at <http://www.umass.edu/wftp/pubs/pubs.html>.

<sup>81</sup> See Lambert & Henly, *supra* note 30, at 7.

who are subject to reduced work hours, temporary layoffs, or involuntary part-time work during slow periods.

*a. Case In Point — Sarah*

Sarah, a mother of four young children, works the night shift as a Certified Nursing Assistant three to four nights a week. The particular nights of the week that she works change from week to week. Her partner, Andrew, works full-time during the day and takes care of their children at night. When Sarah comes home from work at 7 a.m., she gets her five-, six-, and seven-year-old children off to school and is then home all day with her sixteen-month-old baby. Most days Sarah is home alone with the baby, and sleeps only when the baby is sleeping. Sarah arranged her work schedule this way, sacrificing both sleep and time with her partner to be available for her children. Ideally, she would like to secure a stable full-time job, but she has not been able to find one.

Although she has asked for a more regular schedule, Sarah has little, if any, control over which nights or how many hours she works each week. She struggles with a variable schedule and an unstable, fluctuating income.<sup>82</sup>

*b. Prevalence*

In the following sections, we augment analysis of the 2008 NSCW with synthesized data from existing reports to examine how the problems of rigidity, unpredictability, and instability play out for low-wage hourly workers on standard and nonstandard schedules and to identify, to the extent possible, the prevalence of each of these problems for low-wage hourly workers both types of schedules.

*i. Rigid Scheduling Practices*

To determine the frequency of rigid scheduling practices for low-wage hourly workers in both nonstandard and standard jobs we examined three factors: 1) workers' self-reported control over work hours generally, 2) workers' ability to choose start and end times, and 3) workers' ability to schedule their own breaks. (See Table 6).

Roughly half of low-wage hourly workers report having limited control over their work hours. Among those low-wage hourly workers in jobs with standard schedules, 51% of full-time and 42% of part-time workers report having "very little or no control over the hours that they work." Among those low-wage hourly workers in jobs with nonstandard schedules, 43% of full-time and 17% of part-time workers report having very little or no control over their scheduled hours.

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<sup>82</sup> See *supra* note 80.

Significant proportions of low-wage hourly workers also report that they cannot alter their start and end times. As indicated in Table 6, about two-thirds of full-time workers in jobs with standard schedules and three-quarters of full-time workers in jobs with nonstandard schedules have no choice in the start and end of their work day.

Overall, between 40-50% of low-wage hourly workers report experiencing the third indicator of rigid scheduling practices: being unable to determine break times while at work. Among workers in jobs with standard schedules, 42% of full-time and 39% of part-time workers cannot choose their break times. A slightly higher percentage of workers in jobs with nonstandard schedules have no control over their break times—50% of full-time workers and 45% of part-time workers.

Table 6: Rigid Scheduling Practices for Employees in Jobs with Standard and Nonstandard Hours

Rigid Scheduling Practice	Standard hours (n=317), %		Nonstandard hours (n=327), %	
	Full-time	Part-time	Full-time	Part-time
Very little to no control of start & quitting times	51.0	41.8*	42.7	16.9***
Unable to choose start/quit times	66.3	47.6*	75.8	49.2***
Among those who <i>cannot</i> choose start/quit times, but which they could <sup>^</sup>	72.9	70.0	67.8	56.5
Unable to change start/quit time on short notice when special needs arise.	18.2	23.8	25.5	12.5**
Unable to choose when to take breaks <sup>a</sup>	42	39	49.5	45

\*\*\* Statistically difference at p<.001; \*\* statistical difference at p.<.01; \* statistical significance at p.<.05. ^ n=201 standard workers and n=209 nonstandard workers. <sup>a</sup> This item is from the 2002 NSCW, as it was not included in the 2008 National Study of the Changing Workforce; n=368 for standard and nonstandard hours.

### ii. Unpredictable Scheduling Practices

Predictability of work schedules has been defined as the length of advance notice given to workers regarding the shifts they will be required to work.<sup>83</sup> We extend the meaning of predictability to include the requirement to work overtime or extra hours with little or no notice. To the best of our knowledge, no national data exists that directly examines the

<sup>83</sup> See Lambert & Henly, *supra* note 30, at 7.

prevalence of workers receiving their work schedules with little or no notice. Thus, to fully understand the scope of this scheduling challenge, we first turn to three leading research studies on scheduling and flexible workplace practices, and supplement this information using the 2008 NSCW Study to determine the prevalence of overtime hours being required with little or no notice.

*a. Last minute posting of schedules*

In a study led by Lambert of low-skilled, non-production jobs in seventeen major U.S. corporations in four industries (hospitality, airlines and packaging delivery, retail, and financial services), scheduling with little advance notice was a common practice in every industry.<sup>84</sup> Only three of the seventeen corporations gave more than a week's notice of schedules. The rest of the organizations posted schedules on Wednesday, Thursday, or Friday for a work week that began on Sunday, giving as little as two days' notice of schedules.<sup>85</sup> Lambert also observed that some workers in that study experienced unpredictability when they were called in to work at the last minute to respond to last minute fluctuations in business demand.<sup>86</sup>

Last-minute posting of schedules was common practice in another study of low-wage hourly workers in a Fortune 100 retail company.<sup>87</sup> Across multiple stores located in geographically disparate regions in the country, the average length of notice of work schedules that these workers received was seven days.<sup>88</sup>

Finally, in a study of thirty-two companies across a broad range of industries, unpredictable schedules were more common in service industries (e.g., retail, financial, and food service, and less common in manufacturing industries).<sup>89</sup>

*b. Last minute overtime or extra hours requirement*

Unpredictable scheduling also includes a requirement to work overtime or extra hours with little or no notice. Overall, overtime requirements appear to be common among low-wage hourly workers in jobs with both standard and nonstandard schedules, though overtime is slightly more prevalent among workers in jobs with nonstandard schedules. As noted in Table 8, 31% of full-time and 19% of part-time hourly low-wage workers

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<sup>84</sup> *Passing the Buck*, *supra* note 30, at 1203.

<sup>85</sup> *Id.* at 1217.

<sup>86</sup> *Id.* at 1218.

<sup>87</sup> Swanberg et al., *CitiSales: Intro*, *supra* note 30, at 3.

<sup>88</sup> *Id.* at 4.

<sup>89</sup> Phillip Moss, Hal Salzman & Chris Tilly, *When Firms Restructure—Understanding Work-Life Outcomes*, in *WORK AND LIFE INTEGRATION IN ORGANIZATIONS: NEW DIRECTIONS FOR THEORY AND PRACTICE* (Susan Lambert & Ellen Kossek eds., 2005).

on standard schedules are regularly required to work extra hours with little or no notice, while the same is true of about 36% of full-time workers and 27% of part-time workers on nonstandard schedules. Among low-wage hourly workers who are regularly asked to work overtime or extra hours, about 58% of full-time and 14% of part-time workers on standard schedules and 43% of full-time and 24% of part-time workers on nonstandard schedules must work overtime or extra hours to avoid negative consequences.

Table 8: Unpredictable Work Schedules

Unpredictable Work Schedules	Standard hours (n=318) %		Nonstandard hours (n=329) %	
	Full-time	Part-time	Full-time	Part-time
Required to regularly work extra hours with little or no notice	31.27	18.6	36.02	27.3
Among those regularly required to work extra hours, those unable to refuse it without negative consequences.	23.7	4.6**	21.6	12.6**

\*\*\* Statistically difference at  $p < .001$ ; \*\* statistical difference at  $p < .01$ ; \* statistical significance at  $p < .05$ . Regularly is characterized as working overtime/extra hours weekly or more, 2-3 times a month or monthly.

### iii. Unstable Scheduling Practices

We use the term unstable work schedules to refer to work schedules that fluctuate in hours by week, time of day, and/or length of shift. Unstable work schedules make it difficult for workers to plan for their personal or family expenses, as well as schedule their personal logistics, like child care. We also include in our definition of unstable work schedules the reduction of work hours when work is slow, and the incidence of part-time work among those who express a preference for full-time hours.

To determine the prevalence of schedule fluctuations in the low-wage hourly workforce, we refer to three research studies, and we use the 2008 NSCW Study to examine related dimensions of this problem.

#### a. Fluctuating schedules

The Citisales Study, a study of workplace flexibility practices at one U.S. retailer, found that 41% of hourly workers reported working the same



days and shifts each week, and 50% reported working the same days each week.<sup>90</sup> Therefore, 50% of the employees had their shifts change from week to week, while the days that they worked stayed the same; while for 59% of employees, both their shifts and the days that they worked changed weekly.<sup>91</sup>

*b. Involuntary reduction of hours*

The second dimension of schedule instability is involuntary reduction in work hours. The reduction of work hours when work is slow is a problem for both standard and nonstandard hourly workers, as well as for part-time and full-time workers. As noted in Table 9, between 20-30% of part-time workers on standard hourly schedules, and full- and part-time workers on nonstandard hourly schedules report this problem.

Workers occasionally have their hours cut during a work shift. In Dr. Lambert's previously described study, employers often sent workers home when work was slow. Dr. Lambert found that newly hired workers and part-time workers were more likely to be subjected to reductions in the number of hours for which they were previously scheduled to work and to "just-in-time scheduling practices" than other workers.<sup>92</sup>

*c. Involuntary part-time work.*

Low wages, combined with involuntary part-time work, leave many workers with very little take-home pay at the end of the week or month. Assuming that the number of part-time workers who would prefer to work full-time is a fair measure of involuntary part-time work, analysis of the 2008 NSCW indicates that approximately 49% of low-wage hourly part-time workers in jobs with standard schedules and 24% of low-wage hourly part-time workers in jobs with nonstandard schedules would prefer to work full-time. (See Table 9).

These results are consistent with findings from the CitiSales Study that found that 33% of full-time and 43% of part-time workers would like to work more hours. The most common reasons workers gave for not working more hours at CitiSales are that "more hours are not available" and "schedule offerings do not fit with my family responsibilities."<sup>93</sup>

However, we anticipate that these percentages would be higher today, given the still-elevated unemployment rate as the country recovers from the

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<sup>90</sup> See *id.* at 4.

<sup>91</sup> See *id.* (here the author draws a mathematical conclusion from the data).

<sup>92</sup> *Passing the Buck*, *supra* note 30, at 1218, 1222.

<sup>93</sup> Jennifer E. Swanberg (2011) (unpublished data from the CitiSales Study) (on file with authors).

recent recession.<sup>94</sup> Indeed between 2007 and 2009 the number of involuntary part-time workers nearly doubled, as reported by the Economic Policy Institute.<sup>95</sup> More recent figures on involuntary part-time work from the United States Bureau of Labor Statistics show that, as of February 2013, nearly eight million people were employed in part-time jobs for economic reasons, defined as either slack work or business conditions, or only being able to find a part-time job.<sup>96</sup>

Table 9: Scheduling Instability

Scheduling Instability	Standard hours (n=318) %		Nonstandard hours (n=329) %	
	Full-time	Part-time	Full-time	Part-time
Regularly required to work extra hours without notice <sup>^</sup>	31.27	18.6	36.02	27.3
Among those regularly required to work extra hours, those unable to refuse it without negative consequences.	23.7	4.6**	21.6	12.6**
Part-time workers who would prefer to work full-time		48.8		23.7***

\*\*\* Statistically difference at  $p < .001$ ; \*\* statistical difference at  $p < .01$ ; \* statistical significance at  $p < .05$ . <sup>^</sup>Regularly is characterized as working overtime/extra hours weekly or more, 2-3 times a month or monthly.

### III. SOLVING THE PROBLEM — THE FLEXIBLE WORKPLACE SOLUTIONS FRAMEWORK

The challenges of rigidity, unpredictability, and instability are common among low-wage hourly workers. For workers on standard schedules, the primary problem appears to be rigid scheduling practices, with some

<sup>94</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNEMPLOYMENT RATE, AVAILABLE AT *available at* <http://data.bls.gov/timeseries/LNS14000000> (documenting the highest unemployment rate for the last five years as 10% in October 2009 and the lowest unemployment rate during that same time period as 7.7% in February 2013).

<sup>95</sup> Heidi Shierholz & Lawrence Mishel, *Highest Unemployment Rate Since 1983*, ECON. POL'Y INST., Figure C (June 16, 2009), *available at* [http://www.epi.org/publications/entry/jobspict\\_2009\\_july\\_preview](http://www.epi.org/publications/entry/jobspict_2009_july_preview) (referencing the growth of underemployment from Dec 2007 to April 2009).

<sup>96</sup> Table A-8. *Employed persons by class of worker and part-time status*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *available at* <http://www.bls.gov/news.release/emps.it08.htm>. (last updated July 6, 2012).

workers also experiencing unpredictable schedules through last-minute mandatory overtime or extra hours. Workers on nonstandard schedules may face all three of these challenges. The Flexible Workplace Solutions Framework lays a foundation for developing and categorizing solutions to each of these problems that will be meaningful for workers in jobs requiring both standard and nonstandard schedules.

Table 10: The Flexible Workplace Solutions Framework

Scheduling Challenges	Flexible Workplace Solutions
<p style="text-align: center;"><b>Rigidity</b></p> <ul style="list-style-type: none"> <li>• Lack of control in scheduling work hours, including overtime or extra work hours</li> <li>• Lack of input into starting and quitting times</li> <li>• Lack of control over break times</li> </ul>	<p style="text-align: center;"><b>Flexibility</b></p> <p>Opportunities for meaningful input into work schedules</p> <ul style="list-style-type: none"> <li>• The ability to have schedule preferences taken into account, including:</li> <li>• To work or not work particular shifts</li> <li>• To alter start and end times</li> <li>• To work or not work overtime or extra work hours</li> <li>• To take breaks at certain times</li> </ul>
<p style="text-align: center;"><b>Unpredictability</b></p> <ul style="list-style-type: none"> <li>• Regularly receiving work schedules with little or no advance notice</li> <li>• Requiring overtime or extra hours with little or no notice</li> </ul>	<p style="text-align: center;"><b>Predictability</b></p> <ul style="list-style-type: none"> <li>• Providing work schedules (including overtime schedules) in advance</li> <li>• Minimizing changes to previously assigned schedules</li> </ul>
<p style="text-align: center;"><b>Instability</b></p> <ul style="list-style-type: none"> <li>• Fluctuations in work hours by week, time of day, and length of shift</li> <li>• Being subject to reductions in work hours when work is slow</li> <li>• Involuntary part-time work (defined as working part-time but desiring more work hours)</li> </ul>	<p style="text-align: center;"><b>Stability</b></p> <ul style="list-style-type: none"> <li>• Providing a consistent number of hours from week to week or month to month</li> <li>• Guaranteeing a certain proportion of hours or shifts</li> <li>• Giving new employees notice of how many hours of work will be assigned</li> </ul>

Below we provide a number of business examples of flexible workplace solutions in practice, categorized by type of solution: providing opportunities for meaningful input into scheduling, providing more predictable schedules, and providing more stable schedules. In practice,

however, flexible workplace solutions are often bundled together. For this reason, some of the real-world examples we present incorporate more than one type of flexible workplace solution identified in Table 10.

*A. Flexible Workplace Solution: Provide opportunities for meaningful input into work schedules*

Employers can lessen rigidity in scheduling practices by providing employees with opportunities for meaningful input into work schedules.

We note, however, that past efforts to provide greater employee input into scheduling have often resulted in workers being scheduled for fewer hours or less desirable shifts.<sup>97</sup> Thus, regardless of which avenue for including employee input an employer might choose, the employer needs to build in appropriate safeguards for the employee making the request. There are a number of different ways to do this.<sup>98</sup>

**1. Establish a formal process for considering employee requests.**

Some employers have instituted a formal policy by which workers may ask for a flexible work arrangement.<sup>99</sup> Management retains the discretion to refuse these requests, but the policy is designed to provide a level of categorical availability to employees—i.e., assuring that eligible workers can request FWAs—and to allow the employer to respond to requests in a manner that addresses its business needs and achieves a mutually beneficial result. In some companies, a worker may request a FWA regardless of his or her reason or position in the company.<sup>100</sup> Management approves or

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<sup>97</sup> In study of 139 retail store managers, for example, Susan Lambert found that 79% of the store managers surveyed either agreed or strongly agreed with the statement “give more hours to sales associates who have greater availability.” See *Hourly Jobs*, *supra* note 30, at 24.

<sup>98</sup> Susan Lambert and Julia Henly suggest the following interventions to provide workers with greater flexibility (which they define as the “amount of control workers have over the number and timing of their work hours”): “Allow workers input into their work schedule without reducing the number of hours they work; Clarify and codify flexibility options so that all workers have equal access to a schedule that fits their needs.”; see also *CitiSales: Business Benefits*, *supra* note 30, at 5 (recommending that employers conduct internal surveys and focus groups or form “workplace flexibility committees” to gather input) and *Flexible Work Arrangements*, *supra* note 30, at 17-19 (reviewing advice from employers with established flexible work arrangement programs).

<sup>99</sup> The description of these policies comes from interviews that Workplace Flexibility 2010 (part of Corp. Voices for Working Families) staff undertook with various companies in summer 2005. See, e.g., *Business Impacts of Flexibility*, *supra* note 14 at 27; E. Sheley, *Flexible Work Options Beyond 9 to 5*, HR MAG. 41.2, Feb. 1996, at 52-59 (suggesting that the trend is moving away from informal and towards formalized programs for flexible work arrangements).

<sup>100</sup> See *Business Impacts of Flexibility*, *supra* note 14, at 27.

denies the request, often based solely on work-related needs and not based on the merits of the employee's reason for requesting flexibility. Denials of such requests are usually reviewed either by a company's Human Resources Department or through a company's standard employee appeal process.

Anational retail firm that was the focus of the CitiSales Study has three established flexible practices designed to give employees more control over their schedules: 1) Managers allow workers to indicate specific days, shifts, and hours that they prefer to work, as well as preferences for a set routine schedule; 2) managers offer workers "pre-planned scheduled modifications" that give workers the opportunity to request that they not be scheduled for a particular day or shift prior to the creation of the weekly schedule; and 3) just-in-time scheduling changes permit employees to request changes to the existing schedule by having someone cover a particular shift or swapping a shift with a co-worker. Managers report that offering these types of "flexible practices" reduces work-family conflict, employee stress, turnover, absenteeism, and presenteeism (i.e., reporting to work sick), while also enhancing employee engagement. In addition, managers report that flexibility is a good recruitment tool.<sup>101</sup>

**2. Promote team scheduling.** Through team scheduling, results-oriented workplace teams set their own performance goals, which meet the employer's goals and objectives, and then set schedules that allow employees to both meet those goals and meet the individual needs of team members.

The BOLD (Business Opportunities for Leadership Diversity) Initiative is one example of a team-based, results-focused approach to scheduling in which employee teams work together to determine how and when to get the work done. The BOLD approach, pioneered by Bea Fitzpatrick and Harvey Thompson, assumes that employers and employees have a shared need for flexibility, and that productivity will be enhanced by implementing a team-based approach to meeting this need. The BOLD Initiative, which is funded by the Alfred P. Sloan Foundation,

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<sup>101</sup> See *Flexible Work Arrangements*, *supra* note 30 at 15 (finding that many companies use flexible work arrangements not because they're "nice to have," but because they help recruit); see also *Business Impacts of Flexibility*, *supra* note 14 at 14-15.

has been implemented at the Chubb Corporation, Gannett, Nextel, PepsiCo, Johnson & Johnson, and Prudential, among others.<sup>102</sup>

3. **Enlist employee input.** Before making significant schedule changes that will impact its employees, employers can enlist the input of their employees either through key employee interviews or focus groups.

The IKEA Savannah Distribution Center convenes focus groups of co-workers (which is how IKEA refers to its workers) to discuss business and other concerns affecting IKEA co-workers and their families. In particular, changes to the method of scheduling workers are often first discussed in focus groups. (IKEA Distribution Centers receive goods from suppliers for shipment to IKEA home good stores.)<sup>103</sup>

4. **Offer shift-swapping.** When employees are not able to work the shift to which they are assigned, shift-swapping policies can allow employees to find a peer replacement. Shift-swapping is mainly beneficial to employees after schedules are posted, or when last-minute needs prevent them from working an assigned schedule. Shift swaps are commonly provided in collective bargaining agreements.<sup>104</sup> Generally, the agreements provide that the trades or swaps be approved by the employee's supervisor.<sup>105</sup> Many of the agreements set other limitations, such as requiring swapping employees

<sup>102</sup> Harvey A. Thompson & Beatrice A. Fitzpatrick, *Flexible Work Arrangements: A Productivity Triple Play*, THE BOLD INITIATIVE, 10 (2006), available at <http://www.sigmasoft.com.ph/download/public/whitepapers/06FlexibleWorkArrangements.pdf> (explaining that all team members' needs for flexible schedules are considered equally important).

<sup>103</sup> *Georgetown Law Community Policy Forums, Highlights from Savannah, GA, WORKPLACE FLEXIBILITY 2010 2*, available at <https://www.google.com/url?url=http://workplaceflexibility2010.org/images/uploads/Savannah%2520Highlights.pdf&rct=j&sa=U&ei=50o5T6e0IubV0QGbrbnEAg&ved=0CDgQFjAD&sig2=NAdXe4bQRgbSD99IVWajA&q=ikea+workplace+flexibility&usg=AFQjCNFnSe14UywFNNcdwgrXiAE1Rh3Q6g&cad=rja> (describing IKEA's Human Resource strategies to strengthen the commitment of their low-wage workers).

<sup>104</sup> *Flexpack: A Toolkit on Organizing, Bargaining, and Legislating for Worker-Controlled Flexibility*, LABOR PROJECT FOR WORKING FAMILIES 10, available at [www.working-families.org/publications/flexpack.pdf](http://www.working-families.org/publications/flexpack.pdf) (describing the shift-swap language in the bargaining agreement of ATU Local 192); Lea Grundy & Nesty Firestein, *Work, Family, and the Labor Movement*, LABOR PROJECT FOR WORKING FAMILIES 19 (1997), available at [www.working-families.org/publications/workfamily\\_labormovement.pdf](http://www.working-families.org/publications/workfamily_labormovement.pdf) (noting that unions negotiate contracts with a variety of FWA options).

<sup>105</sup> See SHIFT SWAP, LEARN WORK-FAMILY, <http://www1.websearchstudio.net/scripts/ws.dll?websearch&site=LPWF> (providing shift swap contract language from 8 collective bargaining agreements).



to be in the same job classification, limiting the number of swaps that an employee may engage in per month, and stating that swaps are only permissible if they do not result in the employer incurring additional overtime payment obligations.

**5. Promote cross-training.** Cross-training employees creates a sizable pool of employees who are available to cover for an employee who cannot work an assigned shift. Cross-training employees also benefits the employer, who is less likely to be short-staffed on occasions when some employees need to be absent from work if employees are able to fill in for each other. Likewise, cross-training may allow employees to work more hours and have more income. For example, if a restaurant employee who typically works as a server is not needed due to slow customer traffic, that employee might be able to fill in where there is another need in the restaurant (e.g., hosting, taking phone reservations, and assisting in the kitchen).

A team in the economics department from the Harvard Union of Clerical and Technical Workers cross-trained so that each was able to cover the others' work to promote greater flexibility for employees and improved staff coverage for the employer. As a result, the assistants had much greater flexibility in the shifts that they worked, and the professors and graduate students with whom they worked had better staff coverage because if one of the assistants was not working at any given time, the others could still get the work done.<sup>106</sup>

**6. Provide workers with more choice in whether and when they work overtime or extra hours.** Rather than requiring employees to work scheduled overtime or extra hours, employers can try to increase the likelihood that these hours are distributed to employees who want them, rather than to those for whom it is a burden, by first seeking volunteers before requiring any particular employee to work overtime or extra hours. Establishing policies that permit employees to refuse overtime or extra hours without being penalized, or to refuse overtime for particular reasons—e.g., family emergency or other caregiving responsibilities—is another way to give employees input into their schedule.

Some collective bargaining agreements provide opportunities for employees to indicate their preferences for overtime shifts. An American Federation of State, County and Municipal Employees (AFSCME)

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<sup>106</sup> Interview with Kris Rondeau, Founder, Harvard Union of Clerical and Technical Workers (Dec. 11, 2009).

agreement with the state of Delaware allows employees to indicate their overtime availability and shift preferences in an overtime book that is distributed on a rotating seniority basis.<sup>107</sup> A collective bargaining agreement from the La Salle County Highway Department allows employees to be excused from mandatory overtime for illness, family emergency, or an approved leave of absence.<sup>108</sup> A collective bargaining agreement between the California Nurses Association and Mills Peninsula Hospital states that nurses will not be penalized for refusing to work overtime assigned on short notice, and that mandatory overtime will not be assigned unless a disaster or emergency is declared by government officials.<sup>109</sup>

**7. Computerized self-scheduling systems.** Numerous corporations are already leveraging technology to facilitate flexible work for low-wage hourly workers. Computerized self-scheduling systems allow employees to remotely adjust their schedules, responding to obligations as they arise.

JetBlue, J.C. Penney, and Kraft Foods all use variations of online self-scheduling through which an employee can input scheduling preferences, remotely access scheduling information, and electronically contact co-workers with shift change requests. Such programs allow employees to manage their schedules efficiently, even away from the office or worksite, cut down on time managers spend adjusting posted shifts, and foster cooperation in team-based positions.<sup>110</sup>

**8. Train managers on how to respond to scheduling requests.** Training managers to reduce work-family conflict and respond to scheduling preferences has been shown to yield significant positive outcomes for employees. Since implementing innovative scheduling practices is often at the supervisor's or manager's discretion, we recommend that supervisors and managers receive training on the business case for FWAs and how to think creatively about giving employees input into their assigned schedule.<sup>111</sup>

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<sup>107</sup> See *AFSCME & State of Delaware CBA*, LEARN WORK-FAMILY (on file with authors).

<sup>108</sup> LASALLE COUNTY HIGHWAY DEPARTMENT, LEARN WORK-FAMILY (on file with authors)

<sup>109</sup> See *CBA of the California Nurses Association*, LEARN WORK-FAMILY (on file with authors).

<sup>110</sup> See *Workplace Flexibility*, *supra* note 30, at 24–25 (noting the benefits of self-scheduling systems at PNC Bank and JC Penney).

<sup>111</sup> See *Flexible Work Arrangements*, *supra* note 30 at 17 (noting that companies with flexible work arrangements emphasize the importance of training the supervisors).

Training line managers paid big dividends in a grocery store setting. In a study of grocery store managers' supervision practices, Dr. Ellen Kossek provided grocery store managers with training in Family Supportive Supervisor Behaviors, including computer-based tutorial quizzes, face-to-face discussion, and supervisor daily self-monitoring. Employees reported significant benefits from this training, including "higher levels of physical health; higher levels of participation in safety programs; higher levels of perceptions of family supportive supervisor behaviors; higher levels of job satisfaction; lower levels of work-family conflict; and lower levels of turnover intentions."<sup>112</sup>

**9. Train employees on how to negotiate schedules.** Providing meaningful input into scheduling requires that employees understand the scheduling process, are realistic about their requests, and feel empowered to make requests for schedule changes. This can be done through tip sheets, at employee orientation, or during other regularly scheduled employee training. In unionized workplaces, unions can play an important role in training union representatives and other employees in how to negotiate for flexible schedules.<sup>113</sup> A recent issue brief by Kossek and Berg found that a union's support for flexibility was positively associated with access to flexibility.<sup>114</sup> Kossek and Berg concluded that "supporting worker negotiations with their supervisors or helping them with their schedules makes a significant impact on the ability of workers to get access to flexible schedules."<sup>115</sup>

Corporate Voices for Working Families and WFD Consulting

<sup>112</sup> See Ellen Kossek & Leslie Hammer, *Family Supportive Supervisory Behaviors (FSSB) Intervention Study: Effects on Employee's Work, Family, Safety, & Health Outcomes* (2008), available at

[http://ellenkossek.lr.msu.edu/documents/Feedback\\_Report\\_Final\\_000.pdf](http://ellenkossek.lr.msu.edu/documents/Feedback_Report_Final_000.pdf)

<sup>113</sup> See Peter Berg & Ellen Ernst Kossek, *Fostering Flexible Work Environments Beyond the Collective Bargaining Agreement*, THE SUSTAINABLE WORKFORCE INITIATIVE 1, available at

[www.thesustainableworkforce.org/images/stories/briefs/issue%20brief%202%20newrevised.pdf](http://www.thesustainableworkforce.org/images/stories/briefs/issue%20brief%202%20newrevised.pdf) (describing how unions help workers resolve scheduling conflicts); see also

Nicola Dones & Netsy Firestein, *Labor's Participation in Work/Family Issues: Successes and Obstacles*, LABOR PROJECT FOR WORKING FAMILIES 8, available at [www.working-families.org/publications/labor\\_participation.pdf](http://www.working-families.org/publications/labor_participation.pdf) (identifying the need for a clearly expressed "bottom-up" mandate from members around work and family provisions).

<sup>114</sup> See Berg & Kossek, *supra* note 113.

<sup>115</sup> *Id.* Examples of union-negotiated flexibility can be found on the LEARN WORKFAMILY website, available at <http://www.learnworkfamily.org>.

developed a toolkit with advice for employees about negotiating flexible schedules. Tips for employees include being specific about the FWA desired, but also a willingness to be flexible if there are days or times when the particular negotiated FWA does not work; thinking through the employee's job requirements and what types of flexibility would work well; focusing on business results and continuing to meet performance expectations; communicating regularly with managers and co-workers about schedule changes; and soliciting feedback.<sup>116</sup>

*B. Flexible Workplace Solution: Provide advance notice of scheduling*

Employers can provide more predictable work schedules by giving employees as much advance notice of work schedules as is feasible, and by making efforts to minimize last-minute overtime or extra work hours assigned at the last minute.<sup>117</sup>

1. **Advance notice of regular work schedules.** Instead of providing minimal advance notice of work schedules, employers could give employees as much notice as possible, such as posting work schedules (or a portion of each employee's work schedule) one month at a time. Employers can also take steps to minimize changes to schedules once assigned.

An ongoing study by Lambert and Henly demonstrates that posting schedules one month in advance has led to promising results, as demonstrated in<sup>118</sup> In this study at a leading retail chain, Lambert and Henly are analyzing the effects of making work schedules more predictable by providing one month's notice of schedules.<sup>119</sup> Most managers at the retail chain had been posting schedules on a Tuesday for a workweek beginning on Sunday, despite receiving their staffing hours one month ahead of time. Through the intervention developed

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<sup>116</sup> See *Tips & Strategies for Successful Flexible Work Arrangements & Occasional Flexibility*, WFD CONSULTING, CORP. VOICES FOR WORKING FAMILIES 2 available at [www.cvworkingfamilies.org/system/files/e\\_strategies.pdf](http://www.cvworkingfamilies.org/system/files/e_strategies.pdf) (listing helpful tips for hourly employees proposing flexibility to their employers.); see also *Tips for Proposing a Flexible Work Arrangement*, available at [http://www.cvworkingfamilies.org/system/files/e\\_proposing\\_arrangement.pdf](http://www.cvworkingfamilies.org/system/files/e_proposing_arrangement.pdf).

<sup>117</sup> Susan Lambert and Julia Henly suggest the following interventions to provide greater advance notice to employees: "Provide work schedules to employees with greater advance notice; Curb adjustments to posted schedules." See Lambert & Henly, *supra* note 30, at 6.

<sup>118</sup> See *Making a Difference for Hourly Employees*, *supra* note 30, at 18-20 (quoting managers who found that posting schedules one month in advance was more efficient).

<sup>119</sup> See *id.* at 18-20.

by Lambert and Henly, managers changed their practices to post schedules one month in advance.<sup>120</sup> Although results from the experimental component of the study are not yet available, employee survey results indicate that employees with less predictable work schedules had higher levels of stress, greater work-family conflict, and more interferences with non-work activities such as scheduling doctor's appointments, socializing with friends, and eating meals together as a family.

**2. Advance notice of changes to previously assigned schedules.** Providing employees with advance notification of changes to assigned schedules, such as last-minute overtime or extra work hours requirements, can ease work-family conflict for employees. Some collective bargaining agreements require advance notice of schedule changes.

A collective bargaining agreement (CBA) between the Coalition of University Employees and the University of California requires five days' advance notice for a period of less than four workweeks in duration and twenty days' advance notice for a period of four workweeks or more in duration.<sup>121</sup> The CBA makes an exception for twenty-four-hour operations. Another CBA requires posting changes in work schedules at least ten days in advance, except in emergencies.<sup>122</sup>

*C. Flexible Workplace Solution: Provide schedule stability*

**1. Provide a minimum number of hours that workers will be assigned to work each week, month, or year.** Consistency in the number of hours employees are scheduled to work during set pay periods offers them some income stability and a greater personal economic security. One strategy to ensure this consistency is for employers to provide workers with a minimum number of hours per pay period or another designated length of time.

About half of Costco employees work full-time schedules, and virtually all part-time employees are provided with a minimum of twenty-four hours per week. The average part-time worker actually works thirty to

<sup>120</sup> Details of the Work Scheduling Study's methodology and key findings can be found at <http://ssa-archive.uchicago.edu/faculty/work-scheduling-study.shtml>.

<sup>121</sup> *Coalition of University Employees and University of California CBA*, LEARN WORKFAMILY (2003) (on file with authors).

<sup>122</sup> *SEIU and City of Oakland, 2002 to 2008*, LEARN WORKFAMILY, (on file with authors).

thirty-one hours per week. Schedules are posted a minimum of one week in advance, and managers try to maintain work schedules as consistently as possible, giving the same shifts and days off during the week, to the extent possible consistent with business needs. Ninety percent of hourly employees are provided with health insurance benefits. Using these strategies, Costco has achieved very low turnover rates of between ten and 15% per year, in an industry known for extremely high turnover.<sup>123</sup>

**2. Allow employees to supplement their hours by working at multiple employer locations.** As a strategy to minimize a reduction in employee work hours and provide consistency in the number of hours worked per pay period, firms with multiple locations could allow employees to work in more than one location in the event that an employee's usual number of work hours cannot be met at only one employer location.

In the CitiSales Study, a retail employer allowed its workers to work at multiple store locations so that workers could increase their work hours when store traffic at a single location was too slow to provide employees with sufficient hours.<sup>124</sup>

**3. Provide employees with certain guaranteed shifts or guaranteed days, even if the entire week is not guaranteed.**<sup>125</sup> Greater stability in low-wage workers' schedules allows employees to more effectively manage both their lives outside of work and their income. One way to accomplish this stability is to guarantee workers a partially set schedule in which a proportion of work hours is guaranteed to be the same weekly, or to guarantee work on certain days or shifts.<sup>126</sup>

At the IKEA Savannah Distribution Center, hourly co-workers are told when hired that they will work between thirty-two and fifty hours per week, depending on business needs including sales and other factors. These co-workers are scheduled for one of three types of schedules each

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<sup>123</sup> Transcript of Audio Conference by the Center for Law and Social Policy with Mike Brosius, Assistant Vice President of Human Resources, Costco, *Scheduling Hourly Workers in A Just in Time World: Can Employees and Employers Sync the Clock?*, at 2-8 (Dec. 11, 2009), available at [http://www.clasp.org/admin/site/publications/files/CLASP\\_121109-2-DS.pdf](http://www.clasp.org/admin/site/publications/files/CLASP_121109-2-DS.pdf)

<sup>124</sup> Swanberg & James *CitiSales Study: Issue Brief 2: What is Workplace Flexibility for Hourly Retail Workers?* 4 (2009), available at [www.uky.edu/Centers/iv/citisales/\\_pdfs/IB2-HourlyWorkers.pdf](http://www.uky.edu/Centers/iv/citisales/_pdfs/IB2-HourlyWorkers.pdf)

<sup>125</sup> See Lambert & Henly, *supra* note 30, at 6.

<sup>126</sup> See *id.*



week: a 3x10 (30 hours), 4x10 (40 hours), or 5x10 (50 hours). (5x10s usually only occur during particularly busy seasons, such as summertime.) When IKEA moved to this scheduling system, it asked co-workers to indicate their preferences for particular days and shifts within each of these three types of schedules, allowing co-workers to have greater stability in their days and shifts of work. These schedules are assigned three weeks in advance, including, to the extent possible, overtime hours. IKEA seeks volunteers for any overtime assigned with less than the usual notice period, and then gives as much notice as possible.<sup>127</sup>

#### D. The Business Case for Providing Workplace Flexibility to Low-Wage Hourly Workers

Although a number of reports have described a robust business case for workplace flexibility in general, until recently there was almost no research documenting the business case for providing workplace flexibility to low-wage hourly workers.<sup>128</sup> Here, we synthesize and summarize results from the leading reports, and discuss some of the challenges to businesses' implementation of workplace flexibility to low-wage hourly workers.

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<sup>127</sup> See *id.* at 6. In this report we profile IKEA's Savannah Distribution Center's scheduling practices for providing workers with greater stability and input into their schedules. Of course, a large, multi-site employer's practices may vary significantly by location. As one example of this, IKEA's Danville, Virginia production site was recently profiled for having scheduling practices that were very difficult for workers, including unpredictable work schedules, mandatory overtime and disciplinary action for those who could not work schedules assigned at the last minute. See Nathaniel Popper, "IKEA's U.S. Factory Churns Out Unhappy Workers," *LA Times*, April 10, 2011.

<sup>128</sup> For reports discussing the business case for workplace flexibility, see also Victor et al., *supra* note 30, at 1 (documenting increased quality of personal life for employees, increased job satisfaction, and engagement, and increased employee retention), *Business Impacts of Flexibility*, *supra* note 14, at 4 (documenting the positive correlation between flexible work programs and job satisfaction, job commitment, employee engagement, lower stress levels, innovation, customer retention, shareholder value, productivity, and client service), and Joan Williams & Penelope Huang, *Improving Work-Life Fit in Hourly Jobs*, THE CTR. FOR WORKLIFE LAW 4 (2011), available at <http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf> (noting businesses can decrease absenteeism, lower turnover rates, increase productivity, and improve employee engagement by improving the "schedule effectiveness").

### 1. Flexibility for Low-Wage Hourly Workers Improves Recruitment and Retention, Employee Engagement, and Well-Being

Workplace flexibility for low-wage hourly workers improved employee retention in industries with typically high turnover like sales and customer service,<sup>129</sup> reducing recruitment and training costs of new employees.<sup>130</sup>

Job commitment was 63% higher among low-wage employees who felt their managers provided sufficient flexibility to meet their personal and family responsibilities than among workers who felt their managers did not.<sup>131</sup>

### 2. Flexibility for Low-Wage Hourly Workers Benefits the Bottom Line

The studies' overall consensus is that providing flexibility for low-wage hourly workers reduced absenteeism, enhanced customer service, and led to higher profits. The studies found that providing flexibility was cost-neutral. Employee use of flexibility resulted in significant savings because it reduced both overtime hours worked and costs resulting from unscheduled absences.<sup>132</sup> Flexibility for low-wage workers led to a return on investment equal to, if not greater than, the return on investment associated with providing flexibility to other workers.<sup>133</sup>

### 3. Flexibility for Low-Wage Hourly Workers Poses Some Challenges for Business

The studies report several types of challenges, including: Management's mistrust of employees, concern about needing to control hourly workers, and fear of increased costs of providing flexibility.<sup>134</sup> The studies also describe employer concerns about whether offering flexibility to employees would jeopardize the quality and continuity of customer service, and about

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<sup>129</sup> See Bond & Galinsky, *Workplace Flexibility*, *supra* note 30, at 17.

<sup>130</sup> See RICHMAN & BURRUS, ET AL., *supra* note 30, at 5 (noting that employers use flexibility as a tool to reduce costs and use of HR resources).

<sup>131</sup> See Bond & Galinsky, *Workplace Flexibility*, *supra* note 30, at 16.

<sup>132</sup> See RICHMAN & BURRUS ET AL., *supra* note 30, at 30.

<sup>133</sup> See, e.g. Bond & Galinsky, *Workplace Flexibility*, *supra* note 30, at 15–16 (suggesting that implementation of flexible work arrangements may have more of an impact on low-wage workers because of the current extreme lack of flexibility in low-wage work).

<sup>134</sup> Bond & Galinsky, *Workplace Flexibility*, *supra* note 30, at 19 (listing employers' perceived and real challenges of flexible work arrangements in low-wage work).

the need to balance employee requests with the needs of the company.<sup>135</sup> In addition, some employers have questions about how to implement FWAs for non-exempt workers while complying with the requirements of the Fair Labor Standards Act (FLSA).<sup>136</sup>

#### 4. Unions are making progress in implementing flexibility for low-wage hourly workers

A growing body of literature examines how FWAs work in union settings.<sup>137</sup> Identifying strategies to successfully implementing flexibility in the union context—either through formal collective bargaining or informal “shop floor” negotiations—is an important addition to the business case.<sup>138</sup> Identifying barriers to FWAs in union settings is also important.

Further research in union settings is warranted to better understand employer challenges, and develop strategies for overcoming management resistance. Likewise, much more could be done to document the return on investment of providing flexibility to low-wage hourly workers in a variety of jobs and industries.

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<sup>135</sup> See RICHMAN & BURRUS, ET AL., *supra* note 30, at 43 (noting that Marriott managers sometimes struggle to balance flexible work options while also attending to customer service needs); see also *Business Impacts of Flexibility*, *supra* note 14, at 22.

<sup>136</sup> See *Flexible Work Arrangements*, *supra* note 30, at 7 (introducing a common question among employers: How to have a flexible company that responds to the global economy while ensuring fair labor standards?).

<sup>137</sup> See, e.g. *Bargaining Fact Sheet: Control Over Work Hours*, LABOR PROJECT FOR WORKING FAMILIES available at [www.working-families.org/network/pdf/factsheets/workhours.pdf](http://www.working-families.org/network/pdf/factsheets/workhours.pdf) (highlighting flexible work policies negotiated by the IBEW and NTEU); Jennifer MacGillvary & Nesty Fireste in, *Family Friendly Workplaces: Do Unions make a difference?*, LABOR PROJECT FOR WORKING FAMILIES, 4 (2009) (on file with authors) (explaining that more research is needed to understand why there appears to be a negative relationship between unionization and flexible work arrangements).

<sup>138</sup> There are a number of resources on flexibility in unionized workplaces. The LEARN WORKFAMILY website, available at <http://www.learnworkfamily.org> and developed by the Labor Project for Working Families, provides an online database of contract language on work-family issues, bargaining techniques, case studies, principles of good contract language, and resources. The Sustainable Workforce Initiative features research by Ellen Ernst Kossek and Peter Berg on flexibility implementation in eight unionized work environments. Results from this research show two key roles for unions in improving employee access to workplace flexibility: “One, negotiating basic leave policies and flexible schedules and two, facilitating worker access to flexible schedules and leaves through supportive behaviors.” Peter Berg & Ellen Ernst Kossek, *Fostering Flexible Work Environments Beyond the Collective Bargaining Agreement*, THE SUSTAINABLE WORKFORCE INITIATIVE 1, available at [www.thesustainableworkforce.org/images/stories/briefs/issue%20brief%20newrevised.pdf](http://www.thesustainableworkforce.org/images/stories/briefs/issue%20brief%20newrevised.pdf)

## PART IV. AN OVERVIEW OF THE PUBLIC POLICY LANDSCAPE

This section describes both federal and state public policy initiatives to promote or require workplace flexibility, focusing on how those initiatives address the needs, or could address the needs of low-wage hourly workers. Through the White House Forum on Workplace Flexibility, held on March 31, 2010, and subsequent related events, the Administration has continued to raise the profile of this issue.<sup>139</sup> Most visibly, the U.S. DOL's Women's Bureau was charged with hosting local events to discuss the issue of workplace flexibility, several of which focused on industries that employ significant numbers of low-wage and hourly workers, and the Administration released a "Starter Kit" that local communities could use to host their own events.<sup>140</sup> In addition, the Office of Personnel Management (OPM) implemented a flexibility pilot project for salaried and hourly workers. In the fall of 2012, the United States Department of Labor's Office of Disability Employment Policy and the Women's Bureau rolled out a robust online toolkit providing technical assistance and information about workplace flexibility.<sup>141</sup>

This part of the report describes a range of other steps that policymakers could take to increase the availability and use of flexible work arrangements. Below we draw on the key recommendations from Workplace Flexibility 2010's Flexible Work Arrangements Public Policy Platform, issued in 2009, and elaborate on many of those recommendations to identify public policy responses that could serve as a first step toward improving scheduling for low-wage hourly workers and their employers. We also discuss existing models from government, the private sector, and

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<sup>139</sup> See *A Conversation on Workplace Flexibility*, *supra* note 17.

<sup>140</sup> See *Continue the Conversation on Workplace Flexibility*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/work-flex-kit> (last visited September 6, 2012); see, e.g., *Dallas Workers Speak: The Employee Case for Workplace Flexibility*, FAMILY VALUES AT WORK, <http://familyvaluesatwork.org/blog/paid-sick-days/dallas-workers-speak-the-employee-case-for-workplace-flexibility> (describing a local event in Dallas where workers that enjoy greater flexibility seem happier with their jobs).

<sup>141</sup> See United States Department of Labor's Office of Disability Employment Policy and Women's Bureau's Workplace Flexibility Toolkit, available at <http://www.dol.gov/odep/workplaceflexibility/>; see also MEMORANDUM OF AGREEMENT BETWEEN THE OFFICE OF DISABILITY EMPLOYMENT POLICY (ODEP) AND THE DEPARTMENT OF LABOR, WOMEN'S BUREAU, available at <http://www.dol.gov/odep/categories/workforce/moa-odep-wb.htm>. The Memorandum of Agreement (MOA) sets forth the agencies' plan to expand and promote the use of flexible work arrangements. The Women's Bureau and ODEP agree to create a technical assistance website, modeled after ODEP's Job Accommodation Network, and co-host a roundtable discussion on best practices for workplace flexibility, with representatives from the private sector, federal and state agencies, and non-profit organizations.

from other countries that may be useful to policymakers. Finally, we outline the current labor standards discussion in this area.

*A. Workplace Flexibility 2010's Flexible Work Arrangements Public Policy Platform*

The sections that follow describe some of the strategies from the FWA Platform and how they can be implemented in ways that are specific to the needs of low-wage hourly workers. These are important first steps in a comprehensive policy approach to making workplace flexibility a normal way of doing business.

*1. Include low-wage workers in a national campaign on flexibility*

*a. Include low-wage hourly workers in a public issue campaign on the benefits of FWAs to businesses, families, and the public*

Many employers do not anticipate a return on investing in flexibility to workers in low-wage jobs.<sup>142</sup> They wrongly assume that flexibility for these workers carries a high cost and provides little benefit to businesses. Since the research on the positive business impact of flexibility for low-wage hourly workers is not widely known, the federal government has an important role to play in disseminating these findings. One example of a government-sponsored issue campaign to improve workplace practices is the Campaign for Disability Employment, a collaborative effort among business leaders and disability organizations funded through the United States Office of Disability and Employment Policy within the U.S. DOL.<sup>143</sup> The U.S. DOL could start a similar issue campaign promoting FWAs, emphasizing the positive impact on businesses, workers, families, and communities of providing flexibility to low-wage workers.

*b. Provide awards targeted to businesses that provide flexibility to low-wage hourly workers*

The United States Department of Labor could have a special award or special category of an award for companies that provide flexibility to low-wage workers, tailored for different industry sectors.<sup>144</sup> Although a handful

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<sup>142</sup> See Levin-Epstein, *supra* note 30, at 17 (advocating that state and local governments should “build public awareness of the benefits of responsive scheduling”).

<sup>143</sup> The campaign’s website is <http://www.whatcanyoudocampaign.org>.

<sup>144</sup> An interesting model for an awards program is the award launched in 2009 for New York City restaurants that provide paid sick days and other benefits to workers. The award provides a window sticker seal of approval to restaurants that go beyond current state and federal requirements, and is accompanied by a “New York City Diner’s Guide to High Road Restaurants.” While this particular award is a partnership between the Restaurant Opportunities Center—NY and the New York City Restaurant



of outstanding awards programs are offered by the private sector to employers with good workplace practices for hourly workers, including FWA options, the federal government is in a position to make a much bigger impact. The U.S. DOL could find inspiration from other countries that have established similar initiatives. For example, the government of Singapore has a Work-Life Excellence Award and seal that employers may display for recruitment and publicity purposes.<sup>145</sup> Likewise, the Australian Government's National Work-Life Balance Awards recognize businesses, government, and community organizations that have flexible workplaces.<sup>146</sup> The Australian government's website includes a pledge to reinvigorate the awards by funding and developing a seal of approval for award winners and by developing awards for different industry sectors.<sup>147</sup>

*c. Fund research and disseminate findings on FWAs for low-wage hourly workers*

Further research is needed to support the business case for providing FWAs to low-wage hourly workers. In addition, the government should consider funding scientifically rigorous research to document the impact that rigid, unpredictable, and unstable schedules have on family economic security for low-wage workers. The lack of innovative, flexible solutions to address scheduling challenges experienced by low-wage hourly workers may lead to missed work, lost pay, job loss, and other forms of economic insecurity, but little work to date has been done to explore these connections.

*2. Include low-wage hourly workers in a comprehensive program to provide employers with the tools they need to develop and sustain FWAs*

*a. Provide technical assistance and training specific to flexibility for low-wage hourly workers*

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Roundtable—one could imagine an award in which the government would also have a partnership role in the award creation and administration. *See* NEW YORK CITY RESTAURANT INDUSTRY ROUNDTABLE HONORS RESTAURANTS WITH EXCEPTIONAL WORKPLACE AWARD AND DINING GUIDE (July 7), <http://www.pitchengine.com/representagency/new-york-city-restaurant-industry-roundtable-honors-restaurants-with-exceptional-workplace-award-and-dining-guide-july-7/16886/>.

<sup>145</sup> *Work-Life Harmony*, MINISTRY OF MANPOWER, <http://www.mom.gov.sg/employment-practices/work-life-harmony/Pages/work-life-strategies.aspx> (from Singapore).

<sup>146</sup> *National Work-Life Balance Award*, AUSTRALIAN GOV'T, <http://ministers.deewr.gov.au/gillard/launch-2009-10-national-work-life-balance-awards>.

<sup>147</sup> *See id.* (giving awards to thirteen category winners and one overall national winner).



The U.S. government has an important role to play in leveraging existing best practice guidance from the private sector to ensure that it reaches the widest possible audience and creates new guidance where it is needed. The recently-released United States Department of Labor's Workplace Flexibility Toolkit is an excellent resource for employers, and could be strengthened by modifying it to categorize information about low-wage hourly workers in one location so that it is easily accessible for employers and employees.<sup>148</sup> Many employers of low-wage workers are in favor of adopting flexible workplace practices but may not have the time or resources available to make these changes.<sup>149</sup> "How-to" information could make a great deal of difference to these employers. In the United States, the private sector abounds with best practice examples of FWAs that have worked well in different types of businesses, but these examples have yet to reach most businesses.<sup>150</sup> Corporate Voices for Working Families and WFD Consulting have been leaders in publicizing best flexibility practices for hourly workers.<sup>151</sup> Future best practice guidance should explicitly provide examples of ways that employers can improve scheduling along with each of the three flexible workplace solutions that we have identified—meaningful input, predictability, and stability.

To encourage the adoption of flexible workplace solutions for low-wage workers across industries, best practice research and technical assistance should be tailored to particular industries. Studies have shown that training managers how to implement flexibility is incredibly cost-effective and time-efficient in changing managers' behavior.<sup>152</sup> The government is well-positioned to accomplish this goal, either by providing training directly or through third parties. For example, the Australian government worked with an employer organization, Restaurant and Catering Australia, to compile a set of best practices to provide FWAs for restaurant industry employees.<sup>153</sup> The U.S. DOL can work with industry groups to identify best practices and

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<sup>148</sup> See United States Department of Labor's Workplace Flexibility Toolkit, available at <http://www.dol.gov/odep/workplaceflexibility/>.

<sup>149</sup> WORK LIFE BALANCE AND THE ECONOMICS OF WORKPLACE FLEXIBILITY, (MARCH 2010), (March 2010), available at <http://www.whitehouse.gov/files/documents/100331-cea-economics-workplace-flexibility.pdf>.

<sup>150</sup> The Sloan Award's Bold Ideas for Making Work Work Guides provide examples of award-winning companies' flexibility practices for both hourly and salaried workers, available at <http://familiesandwork.org/3w/awards/index.html>; see also *Flexible Work Arrangements for Nonexempt Employees*, WORLD AT WORK, available at <http://www.worldatwork.org/waw/adminLink?id=33622>.

<sup>151</sup> *Workplace Flexibility Toolkits for Hourly Employees and Managers*, CORP. VOICES FOR WORKING FAMILIES, <http://www.cvworkingfamilies.org/publication-toolkits/tips-managers-employees> (last visited September 6, 2012).

<sup>152</sup> See Kossek & Hammer, *supra* note 112.

<sup>153</sup> See *Serving Up Flexibility: Creating Flexible Workplaces in the Restaurant and Catering Industry*, AUSTRALIAN GOV'T (2006) (on file with authors).

make similar best practice guidance available for hourly employees in the industries that employ the greatest number of hourly, low-wage workers — retail, manufacturing, and health care.

The U.S. DOL's Job Accommodation Network (JAN) is an excellent technical assistance model to draw on for the creation of a robust flexibility technical assistance platform. JAN is a source of free, expert, and confidential guidance on workplace accommodations and disability employment.<sup>154</sup> JAN's centerpiece is a comprehensive website through which it offers information about workplace accommodations, the Americans with Disabilities Act, and related information about employment of people with disabilities. JAN is a resource for both employers and employees. Similarly, the government of Singapore's Tripartite Committee on Work-Life Strategy has a website through which it offers best practices guidance and case studies for employers on work-life practices.<sup>155</sup> The U.S. DOL could provide similar resources on FWAs, with technical assistance components specific to low-wage hourly workers, such as shift-swapping software, on-line scheduling platforms that allow for self-scheduling, and sample HR policies on providing opportunities for meaningful input into, advance notice of, and stability in work schedules. To encourage both small and large employers to adopt FWAs, some technical assistance could be geared toward the particular needs of small employers and delivered through the Small Business Administration.

The government can also tap third-party providers to provide important resources and information. The government of Singapore, for example, sponsors several monthly trainings, many of which are conducted by private consultants.<sup>156</sup> Singapore also offers a list of government-approved consultants who can be paid to implement FWA policies using government grant money awarded to companies.<sup>157</sup> The U.S. DOL could sponsor

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<sup>154</sup> The Job Accommodation Network (JAN) describes itself as "the leading source of free, expert, and confidential guidance on workplace accommodations and disability employment issues. Working toward practical solutions that benefit both employer and employee, JAN helps people with disabilities enhance their employability, and shows employers how to capitalize on the value and talent that people with disabilities add to the workplace." About JAN, <http://askjan.org/links/about.htm>.

<sup>155</sup> See *Best Work-Life Practices*, available at [http://www.mom.gov.sg/Documents/employment-practices/Guidelines/2672\\_GuidelinesonBestWLPractices.pdf](http://www.mom.gov.sg/Documents/employment-practices/Guidelines/2672_GuidelinesonBestWLPractices.pdf)

<sup>156</sup> See *Calendar of Trainings and Events on Work-Life Strategies*, MINISTRY OF MANPOWER, <http://www.mom.gov.sg/employment-practices/work-life-harmony/awards-activities/calendar-of-events/Pages/calendar-of-events.aspx>.

<sup>157</sup> See UN Women, POLICY, PRACTICE AND POTENTIAL: WORK-LIFE INTEGRATION IN THE UNITED NATIONS SYSTEM (November 9-11, 2010), available at [http://www.un.org/womenwatch/osagi/worklifeissues/EGM\\_Paper\\_on\\_Work\\_Life\\_Integration.pdf](http://www.un.org/womenwatch/osagi/worklifeissues/EGM_Paper_on_Work_Life_Integration.pdf).

similar trainings, staffing them with both U.S. DOL employees and expert third party consultants.

The U.S. government could partner with leading employers to implement innovative new programs and encourage peer-to-peer information-sharing between leading employers and their industry peers. The Alliance Initiative of the Office of Disability Employment Policy cooperates with leading employers to both improve disability workplace practices through the implementation of new programs and practices and to lead in these practices by participating in forums and events on improving the employment of people with disabilities.<sup>158</sup> The U.S. DOL could undertake a similar effort on flexible workplace strategies for low-wage workers, and form it around several leading employers who offer to implement best practices and lead the business community on this issue.

*3. Strategically invest in piloting new FWA approaches for low-wage hourly workers and new policy strategies*

The federal government should invest in piloting innovative workplace practices, learning from those efforts and disseminating lessons learned. Specifically, it should fund researchers to pilot a range of scheduling interventions for low-wage hourly workers in challenging business environments, and objectively measure and quantify the results.

There are a number of promising practices for low-wage hourly workers that have yet to be piloted on a wider scale and for which results have yet to be measured. Pilot studies and quasi-experimental and experimental research designs could assess the impact of a variety of scheduling interventions for workers on standard and nonstandard schedules, and of interventions designed to implement each of the three flexible workplace solutions. These studies would successfully model innovation for new employers and industries.

Establishing grant programs aimed to incentivize employers to implement FWAs for low-wage hourly workers may help them expend the necessary capital to experiment with new FWAs for their low-wage workers and offset the cost of implementation. For example, the government of Singapore allows companies to claim up to \$20,000 Singaporean dollars to offset the cost of modifying HR policies to include implementing FWAs, hiring FWA consultants, and communicating new policies to staff.<sup>159</sup> Appropriate uses of this funding include ‘job redesign, consultancy, recruitment, training, absentee payroll and equipment, or to

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<sup>158</sup> See THE ODEP ALLIANCE INITIATIVE, <http://www.dol.gov/odep/alliances/index.htm>.

<sup>159</sup> See Ministry of Manpower, Work-Life Harmony, WoW! Fund: Overview, available at <http://www.mom.gov.sg/employment-practices/work-life-harmony/wow-fund/Pages/wow-fund.aspx> (providing a maximum of \$20,000 Singaporean dollars in one-time funding to support organizations’ new workplace flexibility projects).

put in place part-time or flexible working arrangements.”<sup>160</sup> Following a similar model, the federal government could provide tax incentives to offset the implementation of FWAs in the private sector that pioneer cutting-edge strategies, such as computer-assisted employee self-scheduling and computer programs that provide as much advance notice of scheduling as possible while still accounting for fluctuations in consumer demand that affect staffing needs.

*4. Lead by Example: The federal government as model employer*

The federal government could pilot FWAs within its own workforce for exempt, non-exempt, hourly, and contract workers. In particular, because the federal government contracts with various businesses to provide janitorial services, customer service, commissary staffing, and public safety, we recommended that the federal government require federal contractors to provide two of seven suggested FWAs that might be useful for hourly workers.<sup>161</sup> Researchers from the federal government could then analyze these pilot FWAs to determine which ones could potentially succeed in a broader context.

*5. Requirements: A description of recent policy proposals*

Several labor standards approaches have been proposed to improve low-wage hourly workers’ scheduling and access to flexibility. Such approaches include the right to request flexibility, limits on mandatory overtime, and reporting time pay requirements. The following section describes these various approaches, drawing from ideas suggested by academic researchers, advocacy organizations, bills introduced at the state or federal level, and some enacted legislation.

*a. “Right to request law”*

Efforts to develop labor standards that directly address the need for FWAs have been quite limited, in part because it is difficult to formulate labor standards that account for the range of circumstances that employers may face in implementing FWAs, and types of FWAs employees may need.

Perhaps for those reasons, the flexibility labor standard that has gained the most traction is the “right to request” bill. This bill was first introduced

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<sup>160</sup> *Id.*

<sup>161</sup> See David Madland & Karla Walter, *A Contracting Policy that Helps Workers, Taxpayers, Businesses and the Environment*, AMERICAN WORKER PROJECT (March 2010), [http://www.americanprogressaction.org/issues/2010/08/pdf/highroad\\_government.pdf](http://www.americanprogressaction.org/issues/2010/08/pdf/highroad_government.pdf) (recommending that the federal government implement a “high-road contracting policy.”).

by Senator Edward Kennedy and Representative Carolyn Maloney as the Working Families Flexibility Act, and has been re-introduced in several subsequent Congresses.<sup>162</sup> The bill essentially proposes that employees have the right to request schedule flexibility; the only specific outcome required by the “right to request” legislation is that employers abide by a mandated process for considering employee requests.<sup>163</sup>

The “right to request” bill is modeled on similar legislation enacted in 2002 in the United Kingdom, and like that law, the bill creates a process employers must follow when considering employee requests for FWAs.<sup>164</sup> To distinguish the “right to request” from labor standards requiring substantive outcomes such as limits on mandatory overtime, required break times, and minimum hours rules, we refer to the “right to request” as a “process requirement.”<sup>165</sup>

Any “right to request” law would need to allow explicitly for requests relating to meaningful input into scheduling, stability, and predictability. The most recent version of this bill introduced in the U.S. Congress in 2013, included a right to request changes to the number of hours an employee is scheduled to work, times when an employee is scheduled to work or to be on call for work, place of work, and advance notice of work

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<sup>162</sup> S. 2419, introduced by Senator Edward Kennedy on December 6, 2007 and H.R. 4301, introduced by Congresswoman Carolyn Maloney on December 6, 2007, available at [http://www.law.georgetown.edu/workplaceflexibility2010/FWA\\_Background.cfm](http://www.law.georgetown.edu/workplaceflexibility2010/FWA_Background.cfm). The Working Families Flexibility Act, a later version of this bill, introduced in the 111<sup>th</sup> Congress by Congresswoman Carolyn Maloney on March 3, 2009, and by Senator Bob Casey in the United States Senate on September 24, 2010, grants employees the right to request a change in the: (1) number of hours worked; (2) times when the employee is required to work; and (3) location where the employee is required to work. The Act requires the employer to meet with the employee within 14 days of the request and to issue a decision no later than 14 days after the meeting. The Act prohibits employers from interfering with this right and provides an enforcement mechanism through the Administrator of the Wage and Hour Division of the Employment Standards Administration of the U.S. DOL. The Act also requires the Secretary of Labor to conduct a continuing program of research, education, and technical assistance.

<sup>163</sup> *Id.*

<sup>164</sup> EMPLOYMENT ACT (2002), c. 22, § 47(1–2) (U.K.), available at <http://www.legislation.gov.uk/ukpga/2002/22/contents>. In 2009, Australia enacted a similar law. Fair Work Act, 2009, c. 65 (Austl.) New South Wales also has a right to request law, but this law provides certain caregivers with the right to request and receive flexibility, unless providing that flexibility would impose an unjustifiable hardship on the employer. Carers’ Responsibilities Act (N.S.W.), 2001 (Austl.).

<sup>165</sup> In the FWA policy platform, we recommended that the federal government pilot within the federal workforce several different versions of a “right to request” – the main labor standard being discussed in terms of FWAs for workers across the income spectrum. We felt that conducting such pilots could help provide the information needed to better evaluate the utility of this approach. *FWA Public Policy Platform*, *supra* note 14.



schedules.<sup>166</sup> The provisions regarding advance notification of schedules and on-call scheduling are critical additions to the bill in terms of addressing the needs of low-wage, hourly workers.

The United States' current "right to request" bill includes language prohibiting discrimination against employees for any action relating to exercising the right to request. Employees who believe they have been discriminated against may make a formal complaint to the DOL. If an employee is unsatisfied with the DOL's resolution of the complaint, the employee may seek review by an administrative law judge. And if the employee is unsatisfied with the administrative law judge's decision, the employee may seek review by a federal court of appeal.

Notably, in June of 2013, Vermont became the first state to pass a right to request law.<sup>167</sup> But this law specifically excluded "routine scheduling of shifts" from the types of requests that can be made under the law. This may potentially limit the law's utility for low-wage workers.

One significant concern about a "right to request" law is that low-wage hourly workers might decide not to make a request, fearing that the response to such a request may be subtle retribution in the form of reduced hours or a non-preferred schedule. Research on low-wage hourly workers' use of the right to request in those countries that currently have such a law would be helpful in predicting how this law might play out for low-wage hourly workers if enacted in the United States.

*b. FLSA requirements and FWAs*

The FLSA is the primary law governing working time in the United States.<sup>168</sup> The FLSA provides employees with time and a half pay for overtime worked, disincentivizing the assignment of overtime hours.<sup>169</sup>

Though many employers are concerned that providing FWAs to non-exempt employees would violate the FLSA, WF2010's research found that the vast majority of FWAs are permissible under the FLSA.<sup>170</sup> For this reason, WF2010's FWA platform suggests that the U.S. DOL should provide written guidance, technical assistance, and training on the types of FWAs that fit within the requirements of the FLSA. Such guidance should

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<sup>166</sup> See S. 1248; H.R. 2559, Flexibility for Working Families Act (113<sup>th</sup> Congress) (introduced by U.S. Senator Robert Casey and U.S. Representative Carolyn Maloney on June 27, 2013).

<sup>167</sup> See H. 99, Vt. Gen. Ass. (2013).

<sup>168</sup> 29 U.S.C. §207 (2010).

<sup>169</sup> 29 U.S.C. §207(a)(1)(2010).

<sup>170</sup> See *Lower-Wage Workers and Flexible Work Arrangements*, URBAN INSTITUTE (2010), available at <http://workplaceflexibility2010.org/images/uploads/Lower-WageWorkersandFWAs.pdf>



provide examples of FWAs that comply with the FLSA, examples of FWAs that do not, and explanations for the underlying analyses.<sup>171</sup>

We note that at the federal level there have been numerous proposals to amend the FLSA to permit comp time (one and one-half hours off per hour worked) in lieu of overtime pay.<sup>172</sup> In analyzing this issue, we did not find that this action was necessary or effective in advancing FWAs for hourly workers.<sup>173</sup>

### *c. Minimum hours requirements*

Employers could be required or encouraged to provide employees with a certain minimum number of hours per week.<sup>174</sup> The goal of the minimum hour requirement proposal is to provide employees with more stable work hours and income. Proponents of minimum hours legislation argue that

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<sup>171</sup> See *FWA Public Policy Platform*, *supra* note 14 at 23 (explaining that “[S]ome employers have described adhering to rigid scheduling approaches because they fear running afoul of the Fair Labor Standards Act (FLSA). The FLSA requires employers to pay non-exempt workers time-and-a-half for any hour worked over 40 in one workweek. A number of employers have told us that they wanted to offer more flexibility to their employees, but believed their hands were tied by the FLSA. The majority of flexible scheduling arrangements, however, [...] are all generally permissible under the FLSA.” The Platform recommends: “The U.S. DOL should provide written guidance, technical assistance and training on how the majority of flexible scheduling arrangements comply with the requirements of the FLSA. Such guidance should provide examples of FWAs that comply with the FLSA, examples of FWAs that do not, and an explanation of the underlying analysis.”) *Id.*

<sup>172</sup> See Updating Regulations Issued under the Fair Labor Standards Act (FLSA), 76 Fed. Reg. 18832 (April 5, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-04-05/pdf/2011-6749.pdf>.

<sup>173</sup> During the past decade, whether to extend comp time to the private sector has often been debated and a number of comp time bills have been introduced by Republicans at the federal level. To date, none of the bills have garnered bipartisan support, and none have passed. The Working Families Flexibility Act, which was introduced in the 113th Congress, would have amended the FLSA to allow employers to provide comp time in lieu of overtime at a rate of one and one-half hours of paid time off per hour worked for non-exempt private sector employees that meet certain criteria. See H.R. 1406.

See also Family Friendly Workplace Act, H.R. 933, 111th Cong. (introduced by Representative McMorris Rodgers [R-WA] on Feb. 10, 2009 and co-sponsored by 13 other Republican lawmakers); Family Friendly Workplace Act, H.R. 6025, 110th Cong. (introduced by Representative McMorris Rodgers [R-WA] on May 13, 2008 and co-sponsored by 11 other Republican lawmakers). *Id.* at §§ 2(r)(1)(A), 2(r)(2)(B).

Similar legislation was introduced in previous Congresses. See, e.g., H.R. 1119, Family Time Flexibility Act, 108th Cong. (2003); S.317, Family Time and Workplace Flexibility Act, 108th Cong. (2003); America’s Workforce: Ready for the 21st Century, available at <http://www.whitehouse.gov/news/releases/2004/08/20040805-6.html>; 149 CONG. REC. S1999 (daily ed. Feb. 5, 2003) (statement of Sen. Gregg).

<http://www.whitehouse.gov/news/releases/2001/06/20010620-1.html>.

<sup>174</sup> Lambert & Henly, *supra* note 30.

“requiring employers to schedule and pay employees for a minimum number of hours each week would increase the fixed costs of hiring a worker, thereby countering pressures to keep headcount high. Like minimum wage legislation, minimum hour legislation would help level the playing field for employers and provide a stable base of income for workers.”<sup>175</sup> As a model for minimum hour requirements, Lambert, Haley-Lock, and Henly have cited the minimum hour requirements often contained in collective bargaining agreements.<sup>176</sup>

Currently, seven states—California, Connecticut, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, as well as the District of Columbia—impose reporting time pay requirements.<sup>177</sup> In some states these requirements apply only to employers in select industries. For example, Connecticut requires stores whose employees report for duty to compensate these employees for a minimum of four hours at their regular rates of pay even if they do not actually work, with certain narrow exceptions.<sup>178</sup> In comparison, for restaurant workers, Connecticut requires a minimum of two hours of compensation.<sup>179</sup> By contrast, other states have more laws applying to a wide range of employees. For example, in New

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See CAL. INDUS. WELFARE COMM’N WAGE ORDERS #1-16 (2007) (applying broadly to most industries and requiring employers to pay employees half of their scheduled hours when called into work but given less than half of a scheduled day’s work); Conn. Agencies Regs. § -31-62-D2(d) and Conn. Agencies Regs. § -31-62-E1(B); D.C. Tit. 7, 907.1 (requiring 4 hours of pay to all employees who report to work unless the scheduled shift was less than 4 hours); Mass. 455 C.M.R. §2.03(1) (requiring employers to provide 3 hours of pay at the minimum wage to employees who are scheduled to work at least 3 hours, but provided with less than 3 hours of work); N.H. Rev. Stat. § 275 :43-a; N.J.A.C. 12 :56-5.5 (requiring a minimum of one hour of pay to employees who report for work, subject to some exceptions); OAR 839-021-0087(5) (Employer must pay minor employees for one hour of work or half of the scheduled shift, whichever is greater.) R.I. Section 28-12-3.2 (an employee who reports for work must be paid a minimum of 3 hours at the employee’s regular rate of pay).

<sup>178</sup> Conn. Agencies Regs. § -31-62-D2(d) (“An employee who, by request or permission of the employer, reports for duty on any day whether or not assigned to actual work shall be compensated for a minimum of four hours’ earnings at his regular rate. In instances of regularly scheduled employment of less than four hours, as mutually agreed in writing between employer and employee, and approved by the labor department, this provision may be waived, provided the minimum daily pay in every instance shall be at least twice the applicable minimum hourly rate.”).

<sup>179</sup> Conn. Agencies Regs. § -31-62-E1(B) (“Any employee regularly reporting for work, unless given adequate notice the day before to the contrary, or any employee called for work in any day shall be assured a minimum of two hours’ earnings at not less than the minimum rate if the employee is able and willing to work for the length of time. If the employee is either unwilling or unable to work the number of hours necessary to insure the two-hour guarantee, a statement signed by the employee in support of this situation must be on file as part of the employer’s records.”).

York an employee who reports for work and is sent home is entitled to “call-in pay” at the minimum wage for four hours or the amount of hours which the employee was scheduled to work, whichever is less.<sup>180</sup> Similarly, in New Hampshire, an employee who reports to work and is sent home is required to receive a minimum of two hours of pay, with limited exceptions.<sup>181</sup>

*d. Break time requirements*

The FLSA, which does not require employers to permit employees to take breaks (with the exception of nursing mothers), could be amended to require employers to permit employees to take breaks at times they choose for selected purposes. The recent health care bill included a new FLSA requirement that allows employees to take unpaid break time to express breast milk.<sup>182</sup> Prior to enacting this law, nearly half of all states already had laws in place on breastfeeding in the workplace.<sup>183</sup> Likewise, although the FLSA does not require employers to provide breaks at any particular time, a number of states have laws prescribing the times at which employers must permit employees to take meals or rest periods.<sup>184</sup> For example, Colorado requires certain types of employees to be permitted one half-hour meal period for every five hours worked under most circumstances.<sup>185</sup> Outside of meals, rest periods, and break time to express breast milk, the idea of mandating break time to gain flexibility for workers does not appear to have any current supporters.

*e. Mandatory overtime requirements*

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<sup>180</sup> N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.3 (“An employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.”)

<sup>181</sup> N.H. Rev. Stat. § 275:43-a (“On any day an employee reports to work at an employer’s request, he shall be paid not less than 2 hours’ pay at his regular rate of pay; provided, however, that this section shall not apply to employers of counties or municipalities, and provided further that no employer who makes a good faith effort to notify an employee not to report to work shall be liable to pay wages under this section [ . . . ]”)

<sup>182</sup> See Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (to be codified in sections of 42 U.S.C.) (amending the FLSA to guarantee nursing mothers unpaid reasonable break times to express breast milk each time they have a need to do so).

<sup>183</sup> See *Breastfeeding Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, available at <http://www.ncsl.org/default.aspx?tabid=14389> (last modified May 2011).

<sup>184</sup> See *Wage and Hour Division’s Minimum Length of Meal Period Required Under State Law for Adult Employees in the Private Sector*, U.S. DEP’T OF LABOR (last updated January 1, 2012), available at <http://www.dol.gov/whd/state/meal.htm>.

<sup>185</sup> See *id.*

Although the FLSA requires employers to pay employees one and one-half times their regular rate of pay for hours worked beyond forty per week, it does not allow employees to refuse to work overtime.<sup>186</sup> In 2002, Lonnie Golden and Helene Jorgensen proposed a right to refuse overtime at the federal level.<sup>187</sup> Their proposal calls for “upper limits on overtime hours per week, unless there is an agreement, such as in a union contract, between the employer and employee on overtime beyond the established limits; the right of employees to refuse mandatory overtime, with the exception of certain essential personnel, such as firefighters, police officers, and doctors, and except in cases of natural disasters or other emergencies; and sanctions [. . .] against employers who take any actions against or otherwise discriminate against employees who refuse to work more than the maximum number of hours per day or week.”<sup>188</sup> Golden and Jorgensen also recommend that “[r]efusal by any employee to accept such overtimes (*sic*) work should not be a grounds for employment discrimination, dismissal, or discharge or any other penalty.”<sup>189</sup>

Restrictions on overtime have been enacted at the state level, and bills have been introduced to limit overtime for certain categories of workers at the federal level. For example, the Safe Nursing and Patient Care Act, introduced in Congress in 2007, would have limited overtime for nurses and other licensed health care providers.<sup>190</sup>

States with laws limiting mandatory overtime for certain categories of employees include California,<sup>191</sup> Maine,<sup>192</sup> Minnesota,<sup>193</sup> Oregon,<sup>194</sup> and West Virginia,<sup>195</sup> which permit nurses to refuse any shift that is longer than 12 hours in a 24-hour period. Connecticut,<sup>196</sup> Illinois,<sup>197</sup> Maryland,<sup>198</sup> New

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<sup>186</sup> 29 U.S.C. § 207(a)(1) (2006).

<sup>187</sup> See LONNIE GOLDEN & HELENE JORGENSEN, ECON. POL. INST., TIME AFTER TIME: MANDATORY OVERTIME IN THE U.S. ECONOMY (2002), available at [http://www.epi.org/publications/entry/briefingpapers\\_bp120/](http://www.epi.org/publications/entry/briefingpapers_bp120/).

<sup>188</sup> *Id.* at 15.

<sup>189</sup> *Id.*

<sup>190</sup> See S. 1842. This bill was introduced in the Senate by Edward Kennedy, and is co-sponsored by eighteen additional Democratic senators.

<sup>191</sup> See *Mandatory Overtime*, AMERICAN NURSES ASS'N (2007),

<http://www.nursingworld.org/MainMenuCategories/Policy-Advocacy/State/Legislative-Agenda-Reports/MandatoryOvertime> (last visited September 8, 2012).

<sup>192</sup> 26 ME. REV. STAT. § 603(2) (2012).

<sup>193</sup> MINN. STAT. § 181.275, Subd. 2 (2007).

<sup>194</sup> OR. REV. STAT. § 441.166(2)(a)-(b) (2009).

<sup>195</sup> W. VA. CODE § 21-5F-3(a) (2012).

<sup>196</sup> CONN. GEN. STAT. § 19a-490I(b) (2012).

<sup>197</sup> 210 ILL. COMP. STAT. ANN. § 85/10.9(b) (2007).

<sup>198</sup> MD. CODE ANN. LAB. & EMPL. § 3-421(b)-(c) (2012).

Jersey,<sup>199</sup> and Washington<sup>200</sup> prohibit mandatory overtime for nurses except in emergencies. Only one state, Maine, has a statutory cap on the number of overtime hours that all non-exempt employees may be required to work, prohibiting employers from requiring employees to work more than 80 overtime hours in any two-week period.<sup>201</sup> In recent years, nearly twenty other states have introduced legislation to curb mandatory overtime.<sup>202</sup>

As noted above, one challenge of developing a labor standard in this area is that each of these standards only addresses some of the flexibility needs that hourly workers face, with the exception of the right to request process requirement. For example, limits on mandatory overtime address this significant problem for low-wage hourly workers who are regularly subject to this practice (estimated at 33% for full-time workers and 23% for part-time workers),<sup>203</sup> but these limits do not address the problem of involuntary part-time work for low-wage hourly workers who want but cannot get full-time work, (estimated at 48% of part-time low-wage workers in standard jobs and 24% of part-time low-wage workers in nonstandard jobs).<sup>204</sup>

#### CONCLUSION

There is good reason to take the problem of challenging work schedules seriously. These schedules directly impact the economic security, health, and well-being of low-wage hourly workers and their families. For employers, having a stable and effective hourly workforce requires providing workers with the flexibility that they need to get the job done.<sup>205</sup> As described in this article, providing schedule flexibility, predictability and stability for low-wage hourly workers can be a key business strategy to improve performance with positive outcomes, including reduced turnover and absenteeism, and improved employee engagement and productivity. But today, lack of control over work schedules, schedule unpredictability, and schedule instability still remain the norm for workers in low-wage, hourly jobs.

Low-wage jobs are here to stay in significant numbers for the foreseeable future, and if left unchecked the problems of challenging schedules for workers in these jobs are likely to become even more

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<sup>199</sup> N.J. STAT. ANN. § 34:11-56a34(a) (2012).

<sup>200</sup> WASH. REV. CODE § 49.28.140(3)(a) (2012).

<sup>201</sup> 26 ME. REV. STAT. § 603(2) (2012).

<sup>202</sup> SEE GOLDEN & JORGENSEN, *supra* note 188.

<sup>203</sup> Statistics are drawn from analysis of the 2008 NSCW conducted for this report. Percentages reported are for standard and nonstandard workers combined (regularly required to work overtime was operationalized as weekly to 1–3x a month).

<sup>204</sup> *Id.*

<sup>205</sup> See discussion *supra* Part II.



entrenched. During the recovery from the recession, lower-wage occupations have grown at a rate 2.7 times faster than middle and higher-wage occupations, and account for 58% of job growth overall.<sup>206</sup> According to data from the United States Bureau of Labor Statistics Current Population Survey, in 2010, 28% of the workforce worked in a low-wage job; recent projections indicate the same number will work in a low-wage job in 2020.<sup>207</sup> If we do not get to work developing employer practice, collective bargaining, and public policy solutions, the chances are good that challenging work schedules will continue to proliferate.

With more than a quarter of our workforce employed in a low-wage job, making it possible for these workers to have flexible, predictable and stable schedules ought to be a national priority. Fair work schedules will help ensure that workers are able to care for families; find quality, affordable child care; hold down a second job when one is not enough to make ends meet; pursue workforce training; and achieve economic security for their families.

But to achieve the goal of making work schedules more flexible, predictable and stable, whether through voluntary employer practice, collective bargaining agreements or public policy, the traditional understanding of flexibility must expand to fit the distinct scheduling challenges facing workers in low-wage hourly jobs requiring both standard and nonstandard schedules.

Offering flexibility, predictability, and stability to workers in low-wage hourly jobs requires businesses to implement strategies that allow workers to have more schedule control, predictability and stability. Through the flexible workplace solutions framework we have identified employer strategies for making improvements in each of these areas.

The federal government and the state governments should also address the scheduling needs of low-wage workers to create a more stable and effective hourly workforce. The public policy proposals discussed in this article provide food for thought for policymakers.

Workplace flexibility is not a job perk—it is essential to the health and well-being of today's workers and their families, as well as the economic health of American businesses. The flexible workplace solutions framework offered in this article lays the foundation for employers,

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<sup>206</sup> See *The Low-Wage Recovery and Growing Inequality*, p.1 (August 2012), available at [http://www.nelp.org/page/-/Job\\_Creation/LowWageRecovery2012.pdf?nocdn=1](http://www.nelp.org/page/-/Job_Creation/LowWageRecovery2012.pdf?nocdn=1). (measuring hiring trends during the period of recovery spanning from the first quarter of 2010 to the first quarter of 2012).

<sup>207</sup> Rebecca Thiess, *The Future of Work: Trends and Challenges For Low-Wage Workers*, p.8 (Economic Policy Institute, Apr. 27, 2012), available at <http://www.epi.org/>.



employees, unions, and the government to make flexibility a regular feature of low-wage hourly jobs.