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## The Case for the "No-Collar" Exemption: Eliminating Employer-Imposed Office Hours for Overworked, Remote-Ready Workers

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# **THE CASE FOR THE “NO-COLLAR” EXEMPTION: ELIMINATING EMPLOYER-IMPOSED OFFICE HOURS FOR OVERWORKED, REMOTE-READY WORKERS**

JENNIFER HASKIN WILL\*

## **ABSTRACT**

The conventional forty-hour workweek has been a fixture of the American workplace for almost a century. Standard hours of nine-to-five, Monday-to-Friday, are customary even for workers exempted from overtime under the federal Fair Labor Standards Act (FLSA). But the traditional forty-hour workweek is no longer a fit for the modern family or the modern worker. It is time for its demise.

Since passage of the FLSA in 1938, we have witnessed two massive evolutions in the modern workforce: the dramatic increase in numbers of working women, and the rapid rise of the exempt worker in the service sector. The former has exposed fundamental incompatibilities between a fixed, forty-hour workweek and the unpredictable demands of family life. The latter has exposed the fiction of the conventional workday for exempt office workers, who are expected not only to work from nine-to-five, but also to work at all hours. Together, the influx of working women and the growth of exempt work have rendered the traditional forty-hour workweek both needlessly restrictive, in the case of work/life conflict, and effectively meaningless, in the case of the information-age worker who labors 24/7.

The recent revolution in remote work, precipitated by the Covid-19 pandemic, auspiciously permits a new approach, especially for exempt, “remote-ready” workers—that is, white-collar workers engaged in cognitive labor, who have the proven capacity to work offsite. Where exempt, remote-ready workers are already widely expected to work outside of so-called office hours, they should not be beholden to keep regular office hours, too. We should release them from the false confines of nine-to-five, for more fluid integration of work and life. By amending the FLSA regulations to make scheduling freedom a condition of white-collar exemption and restricting

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employers from setting hours of work for this cohort, we could productively disrupt the outdated workweek for all.

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## I. INTRODUCTION

The conventional forty-hour workweek has been a fixture of the American workplace for almost a century. Standard hours of nine-to-five, Monday-to-Friday, are customary for full-time work, even for those workers exempted from overtime under the federal Fair Labor Standards Act of 1938 (FLSA).<sup>1</sup> But in the decades since the FLSA was passed, we have witnessed two massive, concurrent revolutions in the modern workforce: the dramatic increase in the number of women in the ranks of paid labor, and the rapid rise of the exempt worker in the service sector.<sup>2</sup> The former has exposed fundamental incompatibilities between a fixed, forty-hour workweek and the predictably unpredictable demands of family life. The latter has exposed the fundamental fiction of the conventional workday for many exempt office workers, who are expected by their employers not only to work from nine-to-five—or eight-to-six—but also to work at all hours, with unlimited “face time” serving as a proxy for their productivity. Together, the influx of working women and the growth of exempt service work have rendered the traditional forty-hour workweek both needlessly restrictive, in the case of work/life conflict, and effectively meaningless, in the case of the information age worker who labors twenty-four seven.

In either case, the traditional forty-hour workweek is no longer a fit for the modern family, or for the modern worker. It is time for its demise. We have seen its decline already, with the passage of family and medical leave laws and other statutory accommodations that have whittled away at the conventional workweek. Such legislative exceptions are essential, as they provide necessary time away from time on the job. But by making special exceptions to the standard workweek, leave laws *leave out* large numbers of workers who need time off for reasons that do not fit the specific statutory requirements but are nonetheless legitimate. To meet these unmet needs,

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<sup>1</sup> See Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 164 (1994) (noting that, in connection with passage of the Fair Labor Standards Act of 1938, “[t]he 40-hour standard workweek was set in stone, and has not been altered to this day.”).

<sup>2</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO/T-HEHS-00-105, WHITE-COLLAR EXEMPTIONS NEED ADJUSTMENT FOR TODAY'S WORKPLACE 3 (2000) [hereinafter GAO TESTIMONY] (“Two major shifts have significantly reshaped the American workforce: (1) the general shift of industry from manufacturing to service, and (2) the influx of women into the workplace.”).

federal and state legislatures continue to pass ever more legislation designed to provide paid sick leave, predictive scheduling, and other initiatives in the name of flexibility; but this proliferation of legislation only further complicates the legal landscape, without calling into question the rigidity of the workweek itself. Legislated exceptions to expected work hours are also potentially stigmatizing for the workers who use them—predominantly female caregivers—thus perpetuating the very gender disparities that workplace flexibility programs are designed to diminish.

Recently, the idea of shorter workweeks has attracted renewed attention as an alternate way to address overwork. Reducing expected work hours altogether would surely be a simpler and more equitable solution to the outdated workweek, without the need for selective exceptions, and with potentially more far-reaching benefits. Reducing so-called “standard” hours could conceivably bring *all* workers toward a more reasonable mean, moving both the overworked and the underutilized toward a more manageable middle ground. It is no surprise that the push for a four-day week is gaining ground, especially as employers contemplate the post-pandemic return to work. But despite the recent enthusiasm for this approach, it is not feasible in the near term. Putting a four-day workweek into effect for any meaningful number of workers would require either widespread, voluntary adoption of an abbreviated schedule by employers, or an amendment of the FLSA by Congress, lowering the overtime threshold or capping maximum hours. Neither option seems imminently likely in today’s competitive global marketplace. Moreover, a reasonable workweek is farthest out of reach for those workers who work the most excessive hours already, and shorter workweeks with conventional office hours are still inflexible.

Our circumstances demand a new approach—and auspiciously, they permit one. The recent revolution in remote work, first precipitated by the Covid-19 pandemic, now offers us a unique opportunity to reexamine the conventional workweek altogether, especially for the exempt, “remote-ready” worker, defined by this Article as the exempt, white-collar worker engaged in mental labor, who has the proven capacity to work both in the office and outside it. Even before Covid, many exempt employees were working before, during, and after the standard workday. In the hybrid workplace that is now emerging, we would ideally make a renewed commitment to confine working time to fewer, well-demarcated hours. Yet it seems unrealistic to think that a new, shorter workweek would somehow eliminate the late-night emails or early morning international conference calls that have become fixtures of exempt office work today. It seems equally

unrealistic to believe that a shorter workweek would in any way eliminate the personal interruptions that punctuate a parent's workday, however fewer workdays there may be. We need a solution that points in the direction we are already heading and exploits the situation we are already in.

Accordingly, this Article argues that where exempt, remote-ready workers are already widely expected to work outside of so-called office hours, they should not be beholden to keep regular office hours, too. If we cannot realistically rein in the ever-expanding workday, then we should at least release these exempt workers from the false confines of nine-to-five, opening the doors to a more fluid integration of work and life. We could do so by amending the FLSA regulations to make scheduling freedom a condition of white-collar exemption, restricting employers from setting required hours of work for this cohort. Eliminating expected office hours and giving schedule control to exempt, remote-ready workers in the post-pandemic era would be more effective in promoting work/life balance for these workers than a proliferation of exceptions to the so-called standard workweek; similarly, dropping perfunctory face-time requirements would be more feasible in the near term than imposing a shorter workweek altogether. Eliminating expected office hours would allow *all* such employees – males and females, parents and nonparents, the healthy and the unwell—equal opportunity to structure their workday to meet both personal and professional needs alike. Moreover, dispensing with formal office hours for exempt, remote-ready workers under the FLSA would provide a more rational basis for determining exempt status in today's knowledge-based economy, and adding a no-schedule, “no collar” condition for exemption could have the downstream effect of conferring overtime protections on newly nonexempt workers whose duties—or whose employers—do not allow for truly independent, self-scheduled work. Ultimately, adding a no-collar condition could dismantle outdated ideas about working time, setting the stage for a more comprehensive reorganization of work for all.

In support of this no-collar approach, Part II of this Article gives a brief overview of exempt overwork generally, explaining the origins and growth of the so-called white-collar exemptions and noting how changes in the size and composition of the white-collar workforce, as well as changes in technology and the labor market, have compounded the burden of the traditional workweek for these exempt workers. Part II then introduces the



phenomenon of the “time divide,”<sup>3</sup> describing the increasing bifurcation of working time in the United States today, away from the forty-hour mean toward the two extremes of having too many hours of work, and not having enough. As a result of the time divide, American workers at different ends of the hours spectrum experience work/life conflicts in profoundly different ways, and in recognition of this diversity, Part II argues that the divergent experiences of American workers today defy a single solution to work/life tensions for everyone.

Part III then surveys familiar and emerging solutions to work/life conflicts and their relative benefits with respect to the overworked exempt employee. This Part argues that even as we make exceptions to the so-called standard workweek (with family and medical leave and other flexible accommodations), and even as we aim to make the standard workweek shorter (by means of a lower overtime threshold, a cap on maximum hours, or other legislative initiative), in the post-pandemic workplace, we should also question the need for the traditional workweek altogether, especially for white-collar, remote-ready workers. This part explores the “results-only work environment” or “ROWE” approach that was first pioneered by Jody Thompson and Cali Ressler at Best Buy twenty years ago,<sup>4</sup> which empowered employees to work from anywhere, at any time, and to focus solely on their results, not their hours worked. Given the recent revolution in remote work, this Part argues that the principles of ROWE should apply with even greater force to the post-pandemic workplace, because the widespread adoption of remote work has already upended conventional assumptions about where and when work can be accomplished by the white-collar, remote-ready worker.

Taking its inspiration from the ROWE approach, Part IV then sets forth a proposal for the post-pandemic reorganization of white-collar work. Simply put, this Article proposes revising the conditions for exemption under the FLSA regulations to eliminate employer-imposed office hours for white-collar workers, thereby creating the opportunity for this cohort to manage their own time for a more fluid—and efficient—integration of life and work.

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<sup>3</sup> See JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE* (2004); see also *infra* notes 67–92 and accompanying text.

<sup>4</sup> For an explanation of ROWE and its origins, see Culture RX, *The Results-Only Work Environment*, GO ROWE, <https://www.gorowe.com/> (last visited Sept. 12, 2021). See also *infra* notes 144–91 and accompanying text.

Part IV first specifically describes how the new proposal could be readily and practicably implemented by inserting a new, “no collar” condition in the FLSA regulations that require white-collar workers to be paid on a salary basis. The new language would state that to qualify for exemption, employees must not be expected to keep regular office hours or report for scheduled shifts during the week. Part IV explains how this addition would be consistent with the spirit of the white-collar exemptions and would not unduly disrupt the FLSA’s regulatory scheme. In fact, revisions incidental to the no-collar condition would arguably bring more clarity to historically disputed regulatory exceptions.

After outlining the proposed regulatory changes, Part IV anticipates and responds to various potential objections to the no-collar condition, arguing that while eliminating employer-imposed office hours for remote-ready, white-collar workers in the post-pandemic workplace would not resolve work/life tensions for *all* workers—or even all conflicts for white-collar workers—it could nonetheless capitalize on current work trends to productively disrupt the outdated workweek and serve as a feasible first step in developing more reasonable schedules for all. Finally, Part IV argues that the proposed no-collar condition would provide a more rational marker of exempt status in today’s economy than the existing white-collar exemptions alone; and, in turn, its adoption would extend overtime protections to the remaining workers who do not qualify, thus indirectly inhibiting their overly long workweeks as well.

In sum, by reforming the way exempt work is scheduled now, the no-collar condition would offer a more practicable path to workplace flexibility for at least some portion of the workforce. And by rejecting time-on-task as the paramount measure of productivity, the no-collar condition could introduce new efficiencies that legitimize shorter working hours, thus setting the stage for more sweeping and sustainable change for the future of work for everyone.

## II. THE “TIME DIVIDE” DEFIES A SINGLE SOLUTION TO WORK/LIFE TENSIONS

To understand why so many white-collar, remote-ready workers work long weeks in America today, it is helpful first to understand the general history and operation of the FLSA, including the white-collar exemptions from overtime, as well as to understand demographic changes and technological advancements that have impacted who performs office work,

and how, in the twenty-first century workplace. And in order to develop strategies to counteract those long workweeks, it is also helpful to recognize that while some workers in the United States—including many full-time, white-collar, remote-ready workers—work exceedingly long hours, there are other workers at the opposite extreme, who suffer from insufficient hours of work. This increasing divergence in working hours in the United States, also known as the “time divide,”<sup>5</sup> means that different groups of workers experience work/life conflicts in different ways, and this diversity of experience calls for a diversity of solutions.

A. White-collar workers are not eligible for overtime, no matter how many hours their employers require them to work.

The federal Fair Labor Standards Act (FLSA)<sup>6</sup> was passed in 1938 to address the “‘twin evils’ of overwork and underpay.”<sup>7</sup> The FLSA requires payment of a minimum wage,<sup>8</sup> but importantly, it does not place any maximum cap on the number of hours that an employer may require its employees to work.<sup>9</sup> Instead, the FLSA influences work hours indirectly, by requiring employers pay an overtime premium for workers’ excess hours.<sup>10</sup> Importantly, excess hours are not determined on a daily basis under the FLSA; rather, whether an employee has worked overtime is determined by

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<sup>5</sup> See *infra* notes 67–92 and accompanying text.

<sup>6</sup> Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

<sup>7</sup> Regan C. Rowan, Comment, *Solving the Bluish Collar Problem: An Analysis of the DOL’s Modernization of the Exemptions to the Fair Labor Standards Act*, 7 UNIV. PA. J. LAB. & EMP. L. 119, 119 (2004).

<sup>8</sup> 29 U.S.C. § 206(a).

<sup>9</sup> See 29 U.S.C. § 207(a); 29 C.F.R. § 778.102 (2021) (“Since there is no absolute limitation in the Act (apart from the child labor provisions and regulations thereunder) on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed by section 7(a).”). See also Ashley M. Rothe, Note, *Blackberrys and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?*, 54 ST. LOUIS UNIV. L. J. 709, 716 (2010) (“Although the Act requires employers to pay for overtime work, it completely fails to limit the amount of overtime hours an employer may demand from its workforce.”).

<sup>10</sup> See 29 U.S.C. § 207(a)(1).

reference to the workweek as a whole.<sup>11</sup> Under the FLSA regulations, the “workweek” need not coincide with the calendar week. Instead, the workweek can be any “fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods” as established by the employer.<sup>12</sup> The employer can set the workweek for its establishment as a whole, or it can set different workweeks for different employees or groups of employees; but once established, the FLSA workweek remains fixed, and can only be changed by the employer “if the change is intended to be permanent and is not intended to evade the overtime requirements of the Act.”<sup>13</sup> Under the recordkeeping requirements of the FLSA, employers must establish at least one workweek and maintain and preserve records of the time of day and day of the week when it begins.<sup>14</sup>

Employees who are protected by the overtime provisions of the FLSA are entitled to receive one-and-one-half times their regular rate of pay for hours worked over forty<sup>15</sup> in a single workweek.<sup>16</sup> The overtime pay requirement thus provides a financial incentive for an employer to hire more workers for fewer hours, in order to avoid premium payments for longer hours by fewer workers.<sup>17</sup> And when employers do impose long hours,

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<sup>11</sup> See *id.*; see also 29 C.F.R. § 778.102. Note that in contrast to federal law, some state laws require payment of overtime for excess hours worked in a single day. See *Which States Have Daily Overtime Pay Laws?* SHRM (Mar. 18, 2019), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/whatstatesrequireovertimetobecalculatedonhoursworkedinexcessofeightperdayinsteadoffortyperweek.aspx>.

<sup>12</sup> 29 C.F.R. § 778.105 (2021).

<sup>13</sup> *Id.*

<sup>14</sup> 29 C.F.R. § 516.2(a)(5) (2021).

<sup>15</sup> GERALD MAYER, ET AL., CONG. RSCH. SERV., R42713, THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 1 (2013) (“When enacted, the FLSA required employers to pay overtime for hours worked in excess of 44 hours in a week. The 44-hour threshold was lowered to 40 hours in 1940.”).

<sup>16</sup> 29 U.S.C. § 207(a)(1).

<sup>17</sup> See Rothe, *supra* note 9, at 727 (“[T]he FLSA was largely designed to revitalize the nation’s struggling economy. Because many believed overproduction caused the Great Depression, the legislation’s call for shorter hours was intended to decrease production in factories. Additionally, the legislators hoped that shorter hours would spread employment among more workers because employers would prefer to hire a second employee rather than suffer the wage premium of overtime work.”).

employees are ensured enhanced compensation for their time.<sup>18</sup> By these mechanisms, “[t]he overtime pay provisions of the FLSA were designed to advance three main policy goals: a shorter workweek, compensation for overworked employees, and work spreading (or ‘work sharing’).”<sup>19</sup>

From its inception, however, the FLSA has never applied its wage and overtime protections to all workers. Instead, the FLSA exempts various categories of employees.<sup>20</sup> The most well-known and largest group of these exemptions are the so-called “white collar” exemptions, which apply to certain executive, administrative, and professional employees.<sup>21</sup> The FLSA

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<sup>18</sup> See Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. UNIV. L. REV. 139, 146–47 (1993) (“The purpose of the Act’s overtime provision, according to subsequent judicial interpretation, was (1) to reduce unemployment by encouraging employers to hire more workers instead of requiring their current employees to work excessive hours, and (2) to compensate employees for the burden of working excessive hours.”).

<sup>19</sup> Rowan, *supra* note 7, at 123. See also Kimberly A. Pace, *What Does It Mean to Be a Salaried Employee: The Future of Pay Docking*, 21 J. LEGIS. 49, 50 (1995) (“The goal of the FLSA is to eliminate low wages and long hours which endanger the health and well being of the workers and to establish certain minimum labor standards. The forty hour workweek was established by the FLSA to protect the well being of the workers and to discourage overtime work in order to spread employment and thereby reduce the nation’s unemployment.”); accord *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942) (“[A]lthough overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was part of the plan from the beginning.”).

<sup>20</sup> See 29 U.S.C. § 213.

<sup>21</sup> See 29 U.S.C. § 213(a)(1). The United States Department of Labor has more recently referred to exemptions in Section 213(a)(1) as the “EAP”—executive, administrative, and professional—exemptions. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51230, 51230 (Sept. 27, 2019) (“Section 13(a)(1) of the FLSA, commonly referred to as the “white collar” or “EAP” exemption, exempts from these minimum wage and overtime pay requirements “any employee employed in a bona fide executive, administrative, or professional capacity.”) However, given the prevalence of the term “white collar” in the case law and

itself does not define these categories for exemption; instead, Congress delegated rulemaking authority to the Department of Labor (DOL) for this purpose.<sup>22</sup> Under the DOL regulations, exempt status for white-collar workers is not determined by the employee's job title or by the preference of the employee or the employer. Instead:

Since 1940, the regulations implementing the exemption have generally required each of the following three tests to be met: (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet a minimum specified amount (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test").<sup>23</sup>

The three tests for white-collar exemption are famously fact-specific, ambiguous, and difficult to apply, spawning expensive, protracted litigation, and prompting seemingly endless calls for reform. Over the years, employers have consistently pressed for changes that would expand the ranks of exempt workers, and thereby lower overtime costs, while employees have lobbied

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scholarly commentary regarding the exemption, and to highlight certain conceptual distinctions advocated herein, this Article uses the term "white collar" to apply to executive, administrative, and professional employees throughout. However, as used herein, and specifically with respect to the salary basis proposal set forth in Part IV, the term does *not* include outside sales, computer employees, or other exempt employees for whom special compensation requirements or exceptions apply. See *infra* note 207 and accompanying text.

<sup>22</sup> *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51230, 51232 (Sept. 27, 2019) ("The statute delegates to the Secretary of Labor (Secretary) the authority to define and delimit the terms of the exemption."). Accordingly, "[p]ursuant to Congress's grant of rulemaking authority, since 1938 the Department has issued regulations at 29 CFR part 541 defining the scope of the section 13(a)(1) exemptions." *Id.*

<sup>23</sup> *Id.* at 51230.

for amendments that would bolster overtime protections.<sup>24</sup> The FLSA in general, and the white-collar exemptions in particular, have proven remarkably resistant to change.<sup>25</sup> The DOL has amended the exemptions from time to time, but political gridlock has ensured that such amendments have been few and far between. After decades of stagnation and minimal change, the duties tests were overhauled in 2004, and a contested change to the salary level went into effect as recently as January 1, 2020.<sup>26</sup> Despite these sorely needed improvements, the FLSA remains much as it was from the beginning, and the white-collar exemptions remain a source of confusion and concern.

Notably, the legislative history of the FLSA provides little if any explanation for inclusion of the white-collar exemptions in the first place.<sup>27</sup>

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<sup>24</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO/HEHS-99-1645, WHITE-COLLAR EXEMPTIONS IN THE MODERN WORKPLACE 6 (1999) [hereinafter GAO REPORT] (“Ever since the FLSA was enacted, the interests of employers in expanding white-collar exemptions as broadly as possible have competed with those of employees in limiting the use of the exemptions.”); Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L. J. 1, 6 (2001) (“Opponents of changing maximum hours labor standards respond that the politics of overtime have not changed in over sixty years. Employers seek more exemptions from, and workers seek more inclusion within, the labor standards.”).

<sup>25</sup> The intransigency of the legislation is notorious. “In the archives of federal labor laws, the FLSA holds a position nearly comparable to that of the Dead Sea Scrolls—there are other more ancient, but not many.” Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act to Support the Reengineered Workplace*, 11 LAB. LAW. 321, 321 (1996) (“Few, if any, areas of employment law have proven themselves less adaptable to an evolving workforce than the so-called white-collar exemptions to the FLSA.”).

<sup>26</sup> *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51230, 51230 (Sept. 27, 2019) (summarizing regulatory history of the exemptions). For further pertinent discussion of the disputed change to the salary level, see *infra* note 278.

<sup>27</sup> See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122 at 22123–24 (Apr. 23, 2004) (“Although section 13(a)(1) was included in the original FLSA enacted in 1938, specific references to the exemptions in the legislative history are scant.”). See also DeChiara, *supra* note 18, at 141 (“Congress never made explicit its reasons for exempting managerial and professional employees when it enacted the FLSA in 1938.”); Rowan, *supra* note 7, at 124 (“The legislative history of the FLSA contains no explanation for the white-collar exemptions.”).

“The most commonly expressed justification for the FLSA’s managerial-professional exemption is simply that managerial and professional employees do not need the government to regulate their hours.”<sup>28</sup> Scholars have surmised that “[t]he Act’s framers may have felt that the privileged position of managers and professionals in the workplace, along with the bargaining power such employees supposedly enjoyed, made government regulation of their work hours unnecessary.”<sup>29</sup> Moreover, “Congress exempted professionals, administrators and executives because it believed that these employees have some control over their hours. They have the responsibility of determining which tasks require their attention and how much time they will devote to the task. Exempt employees have the discretion to manage their time and activities.”<sup>30</sup> Accordingly, “[a]n exempt employee can be required to work as many hours as it takes to complete a task.”<sup>31</sup> The inevitable result is that “[m]ost white collar workers . . . work overtime ‘not for time and one-half, but for *nothing*’ because they are exempt under the FLSA.”<sup>32</sup>

Because exempt workers are not entitled to overtime, their employers have little incentive to limit their hours. Indeed, employers have every incentive to maximize exempt hours of work, because the white-collar exemptions represent fixed labor costs. “Because managerial and professional employees receive fixed salaries, which do not vary by hours worked, employers face no costs, and only stand to gain, by requiring long hours of work.”<sup>33</sup> Moreover, exempt employees who fear the loss of their

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<sup>28</sup> DeChiara, *supra* note 18, at 165.

<sup>29</sup> DeChiara, *supra* note 18, at 141. *See also* Rowan, *supra* note 7, at 125 (“It has been inferred that the white-collar exemptions served as a line-drawing tool between those workers in need of statutory protection and those whose skills, pay, and position provided them sufficient bargaining power to protect themselves.”); Rothe, *supra* note 9, at 729 (“[W]hen the FLSA was enacted, it was widely believed that white-collar workers were able to protect their own interests and did not require statutory protection.”).

<sup>30</sup> Pace, *supra* note 19, at 54.

<sup>31</sup> *See* GAO TESTIMONY, *supra* note 2, at 2.

<sup>32</sup> Rothe, *supra* note 9, at 717 (quoting MARC LINDER, *TIME AND A HALF’S THE AMERICAN WAY: A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868-2004*, at xxvi (Fanpihua Press 2004)).

<sup>33</sup> DeChiara, *supra* note 18, at 166. *See also* JACOBS & GERSON, *supra* note 3, at 37 (“Because employers are not required to pay overtime to professionals who work



jobs—together with the high salaries and social prestige associated with those jobs—lack bargaining power to push back.<sup>34</sup> “Today’s white-collar employees work long hours inspired not by company loyalty or dreams of advancement, but by the fear of job insecurity.”<sup>35</sup> In short, “[t]he opportunity for free labor motivates the employer to demand longer hours, and the fear of unemployment motivates the employee to comply. Consequently, for many, the threshold for *enough work* is no longer measured by the ‘length of the workday but by the limits of human endurance.’”<sup>36</sup>

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more than forty hours per week, and because extra hours of work by exempt employees do not cost additional wages at all, employers face no strong incentive to limit such workers to a forty-hour workweek.”). Notably, in addition to fixed salaries, the costs of employee benefits for full-time employees are also fixed. *See infra* note 88. Other systemic factors contribute to the growth in exempt hours, too. *See* DeChiara, *supra* note 18, at 166 (“In addition to the incentives built in to the fixed-salary pay structure, recent developments in the economy such as increased international competition, deregulation, and mergers, have fueled the demand for long hours.”).

<sup>34</sup> *See* DeChiara, *supra* note 18, at 167 (“It also appears clear that most managers and professionals lack sufficient bargaining power to resist employer demands for longer hours.”); JULIET B. SCHOR, *THE OVERWORKED AMERICAN* 71 (Basic Books 1991) (“For every aspiring manager determined to limit his or her hours, there are usually many more willing to give the company whatever time it demands.”).

<sup>35</sup> Rothe, *supra* note 9, at 731. Moreover, exempt workers who value their relatively privileged status may internalize values aligned with their employer’s interests. *See* DiChiara, *supra* note 18, at 180 (“The ideology of professionalism teaches professionals to cherish their privileged status and to give unstintingly of their time to their employer.”). *See also* Derek Thompson, *Workism Is Making Americans Miserable*, *THE ATLANTIC* (Feb. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441/> (“But a culture that funnels its dreams of self-actualization into salaried jobs is setting itself up for collective anxiety, mass disappointment, and inevitable burnout.”).

<sup>36</sup> Rothe, *supra* note 9, at 715 (quoting Schor, *supra* note 34, at 70). The insecurity that exempt workers experience may be intensified by the stark occupational divide that characterizes the American workforce today and the tenuous hold that employees in “elite” professions feel they have in their privileged positions. *See generally* DANIEL MARKOVITS, *THE MERITOCRACY TRAP* (Penguin Press 2020).

B. Changes in the size and composition of the white-collar workforce, as well as changes in technology and other modern pressures, have compounded the “time squeeze” for exempt workers.

The burden of long workweeks is not only the result of exempt status *per se*, but also the result of shifting workforce demographics and encroaching uses of technology. This section briefly outlines demographic and technological influences that intensify the impacts of long workweeks for white-collar, remote-ready workers.

First, the changing face of the workforce has fueled the white-collar time squeeze. As compared to the mid-twentieth century, today there are many more workers who are exempt from overtime protections, and many more of them are women. In the early days of the FLSA, the white-collar exemptions applied only to a small fraction of the workforce as a whole.<sup>37</sup> However, with the expansion of the service sector in the U.S. economy, a greater and greater percentage of the workforce is now classified as exempt from overtime protections.<sup>38</sup> When the FLSA was enacted, fewer than half of the workforce was employed in the service sector,<sup>39</sup> but today, the service sector represents approximately eighty percent of the workforce.<sup>40</sup> Reflecting

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<sup>37</sup> See Miller, *supra* note 24, at 32 (“At the time, white-collar workers were a small and exclusive class. . . . Times have changed. The ranks of white-collar employees currently swell the United States workforce.”). See also DeChiara, *supra* note 18, at 151 (“In 1940, professional and technical employees combined amounted to fewer than four million individuals, or less than 7.5 percent of the workforce. Managerial employees, at approximately 3.5 million, constituted just over seven percent of the workforce.”).

<sup>38</sup> See GAO REPORT, *supra* note 24, at 2 (“In recent years, the percentage of employees covered by these exemptions has been increasing.”). See also DeChiara, *supra* note 18, at 141 (providing data as of 1992 and noting that “while managerial and professional employees constituted a slim portion of the labor force when Congress enacted the FLSA, the last fifty years have seen their ranks swell to the point where they now constitute over one-quarter of the entire paid workforce”). “Indeed, by 1989, the number of managerial, professional, and technical workers in this country exceeded the number of blue-collar workers.” *Id.* at 151.

<sup>39</sup> Rothe, *supra* note 9, at 730.

<sup>40</sup> See *Employment by Major Industry Sector*, BUREAU LAB. STAT., <https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm> (last visited Sept. 13, 2021).

on this growth, the Government Accounting Office (GAO) has noted that “[t]he rapidly growing service sector had a higher proportion of exempt workers than other sectors, and is responsible for much of the overall increase in numbers of exempt workers.”<sup>41</sup> Reasons for this expansion include the growth of the health care industry, advancements in technology, and the “professionalization” of formerly unprofessional positions.<sup>42</sup>

Not only are exempt workers an ever-larger proportion of the workforce, exempt workers are increasingly female.<sup>43</sup> Indeed, more women than men entered the full-time white-collar workforce in the last twenty years of the twentieth century.<sup>44</sup> The influx of women in the workforce has in turn contributed to the rise of the single-parent and dual-earner households,<sup>45</sup> displacing the single-earner, male-breadwinner model that was previously so prevalent.<sup>46</sup> And as women who formerly devoted their full time to homemaking have entered the workforce in large numbers, with no one taking up the tasks they were performing before, American households are

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<sup>41</sup> GAO TESTIMONY, *supra* note 2, at 1. *See also* Rothe, *supra* note 9, at 730 (“Notably, the growth in white-collar positions predominantly resulted from the economy’s shift to a service-oriented economy.”).

<sup>42</sup> DeChiara, *supra* note 18, at 151–52.

<sup>43</sup> DeChiara, *supra* note 18, at 153 (“Not only have the ranks of the managerial-professional workforce grown, but they have changed in composition, most notably by an increase in female members.”).

<sup>44</sup> GAO TESTIMONY, *supra* note 2, at 1. (“Similarly, our data indicated that more women than men entered the full-time white-collar exempt positions over this period” [from 1983 to 1998]).

<sup>45</sup> “[T]oday, over two-thirds of American families are headed by single parents or two working parents.” Bobbi Thomason & Heather Williams, *Viewpoint: What Will Work/life Balance Look Like After the Pandemic?* SHRM (Apr. 27, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/viewpoint-what-will-work/life-balance-look-like-after-the-pandemic.aspx> (reprinted with permission from Harvard Business Review).

<sup>46</sup> JACOBS & GERSON, *supra* note 3, at 1 (“Today, as a new century begins, we face a greatly altered family landscape in which dual-income and single-parent families far outnumber the once ascendant two-parent, one-earner household.”). Importantly, however, the overall increase in the numbers of working women hides important demographic realities. While at the time the FLSA was passed, “[f]ew women worked outside the home,” it is also the case that “some, disproportionately women of color and recent immigrants, always have had relatively high labor force participation.” Heather Boushey, *The Role of Government in Work-Family Conflict*, FUTURE OF CHILD. 163, 164 (2011).

increasingly strapped for time.<sup>47</sup> “Contemporary households face a rising time squeeze not because individual workers are putting in substantially more time at work, but rather because households, whether headed by dual-earning couples or single parents, face a changing equation in the overall time available for paid work versus domestic pursuits.”<sup>48</sup>

These demographic trends have been documented and debated for years.<sup>49</sup> “For decades, scholars have described how organizations were built upon the implicit model of an ‘ideal worker’: one who is wholly devoted to their job and is available 24 hours a day, 365 days a year, every year of their career. This was always an unrealistic archetype, one that presumed a full-

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<sup>47</sup> Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in *PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 131, 137 (Judy Fudge & Rosemary Owens eds. 2006) (“In the United States, in particular, the rise in women’s employment and in the hours worked by women, with no countervailing decrease in hours worked by men, has created a ‘time crunch.’ Compared to nine other countries with a similar level of economic and social development, the United States has the highest average working week for women (37.4 hours), and also the highest percentage of women (11.3 per cent) and men (26.8 per cent) who work over 50 hours per week.”).

<sup>48</sup> JACOBS & GERSON, *supra* note 3, at 4. (“Drawing on information from the Current Population Survey (U.S. Bureau of Labor Statistics 2002a), from 1970 through 2000, we find that the working time of couples has risen far more dramatically than that of individual workers.”). *See also* Marin Clarkberg & Phyllis Moen, *Understanding the Time-Squeeze: Married Couples Preferred and Actual Work-Hour Strategies*, 44 *AM. BEHAV. SCIENTIST* 1115, 1117 (2001) (“[E]ven without a significant change in the average worker’s hours, married women’s rising labor force participation has meant that workers are increasingly married to each other. This fact by itself would imply that the family work week would be substantially longer, absent other changes in work.”).

<sup>49</sup> Clarkberg & Moen, *supra* note 48, at 1117 (“Studies have consistently found that dual-earner families are not only more prevalent but are also working harder than before.”). Although scholars over the years have analyzed the data differently, there is shared consensus that women’s entry into the workforce in large numbers fueled the time-squeeze that so many families feel today. *Compare* JACOBS & GERSON, *supra* note 3, at 24–25 (“In sum, the expansion in the number of weeks per year worked by the average American worker is largely a consequence of women’s determined and steady march toward greater commitment to economic independence and work outside the home”) *with* Schor, *supra* note 1, at 159 (“[T]he shift from a full-time homemaker to a full-time worker is associated with a very large rise in hours, which is the core of the ‘work-family’ dilemma.”).

time caretaker in the background.”<sup>50</sup> Without a full-time caretaker acting as a “silent partner,”<sup>51</sup> the effects of long workweeks are compounded.<sup>52</sup> Women are especially vulnerable to this time crunch,<sup>53</sup> threatening the progress of women in the workplace.<sup>54</sup> Even so, the problem of overwork

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<sup>50</sup> Thomason & Williams, *supra* note 45.

<sup>51</sup> See HEATHER BOUSHEY, *FINDING TIME: THE ECONOMICS OF WORK-LIFE CONFLICT* 45 (Harvard Univ. Press 2016) (“American business has lost its Silent Partner.”). See also *id.* at 43–45 (discussing declining prevalence of stay-at-home caregivers since the 1930s).

<sup>52</sup> See Miller, *supra* note 24, at 5 (“The [labor] standards, their white-collar exemptions, and the USDOL’s regulations delineating and defining the exemptions were designed to address the single-earner household model. Under this model, a breadwinner (particularly exempt white-collar male employees) perform[s] long hours of marketplace work, enabled by a stay-at-home spouse (female) performing the non-marketplace work for the household. This model has a detrimental effect on many dual-earner households where both partners are often exempt white-collar workers who come home from their first shift of marketplace work hours to a second shift of non-marketplace household work.”). See also *infra* notes 67–92 and accompanying text for more lengthy discussion of the “time divide” and its impact on dual-earner households and white-collar workers.

<sup>53</sup> See DeChiara, *supra* note 18, at 142–43 (“These female managers and professionals, unlike their male predecessors, typically do not have a spouse staying home to provide childcare and other domestic labor. Indeed, the reality is that female managers and professionals bear nearly the entire burden of their families’ childcare duties. Employer demands for excessive work hours threaten to drive away those female managers and professionals who now struggle to balance workplace and family responsibilities.”). See also Thomason & Williams, *supra* note 45 (“The “ideal worker” expectation is particularly punitive for working mothers, who also typically put in more hours of caregiving work at home than their spouses.”).

<sup>54</sup> See DeChiara, *supra* note 18, at 175–76 (“Thus, the excessive hours required in managerial and professional jobs threaten to undermine the legal, political, and social victories women have won in their efforts to enter such occupations”); Claire Cain Miller, *Women Did Everything Right. Then Work Got ‘Greedy’*, N.Y. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/upshot/women-long-hours-greedy-professions.html> (observing that “long, inflexible hours” are an “unintentional side effect of the nation’s embrace of a winner-take-all economy” that is “so powerful, researchers say, that it has cancelled the effect of women’s educational gains. Just as more women earned degrees, the jobs that require those degrees started paying disproportionately more to people with round-the-clock availability.”). The pandemic only intensified the threat to women’s careers,

transcends gender. Studies consistently show that “[m]ost Americans, men as well as women, regardless of marital and parental status, say they would like to work less and devote more time to personal and family care.”<sup>55</sup> Exempt office workers in particular are among those who work excessive hours, leaving little time for personal affairs.<sup>56</sup> “Indeed, while comprising one-third of the workforce, [exempt managerial and professional employees] constitute nearly 50 percent of the workers who work 50 or more hours a week.”<sup>57</sup>

Demographics alone are not the issue; technology is also a key culprit causing time creep. To begin with, technology has fueled the growth of so-called “knowledge work” itself, expanding this category of occupations as a whole.<sup>58</sup> In addition, technology and other pressures of modern life have

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especially in high-powered occupations like law. See Liane Jackson, *How Pandemic Practice Left Lawyer-Moms Facing Burnout*, ABA J. (Aug. 1, 2021), <https://www.abajournal.com/magazine/article/how-pandemic-practice-left-lawyer-moms-on-the-verge>.

<sup>55</sup> Schultz & Hoffman, *supra* note 47, at 137. See also Leslie A. Perlow & Erin L. Kelly, *Toward a Model of Work Redesign for Better Work and Better Life*, 41 WORK & OCCUPATIONS 111, 112 (2014) (“The intensification of work is felt keenly by growing numbers of dual-earner couples, single parents, elder caregivers, and fathers who are involved in day-to-day caregiving.”).

<sup>56</sup> See GAO TESTIMONY, *supra* note 2, at 4 (“Overall, full-time workers covered by the white-collar exemptions are much more likely to work overtime—that is, more than 40 hours per week—than nonexempt workers.”). See also, Scott D. Miller, *Work/Life Balance and the White-Collar Employee Under the FLSA*, 7 EMP. RTS. & EMP. POL'Y J. 5, 42 (2003) (“The individuals affected by the long work hours are white-collar employees, mostly women and couples in dual-income households.”).

<sup>57</sup> Schultz & Hoffman, *supra* note 47, at 139.

<sup>58</sup> For a general explanation of “knowledge work” and its growth, see Bret Brody, *Knowledge Workers, Information Life Cycles, and Content Silos Oh My*, MEDIUM (Nov. 25, 2018) <https://medium.com/snipply/knowledge-workers-information-life-cycles-and-content-silos-oh-my-a4263eed427>. As Brody notes, “Knowledge workers can be programmers, architects, engineers, marketers, design thinkers, public accountants, lawyers, and academics, and essentially any other white-collar worker who uses judgement and critical thinking in their role.” *Id.* Brody observes, “Despite advancements in technology (like AI, automation, robotics) that are supposedly going to wipe out jobs, knowledge workers continue to be the most prolific area of job growth in the modern economy.” *Id.* See also Josh Zumbrun, *The Rise of Knowledge Workers Is Accelerating Despite the Threat of*

extended exempt work, including specifically knowledge work, well beyond the standard workday and workweek. This is a sad irony, given the apparent potential of technology to make our lives easier, not harder. “Until about the 1970s, it was widely believed that worktime *would* shrink. Experts expected that automation and mechanization would lead to the four-hour day by the 1980s.”<sup>59</sup> Instead, technology has not only increased employee productivity but also somewhat paradoxically increased working hours,<sup>60</sup> in part by removing previously existing logistical barriers to work:

Work responsibilities are no longer forgotten when employees leave the office for the day. Instead, the work spills into morning and evening commutes, after-hour emails and voicemails, and late-night readings of proposals and memos. Such ‘seepage . . . [is] the dirty secret behind many a corporation’s thriving bottom line,’ because now

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*Automation*, WALL ST. J. (May 4, 2016), <https://www.wsj.com/articles/BL-REB-35617> (“In the past three decades, the number of jobs for knowledge workers has never been rising as quickly as it is right now.”); Steve Glaveski, *The Case for the 6-Hour Workday*, HARV. BUS. REV. (Dec. 11, 2018), <https://hbr.org/2018/12/the-case-for-the-6-hour-workday> (“The internet fundamentally changed the way we live, work, and play, and the nature of work itself has transitioned in large part from algorithmic tasks to heuristic ones that require critical thinking, problem solving, and creativity.”).

<sup>59</sup> Schor, *supra* note 1, at 157.

<sup>60</sup> See Rothe, *supra* note 9, at 711–12 (“Undeniably, technological advancements have increased employee productivity. Technology, however, has also intensified the overwork trend.”). See also Miller, *supra* note 24, at 4 (“Technological and economic progress has, however, increased, not decreased, work hours. Home computers and faxes, voice and e-mail, beepers, and cell and car phones have lured workers into a 24/7 marketplace workweek.”); Robert Booth, *Is This the Age of the Four-Day Week?* THE GUARDIAN (Mar. 13, 2019), <https://www.theguardian.com/world/2019/mar/13/age-of-four-day-week-workers-productivity> (“Automation and artificial intelligence, billed as drivers of greater leisure, have been harnessed by the barons of the gig economy to the opposite effect for some workers.”). Incidentally, “[n]on-marketplace household work hours have also increased as washing machines, vacuum cleaners, and other labor saving devices created higher expectations for household cleanliness.”). Miller, *supra* note 24, at 4.

employees are working around the clock at no additional cost to their employers.<sup>61</sup>

With technology driving a longer workday, “the digital day never really ends.”<sup>62</sup> Instead, “[p]rofessional, managerial, and many technical employees are often expected to be connected anywhere, anytime.”<sup>63</sup> This means that exempt employees not only toil for longer hours in the office, they face interruptions to their nights and weekends as well,<sup>64</sup> making their schedules not only long, but also erratic and unpredictable.<sup>65</sup>

In sum, the number of white-collar workers, and the percentage of such workers who are women, has grown enormously in the decades since

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<sup>61</sup> Rothe, *supra* note 9, at 711 (quoting JILL ANDRESKY FRASER, *WHITE-COLLAR SWEATSHOP: THE DETERIORATION OF WORK AND ITS REWARDS IN CORPORATE AMERICA* 25 (W. W. Norton & Co. 2001)).

<sup>62</sup> Arjun Narayan, et. al, *The Endless Digital Workday*, HARV. BUS. REV. (Aug. 12, 2021), <https://hbr.org/2021/08/the-endless-digital-workday>.

<sup>63</sup> Perlow & Kelly, *supra* note 55, at 112 (“The world of work is changing. It is becoming more virtual, more global, and more technologically advanced. Expectations of when and where work is done are also changing.”). *See also*, ERIN L. KELLY & PHYLLIS MOEN, *OVERLOAD: HOW GOOD JOBS WENT BAD AND WHAT WE CAN DO ABOUT IT* 4 (Princeton Univ. Press 2021) (“New communication technologies foster an always-on, always-working culture. Managers and coworkers know they can contact employees anytime, anywhere, and they often do reach out before and after official workdays.”).

<sup>64</sup> *See* KELLY & MOEN, *supra* note 63, at 5 (“Most businesses continue to demand 9 to 5 (or 8 to 6) desk time in addition to early morning calls to offshore colleagues, last-minute but all-too-common work requests at 10 p.m., and ubiquitous emails, texts, and instant messaging.”). *See also* Cal Newport, *5-Hour Workdays? 4-Day Workweeks? Yes, Please*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/2019/11/06/opinion/five-hour-workday-experiment.html> (opining that the “distinction between time in the office and time spent working is critical. In our current age of email and smartphones, work has pervaded more and more of our waking hours — evenings, mornings, weekends, vacations — rendering the idea of a fixed workday as quaint”).

<sup>65</sup> Of course, technology introduces distractions, too, and concerns about its encroachment on employee time run both ways. Notably, “[t]echnological advancements have not only made employees more accessible around the clock, but have also allowed them to shirk more during working hours. . . . Arguably, if employees are filling the hours from nine to five with personal emails and web surfing, it is not unreasonable for a work-related call or email to occasionally interrupt their nights and weekends.” Rothe, *supra* note 9, at 733.



the FLSA was passed, leaving ever larger numbers of workers without overtime protections.<sup>66</sup> The rise of dual-income and single-parent households has increased the burden of even the average workweek, and the intrusion of technology has expanded, not contracted, the available hours for knowledge work. Overwork now is endemic to a growing group of white-collar workers doing digital labor in the United States today. Collectively, these forces have put white-collar, remote-ready workers on the far side of the “time divide,” as discussed below.

C. Time-squeezed American households also reflect a “time divide.”

As we consider whether there is any remedy for the overworked exempt employee, it is important to keep in mind that the problem of work/life balance is exceedingly complex and should be analyzed and understood from multiple angles.<sup>67</sup> The problem has proven so intractable in part because it is not one problem but many, with many diverse causes and widely diverse effects on different segments of society.<sup>68</sup> Given its multifaceted nature, the so-called “time squeeze” has also been difficult to

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<sup>66</sup> See Miller, *supra* note 24, at 32 (“The existing regulatory environment (ossifying the USDOL regulations addressing the white-collar exemptions) effectively enlarges the scope of workers unprotected by maximum hours labor standards.”).

<sup>67</sup> See Katharine B. Silbaugh, *Sprawl, Family Rhythms, and the Four-Day Work Week*, 42 CONN. L. REV. 1267, 1271 (2010) (exploring the impacts of urban sprawl on work/family tension and noting that “[t]he literature on work/family or work/life balance is robust and extensive. It seems that every discipline has developed an approach, performed research, and offered insights—economists, lawyers, sociologists, psychologists, business consultants, as well as some from more surprising fields like architecture and comparative religion have weighed in on the topic. That multiple disciplines would engage the topic is evidence of the multifaceted and complex problem under consideration.”).

<sup>68</sup> Indeed, the scope and origins of the problem itself are difficult even to begin to define. As we grapple with work/life issues, “we are not sure whether we have a problem of rising and shifting parenting standards, enormous generational change in the lifespan and cultural notions of appropriate care for the elderly, voracious employers, extended childhoods, new risks to children, stagnating wages, gender role transformations, increasing inequities among population groups, or decreasingly livable communities—the number of possible ways to describe the problem can bewilder.” Silbaugh, *supra* note 67, at 1272.

reliably quantify with data. Indeed, there has been substantial debate among scholars over the years about whether Americans are in fact working more today than they have in the past, with some researchers claiming a stark increase in Americans' work hours, and others arguing there has been no such increase in working time at all.<sup>69</sup>

This debate was extensively examined by Jerry Jacobs and Kathleen Gerson in their groundbreaking work from 2004, *The Time Divide*.<sup>70</sup> To investigate the overwork debate, Jacobs and Gerson collected and analyzed

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<sup>69</sup> The history of this debate has been summarized concisely by sociologists Marin Clarkberg and Phyllis Moen in their study of the time-squeeze and the working hours that married families prefer:

Considerable debate has arisen as to whether and why Americans are working longer hours today than they had in the past. This discussion was largely generated by the 1991 publication of Juliet Schor's *The Overworked American*, but the notion of increasing workload—particularly for women—has been a theme in sociological literature for some time. Early studies emphasized the relative stability of women's time spent at housework, even with increasing labor force participation, placing the onus of the overwork problem in the context of the division of household labor. Schor's estimates of trends in work time since 1969—indicating an annual increase of almost 100 hours a year for men and three times that for women—brought the question of women's and men's time spent in the labor market in central focus.

Yet, even while panel studies document a growing perception of feeling rushed, stressed, or otherwise crunched for time, a number of researchers have strongly questioned the accuracy of Schor's estimates. Indeed, at least a dozen studies in the 1990s have constructed alternative estimates of individual work-time trends throughout the past few decades, most also documenting an overall increase, but some actually finding a decline, with each emphasizing the merits of various data collection and weighing methods.

Clarkberg & Moen, *supra* note 48, at 1116. See also Miller, *supra* note 24, at 46–109 (providing an extensive summary and analysis of the academic literature on the “overworked American” thesis and concluding that “[w]hile Americans may have forgotten the rationales for maximum hours labor standards, the standards are as relevant today as they were at the turn of the twentieth century”).

<sup>70</sup> JACOBS & GERSON, *supra* note 3.

voluminous data regarding labor and time and performed a “multifaceted analysis of the complex and evolving links between working time, workplace arrangements, and work-family conflicts among American workers.”<sup>71</sup> While in-depth treatment of their results is beyond the scope of this Article, a few key points stand out. As a preliminary matter, it is important to note that Jacobs and Gerson actually found little evidence to suggest that the length of the average American workweek, overall, has increased over the past several decades.<sup>72</sup> This finding would appear to support the naysayer side of the overwork debate. Importantly, however, more granular sorting of the data tells a different story.

According to Jacobs and Gerson, “If it seems surprising that the average length of the workweek has remained largely unchanged since 1970, it is important to remember that this apparent stability masks some important shifts. Variation around the average has increased, marking the emergence of both longer and shorter workweeks for different groups of workers.”<sup>73</sup> In other words, hidden behind group averages, data regarding individual workers’ hours show an increasing disparity, with trends both toward hours that are overly long (more than fifty hours per week), and overly short (less than thirty hours per week),<sup>74</sup> meaning one group of workers is working many more hours than they would like, and the other group is working far fewer hours than they would like.

Thus, one important feature of the time-squeeze is its bifurcated nature: “while a large segment of the labor force is working longer and harder than ever, another group of workers is confronting the problem of finding enough work.”<sup>75</sup> The analysis by Jacobs and Gerson reveals that “there is a growing time divide between those working especially long weeks, who would prefer to work less, and those working relatively short weeks, who

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<sup>71</sup> JACOBS & GERSON, *supra* note 3, at 3.

<sup>72</sup> *Id.* at 32. (“There is, in sum, little support for the notion that there has been a general and markedly upward trend in the length of the average workweek.”).

<sup>73</sup> *Id.* See also Clarkberg & Moen, *supra* note 48, at 1116 (whether or not overall average work hours are holding relatively constant, “[c]hange—or stability—in the mean may mask important changes in the distribution of work hours across individual workers, as well as across households”).

<sup>74</sup> Clarkberg & Moen, *supra* note 48, at 1116 (“[S]ome researchers have found that changes in mean work hours have been relatively minor in comparison to the shift toward both long (e.g., more than 50 hours) or short (e.g., less than 30 hours) work weeks among individual workers.”).

<sup>75</sup> JACOBS & GERSON, *supra* note 3, at 13.

would prefer to work more.”<sup>76</sup> Exempt white-collar workers are often among those who face overwork.<sup>77</sup> “Managerial and professional employees typically work very long hours at a single job, while less-skilled workers often have trouble finding one job that will provide them with enough hours to make a living.”<sup>78</sup> While many nonexempt workers also unwillingly work long hours of overtime,<sup>79</sup> Jacobs and Gerson find that “long workweeks are most common among professionals and managers.”<sup>80</sup> Workers who struggle to find enough work, on the other hand, are often faced with particularly inflexible, unpredictable work schedules that heighten work-family conflicts as much—and often much more—than long hours alone.<sup>81</sup>

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<sup>76</sup> *Id.* at 5.

<sup>77</sup> See GAO TESTIMONY, *supra* note 2, at 3 (“In general, exempt white-collar workers are increasingly much more apt to work overtime hours on their jobs than are workers in nonexempt positions.”).

<sup>78</sup> Vicki Schultz, *Life's Work*, 100 COL. L. REV. 1881, 1956 (2000).

<sup>79</sup> Long hours are not limited to professionals and managers; many nonexempt workers are required to work excessive overtime, too. See Shirley Lung, *The Four-Day Work Week: But What About Ms. Coke, Ms. Upton, and Ms. Blankenship?* 42 CONN. L. REV. 1121, 1126 (2010) (“The myth is that long work hours are the province of professional women and men exempted from the overtime pay requirements of the Fair Labor Standards Act of 1938 (‘FLSA’). Yet, low-wage workers in the garment, restaurant, domestic, home care, janitorial, and other low-wage industries are routinely subjected to mandatory or forced overtime, including uncompensated overtime.”).

<sup>80</sup> JACOBS & GERSON, *supra* note 3, at 35. See also *id.* (“Over one in three men (37.2 percent) who work in professional, technical, or managerial occupations work fifty hours or more per week, compared to one in five (21.3 percent) in other occupations. For women, the comparable figures are one in six for professional and managerial positions versus less than one in fourteen for other occupations.”).

<sup>81</sup> As one scholar has described the work/life conflicts faced by low-wage workers:

While many workers experience a climate of inflexible work, low-wage workers are the most vulnerable. Many low-wage workers find making ends meet challenging. Low-wage workers are disproportionately faced with the broader demographic challenges of the rise in single parenting, two working spouses, and extended care for elderly parents.

Thus, the time squeeze is real, but differently experienced by different groups.<sup>82</sup> Jacobs and Gerson neatly summarize the convergence of factors that culminate in a time squeeze, especially for workers who resemble white-collar, remote-ready workers:

Although the average American workweek has not changed dramatically over the past several decades, a growing group of Americans are clearly, and strongly, pressed for time. These workers include employees who are putting in especially long days at work each week, often against their desire, and people in dual-earner and single-parent families who cannot rely on a support system anchored by a nonemployed member. The intransigence of the structure of work and the rise of highly demanding jobs, especially at the upper levels of the occupational hierarchy, present dilemmas

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Low-wage workers could most benefit from the freedom that flextime provides, but low-wage workers are even less likely than their higher-paid counterparts to have access to flexible schedules. Such workers are in fact the most likely to work in jobs that are rigidly scheduled. When their jobs do vary, they vary with unpredictability, not flexibility. ‘Flexible’ time for low-wage workers means having little warning when overtime is necessary or when an expected shift will be cancelled. Technology can exacerbate the problem as employers use computer planning to rapidly add, subtract, or shift hours within the same day to respond to fluctuating consumer or production demand.

Robert C. Bird, *Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform*, 37 BERKELEY J. EMP. & LAB. L. 1, 4-5 (2016). See also Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1218 (2010) (“Low-wage workers do have a need for greater flexibility: many of them work in jobs characterized by rigid and unforgiving schedules that can lead to lower mobility or even job loss for those who cannot comply.”); Lung, *supra* note 79, at 1127 (“In most low-wage jobs, employer autocracy, rather than flexibility, is the norm.”). While these scholars’ concerns relate to low-wage workers generally, the problems highlighted here arguably apply equally to workers who engage in part-time, contingent, or other “precarious” work, without enough hours, compensation, or predictability.

<sup>82</sup> Perlow & Kelly, *supra* note 55, at 112 (“Conflicts between work life and personal life are broadly, though unequally, felt.”).

and problems for many workers. And, increasingly, women and men alike face challenging work without the traditional, unpaid spouses once taken for granted by husbands in upwardly mobile careers and highly demanding jobs. Yet employers have not readily responded to these changed realities, assuming that devoted workers have—or should have—unpaid partners who are home full-time to take care of the many domestic tasks on which not only family life but successful careers and secure communities depend.<sup>83</sup>

The findings of Jacobs and Gerson regarding the time divide are consistent with a broader occupational divide, supported by data confirming job polarization generally.<sup>84</sup> Many of the most prestigious office jobs today require the most hours, with the least tolerance for moderation.<sup>85</sup> In this polarized labor market, pressures on highly skilled employees to maintain their status—and income—are intense.<sup>86</sup> Where very long working hours are

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<sup>83</sup> JACOBS & GERSON, *supra* note 3, at 39.

<sup>84</sup> See, e.g., *Job Polarization*, THE FRED BLOG (Apr. 28, 2016), <https://fredblog.stlouisfed.org/?s=job+polarization> (“The trend is clear: Middle-skill occupations such as manufacturing and production are declining, and both high-skill and low-skill occupations such as managers and professionals on one end and personal care services on the other are growing. Another way to describe the trend is that routine jobs are decreasing and nonroutine jobs are increasing. Economists refer to this process as ‘job polarization,’ which is driven by both automation and offshoring.”).

<sup>85</sup> See Thomason & Williams, *supra* note 45 (“Employees are disproportionately well-compensated for being ideal workers. ‘Time greedy’ professions like finance, consulting, and law — where 80- or 100-hour weeks may be typical — compensate their workers per hour more than professions with a regular 40-hour week.”). See also Cain Miller, *supra* note 54 (“The returns to working long, inflexible hours have greatly increased. This is particularly true in managerial jobs and what social scientists call the greedy professions, like finance, law and consulting — an unintentional side effect of the nation’s embrace of a winner-take-all economy.”).

<sup>86</sup> See generally MARKOVITS, *supra* note 36, at 3–19 (describing the role of meritocracy in the disappearance of the middle class and fetishizing of long hours and high incomes for the “elite” class of “superordinate workers” in “extreme jobs”). As Markowitz notes, “Both the demands and the rewards of elite work are greater today than they have ever been before.” *Id.* at 8. Moreover, “Overall, prime-aged men from the top 1 percent of the income distribution work nearly 50 percent longer

prized in the workplace, “[t]he costs of choosing to work less than exceedingly long workweeks can be particularly acute for professional workers.”<sup>87</sup> Entrenched features of our modern workplace benefits and culture further intensify the time divide and make it exceedingly difficult for overworked workers to simply work less.<sup>88</sup> “Families who prefer to incorporate less than full-time work hours into their lives find themselves most frequently between a rock and a hard place: zero versus 40 or more hours of work each week for each partner.”<sup>89</sup>

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hours, on average, than their counterparts from the bottom half.” *Id.* at 10. The practice of law typifies these excessive time pressures. *Id.* See also Jackson, *supra* note 54 (describing lawyering as “all-consuming, 24/7, customer service-driven work without traditional start and stop points” and noting “a first-in-last-out mentality that has led to mental health crises and burnout in the profession”).

<sup>87</sup> JACOBS & GERSON, *supra* note 3, at 110. See also Opinion, *Working Less Is a Matter of Life and Death*, N. Y. TIMES (May 29, 2021), <https://www.nytimes.com/2021/05/29/opinion/work-hours-us-health.html> (“But affluent Americans also are motivated by the reality that the rewards for working hard are larger than ever — and in this sternly meritocratic society, so are the consequences of falling behind.”).

<sup>88</sup> JACOBS & GERSON, *supra* note 3, at 37 (“The structure and distribution of benefits, such as health care and other services, also give employers incentives to divide the labor force. By hiring part-time workers with no benefits and simultaneously pressuring some full-time employees—especially salaried workers—to work longer hours, work organizations can lower their total compensation costs. The unintended consequence of these cost-limiting strategies is a division of the work force into those putting in very long workweeks and those putting in relatively short ones.”). See also *id.* at 63 (“While people face new needs for balance and flexibility in their working lives, employers have good reasons to offer jobs with either long or short workweeks. This forces workers to choose between time and income—a difficult decision that clashes with the exigencies of the new family economy.”).

<sup>89</sup> Clarkberg & Moen, *supra* note 48, at 1132. See also *id.* (“[E]mployer demands and the institutionalized nature of work and employment dictate that work hours come in prepackaged bundles.”). This all-or-nothing scenario may contribute to a concern that educated women have “opted out” of jobs that are prestigious, but also require an unflagging commitment to long hours. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES (Oct. 26, 2003), <https://www.nytimes.com/2003/10/26/magazine/the-opt-out-revolution.html>; Cf. Cain Miller, *supra* note 54 (“This is not about educated women opting out of work (they are the least likely to stop working after having children, even if they move to

These disparities in work hours and their impacts make it difficult—indeed, perhaps, inadvisable—to seek a single societal solution to the problem of work/life conflict. As Jacobs and Gerson note, the “new diversity in family arrangements and worker circumstances implies that social policies should be sensitive to the myriad needs facing households with varying structures, incomes, and priorities.”<sup>90</sup> As another scholar has cautioned, noting these and other complexities of the time-squeeze, “[w]ork/life balance reformers [should] remain mindful of the multi-dimensionality of the issue. We should not expect one reform to ease the tension on its own and, thus, should work to promote a variety of reforms simultaneously.”<sup>91</sup> And similarly, “reforms that would reduce work time must consider nuances in differences among workers by job type and income level.”<sup>92</sup> Heeding this advice, Part III turns to consider possible solutions to the workweek/work/life conundrum and their relative potential for success as applied to a specific segment of the workforce: beleaguered exempt office workers.

### III. EVEN AS WE MAKE EXCEPTIONS TO THE STANDARD WORKWEEK, AND EVEN AS WE WORK TO MAKE IT SHORTER, WE SHOULD QUESTION ITS RELEVANCE TO WHITE-COLLAR WORKERS ALTOGETHER.

As explained above, the forty-hour workweek may be fixed in our national consciousness, but it is no longer lived in our collective experience. Instead, Americans are increasingly working at the extremes, with some working far fewer hours than they would like, and others working far more.

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less demanding jobs.) It’s about how the nature of work has changed in ways that push couples who have equal career potential to take on unequal roles.”).

<sup>90</sup> JACOBS & GERSON, *supra* note 3, at 170.

<sup>91</sup> See Silbaugh, *supra* note 67, at 1272. Silbaugh also warns that “[i]n addition, we should evaluate reforms for their unintended consequences as well as their benefits.” *Id.* For the beginnings of such evaluation on the reforms proposed here, see *infra* notes 259–61 and accompanying text.

<sup>92</sup> Lonnie Golden, *A Purpose for Every Time? The Timing and Length of the Work Week and Implications for Worker Well-Being*, 42 CONN. L. REV. 1181, 1201 (2010) (evaluating proposed four-day work week from economic standpoint and concluding that most promising reforms are those that would require employers to consider individual requests, given diversity of employee preferences over the lifecycle).



The seismic changes to the American workforce since the passage of the FLSA have generated national consternation over work/life conflict and a national conversation about how to address it, with possible solutions both adopted and proposed. This Part III surveys both familiar and emerging solutions to work/life conflicts and their relative benefits for the overworked exempt employee, including flexible work arrangements (FWAs), four-day workweeks, and the results-only work environment, or ROWE. Taking all these options into account, this Part argues that even as we continue to make much-needed exceptions to the standard workweek, and even as we work toward achieving a more reasonable workweek for everyone, we should also question the necessity of standard working hours altogether, especially for the white-collar, remote-ready worker.

A. Leave laws and other legislative exceptions to the standard workweek are necessary but not sufficient to solve the problem of exempt overwork.

Enactment of the federal Family and Medical Leave Act (FMLA) in 1993<sup>93</sup> secured a seminal victory for advocates of work/life balance, and in the decades since, we have seen tremendous growth in state and local legislation, as well as private employer policy initiatives, further promoting workplace flexibility and offering essential employee protections. Flexible work arrangements, or FWAs, include an assortment of public and private exceptions, modifications, and accommodations to the standard workweek, such as family and medical leave, part-time schedules, flextime, job sharing, and telecommuting. These accommodations are, without question, a lifeline to the workers and their families who need them. Importantly, however, these flexible workplace accommodations collectively operate by making exceptions to the employer’s established workweek, without questioning its legitimacy. And because these flexible work arrangements are premised on special exceptions to standard working hours, they can result in inadequacies, inequities, and administrative complexities that undermine their ultimate success.

First, it is important to understand at the outset that FWAs may be necessary, but they are not always adequate to fully mitigate work/life conflict. The reason is that FWAs are only flexible by reference to the rigid workweeks they presume—and thereby implicitly condone—in the first

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<sup>93</sup> 29 U.S.C. §§ 2601-2654.

instance. By taking the standard workweek for granted, FWAs harbor an inherent rigidity that competes with their stated purpose. As workplace researchers Kelly and Moen observe, “[s]ome purportedly flexible work practices offer little discretion over schedules, instead creating new routines that are equally rigid,” such as delayed start/stop times, with equally long core hours, or compressed workweeks over which employees have no control.<sup>94</sup>

This stealthy rigidity means that so-called workplace flexibility does not solve either for all problems, or for all persons. Flexible work arrangements do not solve for all problems, precisely because they depend on making specific exceptions to the standard workweek, for specific reasons.<sup>95</sup> Other legitimate reasons for leave are left out.

FWAs do not serve all persons, either. FWAs can also be inequitable, because they are not available to everyone. Unfortunately, “many employees still do not have access to these arrangements.”<sup>96</sup> Partly this lack of access is inherent by design, insofar as some leave laws and policies only apply to specific groups of employers and employees for specific reasons. But partly this lack of access is a result of how FWAs are administered, especially employer-provided policies that are available only at manager discretion. “[A]ccess to flexible arrangements is quite uneven and may seem unpredictable within organizations and even within departments,” because individual supervisors are often the ones who decide whether a flexible

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<sup>94</sup> Erin L. Kelly & Phyllis Moen, *Rethinking the Clockwork of Work: Why Schedule Control May Pay Off at Work and at Home*, 9 ADVANTAGES DEVELOPING HUM. RES. 487, 490 (2007).

<sup>95</sup> The FMLA, for example, only provides leave to eligible employees of covered employers for qualifying reasons. 29 U.S.C. §§ 2601–2654. *See generally* Bird, *supra* note 81, at 13, 16 (arguing that the “FMLA concepts of permissible leave are insufficient to capture the needs of modern working time in at least three ways,” including the unsuitability of intermittent leave for acute and changing family needs, the availability of reduced workweeks without the ability to make up the lost time, and the income penalty associated with part-time work on a permanent or semi-permanent basis; and concluding that the “FMLA needs to be more elastic to be effective”). Among other reforms, Professor Bird argues that the FMLA should be amended to add a new category of permissible leave; to lower the employer coverage threshold to 25 employees; to broaden coverage to include more part-time employees; to expand the meaning of “family” for purposes of qualifying leave; and to revise the events that constitute qualifying FMLA leave. *Id.* at 23–28.

<sup>96</sup> Kelly & Moen, *supra* note 94, at 489.

arrangement will be granted, and individual supervisors experience various and varying personal and professional pressures that might make them more or less disposed to grant an employee’s request.<sup>97</sup> The uneven availability of FWAs not only affects eligible employees themselves, it also impacts their co-workers. Colleagues who are similarly overworked but technically ineligible for FWAs may resent the apparent inequity, especially if they believe they are being asked to take on extra tasks to support a co-worker’s accommodation.<sup>98</sup>

In addition to fostering resentment, FWAs can also foster negative stereotypes. Family-friendly arrangements frequently result in stigma for employees who try to access them,<sup>99</sup> because they entail individual deviation

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<sup>97</sup> Researchers Kelly and Moen identify several factors that may predispose managers not to offer flexible work:

Managers favor individually negotiated arrangements because they want to avoid a sense of entitlement, instead permitting flexible work arrangements *quid pro quo*, in return for superior performance. Managers see some jobs and some employees as unsuited to flexible arrangements. They sometimes prefer low flexibility utilization, fearing it would be difficult to coordinate work and ensure adequate coverage if flexible work is widespread. Supervisors may worry that they would need to learn new ways to monitor and evaluate workers’ performance. For all these reasons, managers are tempted to limit access to flexible arrangements, and continue to reward employees who work in the traditional manner.

Kelly & Moen, *supra* note 94, at 490–91. In addition, “Managers are often given little guidance as to how they should evaluate requests for flexible work arrangements, and there is little tracking of requests or approvals across departments.” *Id.* at 490.

<sup>98</sup> Temporary leave laws during Covid may have exacerbated this ongoing issue. See Daisuke Wakabayashi & Sheera Frenkel, *Parents Got More Time Off. Then the Backlash Started.*, N.Y. TIMES (July 28, 2021), <https://www.nytimes.com/2020/09/05/technology/parents-time-off-backlash.html> (“Resentment from employees without children about extra parental benefits existed at companies before the pandemic, of course. But the health crisis has amplified that tension.”).

<sup>99</sup> See Paul D. Hallgren Jr., *Requesting Balance: Promoting Flexible Work Arrangements with Procedural Right-to-Request Statutes*, 33 ABA. J. LAB. & EMP. L. 229, 229 (2018) (“Employees who take advantage of flexible options are often stigmatized.”). This stigma has persisted, long after the “furor” over the so-called

from an accepted collective standard—with connotations of slacking off. “Many employees believe that using flexible work arrangements will stall their careers and signal to management that they are not committed to the organization.”<sup>100</sup> In fact, “using—and even asking for—family support at work can be dangerous to the work careers of the very people who are its purported beneficiaries.”<sup>101</sup> This “flexibility stigma” often falls disproportionately on workers in the “time greedy” occupations, where long hours are a badge of honor, and taking time for anything else can be perceived as a lack of commitment.<sup>102</sup>

Finally, FWAs can be complicated for employers to administer, especially as mandates for such arrangements multiply. Whether or not employees truly benefit from access to FWAs, employers and politicians undoubtedly benefit from supporting work/life balance initiatives, and family-friendly policies and proposed legislation continue to proliferate. On the plus side, the expanding array of flexible options could conceivably help to fill the gaps in existing legislation, to the extent the current cannon aids only certain employees, for certain qualifying reasons. Yet the expanding list of reasons for exceptions will come at a cost to employers in administrative

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“mommy track” has subsided. For a historical perspective on the “mommy track” and its critique, see generally Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV. (1989); Tamar Lewin, ‘Mommy Career Track’ Sets Off a Furor, N.Y. TIMES (Mar. 8, 1989), at A18; Jennifer A. Kingson, *Women in the Law Say Path Is Limited by ‘Mommy Track,’* N.Y. TIMES (Aug. 8, 1988), at A1, (“Although a growing number of prestigious [law] firms offer flexible working hours, child care and lenient maternity leave, women who take advantage of them often find themselves left behind when it comes to partnerships, choice assignments and stature.”). Cf. Angie Kim, *The Mommy Track Turns 21*, SLATE (Mar. 31, 2010), <https://slate.com/human-interest/2010/03/the-mommy-track-turns-21.html> (“The language of the mommy track—flexibility, balance—is infiltrating more and more jobs and replacing traditional work values—long hours, face time—as the new workplace ideal.”).

<sup>100</sup> Kelly & Moen, *supra* note 94, at 490.

<sup>101</sup> JACOBS & GERSON, *supra* note 3, at 6. See also *id.* (“Even when they exist on paper, making use of family benefits can entail risks to a work career.”).

<sup>102</sup> See Tara Siegel Bernard, *The Unspoken Stigma of Workplace Flexibility*, N.Y. TIMES (June 14, 2013), <https://www.nytimes.com/2013/06/15/your-money/the-unspoken-stigma-of-workplace-flexibility.html> (quoting term coined by Joan C. Williams, founding director of the Center for Work/life Law at the University of California, Hastings College of the Law).

complexity. The administrative burden of the FMLA itself has arguably been manageable over the years,<sup>103</sup> but employer impatience with its logistical challenges persists.<sup>104</sup> The difficulty of employer compliance will only increase with the recent increase in state and local laws regarding paid sick leave, predictive scheduling, and other parochial peculiarities with which employers must also comply.<sup>105</sup>

Moreover, newer proposals reflect a trend toward ever more individuated solutions, which will only further multiply employer obligations. Among the most promising approaches to work/life balance is the emerging “right to request” model. Rather than imposing a top-down, legislative mandate that would require employers to provide a uniform, one-size-fits-all set of accommodations, “right-to-request” legislation would empower individual employees to request workplace modifications and

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<sup>103</sup> See Bird, *supra* note 81, at 39 (citing a 2012 study commissioned by the Department of Labor to support the proposition that “when the closest analogue to flextime reform, the FMLA, is studied to discern its regulatory burden, the costs on business do not appear to be overwhelming.”).

<sup>104</sup> See Stephen Miller, *HR Professionals Struggle Over FMLA Compliance*, SHRM Tells the DOL, SHRM (Sept. 21, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/hr-professionals-struggle-over-fmla-compliance-shrm-tells-the-dol.aspx>.

<sup>105</sup> For a summary of paid sick leave laws by state (exclusive of temporary Covid leave laws), see *State by State: Paid Sick Leave*, SHRM (last updated Apr. 13, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/state-local-paid-sick-leave-chart.aspx>. Regarding the increase in predictive scheduling legislation, see Dan Whitehead, *Predictive Scheduling Laws: What They Cover and how to Comply*, WORKFORCE (MAY 2021), <https://workforce.com/news/predictive-scheduling-laws-what-are-they-where-do-they-exist-and-employers-reaction>; *Predictive Scheduling Laws*, HR DRIVE (Updated Dec. 2019), <https://www.hrdrive.com/news/a-running-list-of-states-and-localities-with-predictive-scheduling-mandates/540835/>; Lisa Nagele-Piazza, *Predictable Scheduling Laws: The Next Trend in Workplace Regulations*, SHRM (Sept. 27, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/predictable-scheduling-laws.aspx>; *Predictive Work Schedule Laws: A City-by-City Guide*, Paycor, <https://www.paycor.com/resource-center/articles/predictive-work-schedule-laws-a-city-by-city-guide/> (last updated Mar. 25, 2021). These complexities are of course compounded for employers with operations in multiple states.

protect them from retaliation for exercising this procedural right.<sup>106</sup> Employers would be required to consider and respond to employee requests, with varying levels of employer burden depending on the proposal. Although this responsive approach offers exciting possibilities to truly meet employees' particular needs and influence workplace norms, it also represents a mind-boggling array of individually negotiated work arrangements, when carried to its logical extreme. At some point, our efforts at flexibility may devolve to contortions that could surely be avoided if we were simply to question the standard that we are so bent on bending in the first place.

B. A shorter workweek would benefit everyone, but shorter schedules are still schedules, and the longest hours are hardest to cut.

Disenchanted with the limitations of the accommodations approach, many scholars—and increasingly, business executives and the popular media as well—have rallied around the notion of making the standard workweek shorter,<sup>107</sup> by reducing either the number of working days in a week or the number of working hours in a day.<sup>108</sup> Shorter workweeks have been proposed

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<sup>106</sup> See generally Bird, *supra* note 81, at 28–34 (recommending, among other reforms, adoption of right-to-request legislation that would enable employees to request a flexible schedule and trigger employer obligation to evaluate and respond to the request without retaliating); Hallgren, *supra* note 99 (surveying examples of right-to-request laws and proposing model legislation); John A. Durkalski, *Fixing Economic Flexibilization: A Role for Flexible Work Laws in the Workplace Policy Agenda*, 30 BERKELEY J. EMP. & LAB. L. 381 (2009); Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. REV. 1081 (2010).

<sup>107</sup> See, e.g., ALEX SOOJUNG-KIM PANG, *SHORTER* (Hachette Book Group 2020); ANDREW BARNES & STEPHANIE JONES, *THE 4 DAY WEEK* 8–9 (Piatkus 2020) (“[T]he five-day week is a nineteenth-century construct that is not fit for purpose in the twenty-first century”). See also *infra* notes 111, 120, 126.

<sup>108</sup> While there are different proposals to reduce the workweek, this Article defines a shorter or reduced workweek as one that results in a reduction in total hours of work, either by reducing the number of days or the number of hours per day. In this sense a shorter or reduced work may be distinguished from what is commonly referred to as a “compressed” workweek, which entails working the same number of hours over a fewer number of days (for example, by working four, ten-hour days

as a promising avenue for the post-pandemic reorganization of work,<sup>109</sup> both as a means of controlling contagion,<sup>110</sup> and as a new way to return to work.<sup>111</sup> However, while there are many reasons to believe that a more reasonable workweek would mitigate the time squeeze for everyone—men and women, the overworked and the underemployed alike—and offer many other advantages as well, there is also little reason to believe that reduced workweeks would be attainable for any significant number of employees in the foreseeable future, especially for those employees whose hours are already overly long. This section acknowledges the many potential benefits

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instead of the more common five, eight-hour days). Because a compressed workweek does not permit a departure from the total number of hours the worker would otherwise be scheduled to work, it more closely resembles the kind of FWA discussed in Part III.A, *supra*. This section addresses the more assertive model of reducing standard weekly hours altogether.

<sup>109</sup> Notably, interest in the four-day work week predates the pandemic by decades. *See generally*, Robert C. Bird, *The Four-Day Work Week: Old Lessons, New Questions*, 42 CONN. L. REV. 1059 (2010) (outlining historical interest in the four-day workweek, including a surge of popular interest in the 1970s); Riva Poor, *How and Why Flexible Work Weeks Came About*, 42 CONN. L. REV. 1047 (2010) [hereinafter Poor, *How and Why*]; 4 DAYS, 40 HOURS: REPORTING A REVOLUTION IN WORK AND LEISURE (Riva Poor ed., Bursk & Poor Publishing 1970). Like the pandemic, the Great Recession similarly prompted interest in the four-day workweek, not only as a means of work spreading, but also as a potential means of reducing energy costs associated with commuting. In 2010, the University of Connecticut School of Law sponsored a symposium devoted to the topic, *Redefining Work: Implications of the Four-Day Work Week*, with submissions collected and published in Volume 42 of the Connecticut Law Review. The symposium articles are cited throughout this Article.

<sup>110</sup> *See* Alex Soojun-Kim Pang, *To Safely Reopen, Make the Workweek Shorter. Then Keep It Shorter.*, THE ATLANTIC (Apr. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/safely-reopen-make-workweek-shorter/610906/>. *See also* Uri Alon, et al., *10-4: How to Reopen the Economy by Exploiting the Coronavirus’s Weak Spot*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/2020/05/11/opinion/coronavirus-reopen.html>.

<sup>111</sup> *See* Soojun-Kim Pang, *supra* note 110; *see also* Bryce Covert, *8 Hours a Day, 5 Days a Week Is Not Working for Us*, N.Y. TIMES (July 20, 2021), <https://www.nytimes.com/2021/07/20/opinion/covid-return-to-office.html?referringSource=articleShare> (“But we shouldn’t just be talking about the parameters of how we get work done in a postpandemic world. We should be pushing to do less of it.”).

of a more reasonable workweek, but also explains why reduced workweeks alone are unlikely to provide imminent relief to exempt employees who already work excessively long and erratic hours.

First, it is worth acknowledging that reduced workweeks are a model worth striving for. The purported benefits of a reduced workweek are legion, and laudable.<sup>112</sup> Reducing the standard workweek from five to four days would obviously give overworked individuals another day or more for personal use, which is beneficial by itself.<sup>113</sup> Reducing standard workweeks for employees with excessive hours might also reallocate hours to workers with nonstandard jobs, whose precarious employment does not currently offer them enough hours of work. In this way, a shorter workweek could conceivably mitigate the time divide,<sup>114</sup> leading to a more *reasonable*

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<sup>112</sup> See PANG, *supra* note 107, at 12 (“[T]he shorter workweek offers a solution to all these problems—the culture of overwork, gender inequity, and unequal division of economic gains, and the massive indirect costs of burnout and shortened careers.”); *id.* at 16 (“Shortening the workweek can help make companies run better, encourage leaders and workers to develop new skills, enhance focus and collaboration, make work more sustainable, and improve work/life balance. It can even help the environment, reduce traffic and congestion, and make people healthier.”).

<sup>113</sup> See Rex L. Facer II & Lori L. Wadsworth, *Four-Day Work Weeks: Current Research and Practice*, 42 CONN. L. REV. 1031, 1046 (2010) (outlining results of research conducted in connection with Utah’s implementation of four-day workweeks for state employees and concluding that “[m]ost of the research suggests greater benefit than drawbacks for individuals, as well as organizations.”). Benefits purportedly extend not only to family time, but employee wellness as well. See, e.g., Pang, *supra* note 110 (asserting that employees working a shorter workweek “are healthier and use fewer sick days because they have more time to exercise, cook better food, and take care of themselves. Their work/life balance improves, they’re more focused and creative, and they’re less likely to burn out”). See also BARNES & JONES, *supra* note 107, at 92–93 (summarizing data from a 4-day workweek trial and reporting that individuals had more time “to accomplish tasks in their personal lives,” “to participate in family life,” “to learn and contribute,” and “to explore and imagine”).

<sup>114</sup> See Schultz, *supra* note 78, at 1956 (“Jacobs and Gerson hope to stimulate convergence toward a new mean in which most employees work neither too little nor too long. But our current mean is too high.”).



workweek for all.<sup>115</sup> A shorter workweek could also mitigate the “gender divide,”<sup>116</sup> because the extra time would be equally available to everyone.<sup>117</sup>

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<sup>115</sup> In support of new workweek norms, Yale Law Professor Vicki Schultz has adopted the term “reasonable” workweeks, rather than “reduced” ones. Referring to her own previous scholarship in collaboration with Professor Allison Hoffman, she observes, in retrospect:

In fact, the term ‘reduced work week’ was a misnomer: we were calling less for a ‘reduced’ work week than for a new social ideal and a new set of norms about working time in which most people are able to work regular, predictable schedules for a number of hours (or a range of hours) that lies somewhere comfortably between the two poles of overwork and underutilization and that gives people the ability to plan and to participate in meaningfully in important life endeavors in addition to employment. It is this notion of a more predictable, moderate work schedule that I seek to capture here in using the phrase ‘reasonable work week.’

Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1207 (2010). This Article similarly endorses a more reasonable workweek for all; but given its focus on the white-collar, remote-ready worker, and given the many sources referenced herein that refer to “reduced” workweek, this Article retains use of the “reduced” workweek terminology.

<sup>116</sup> In their work, Jacobs and Gerson note that in addition to the “time divide,” America’s working families face other divisions, too, including a “gender divide,” a “work-family” divide, an “occupational divide,” an “aspiration divide,” and a “parenting divide.” JACOBS & GERSON, *supra* note 3, at 8.

<sup>117</sup> Professor Schultz was an early advocate of more reasonable working hours, in large part because the benefits could be made available to all, without limitation—or stigmatization—by gender. More than twenty years ago, she argued that eliminating the gender disparity associated with “nonstandard” work “means abandoning proposals to create part-time or other nonstandard jobs *for women*, and redefining what is ‘standard’ in a way that will encourage *men and women*, from all walks of life to work at a livable pace.” See Schultz, *supra* note 78, at 1956 (emphasis in original). She further argued, “[T]hose of us who believe in gender integration must call for reforms that encourage men and women to work similar—and saner—hours that will allow both to participate more fully in all life’s experiences.” *Id.* at 1937. See also Denise Cummins, *Why We Need to Redefine ‘Full Time’ Work*, PBS (Dec. 2, 2019), <https://www.pbs.org/newshour/economy/making-sense/column-why-we-need-to-redefine-full-time-work> (“In order to achieve a truly equitable distribution of workplace and household duties between the sexes, the first thing that has to budge is the definition of full-time work.”). Or as Alex Pang writes: “Working

And if shorter workweeks were available to everyone, there would be less disparity, less inequity, and less stigma as compared to the “accommodations” approach to work/life balance,<sup>118</sup> and greater simplicity of administration for employers as well. The foreseeable benefits of a reduced workweek even go beyond issues of work/life balance. Advocates note the potential environmental benefits and reduced energy costs associated with fewer days in the office and less frequent commutes.<sup>119</sup> And finally, advocates of shorter working hours point to research suggesting that cognitive workers are less productive after six hours of work, or fewer,<sup>120</sup>

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mothers don’t need tips and tricks. They need a workplace and a career model that doesn’t expect them to work as if they don’t have kids, raise children as if they don’t work, demand that they do both at exactly the same time, and say it’s their own fault if they can’t do that to some poorly articulated, impossible standard. . . What they need now is structural change.” PANG, *supra* note 107, at 14.

<sup>118</sup> See Schultz, *supra* note 78, at 1937 (“People who have children or others to care for need shorter hours, but not in the form of stigmatizing special accommodations.”); BARNES & JONES, *supra* note 107, at 16 (“Without intervention such as a legislative cap on all participants, those who take time out for leisure or family reasons risk losing opportunities for career advancement to those who sacrifice everything else in the pursuit of glory.”); PANG, *supra* note 107, at 95 (as compared to flexible hours, which place the burden “squarely on the individual,” shorter hours “succeed through company-wide and normative changes” that reduce potential conflicts between colleagues).

<sup>119</sup> See, e.g., BARNES & JONES, *supra* note 107, at 21–23, 130–32 (describing how reduced commuting could benefit the environment); PANG, *supra* note 107, at 242 (“A shorter workweek can help alleviate work’s impact on energy consumption and the environment.”).

<sup>120</sup> See Glaveski, *supra* note 58. See also Cummins, *supra* note 117 (“Adam Grant, a professor at the University of Pennsylvania’s Wharton School of Business has spent years studying the dynamics of success and productivity in the workplace. His conclusion: Workers can be as productive and creative in six focused hours as in eight unfocused hours. For this reason, he suggests the workday should end at 3, instead of 5 p.m. That sentiment is echoed by Cal Newport, the best-selling author of *Deep Work: Rules for Focused Success in a Distracted World*, who argues that three to four hours of continuous, undisturbed deep work each day is all it takes to see a transformational change in our productivity and our lives.”); Theresa Agovino, *Is It Time to Kill the 40-Hour Workweek?* SHRM (Jan. 23, 2017), <https://www.shrm.org/hr-today/news/hr-magazine/0217/pages/is-it-time-to-kill-the-40-hour-workweek.aspx> [hereinafter Agovino, *Is It Time*] (citing Chris Bailey,

suggesting that shorter workweeks are a better value proposition for employers. In a similar vein, proponents of shorter working hours lament the time-wasting features of conventional office patterns today,<sup>121</sup> which

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author of *The Productivity Project*, for the proposition that “[h]ours are the wrong focus” because “people become less thoughtful and creative after five or six hours”); Theresa Agovino, *The Phenomenon of the Four-Day Workweek*, SHRM (June 20, 2020), <https://www.shrm.org/hr-today/news/all-things-work/pages/four-day-workweek.aspx> [hereinafter Agovino, *The Phenomenon*] (“Professionals such as software developers, architects, engineers and physicians rely on deep thinking to carry out their jobs, and experts say it’s difficult to maintain such concentration for eight hours a day.”).

Employees themselves appear to agree. Citing a recent survey by The Workforce Institute at Kronos Inc, SHRM reported that “[m]any workers feel they could get their work done in less than the typical time allotted. Nearly half (45 percent) of the respondents said it would take them less than five hours a day to do their jobs if they were able to work uninterrupted.” Dana Wilkie, *Is the Shorter Workweek for Everyone?* SHRM (Nov. 13, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/four-day-workweek.aspx>. See also Lizzie Wade, *The 8-Hour Workday Is a Counterproductive Lie*, WIRED (Nov. 21, 2019), <https://www.wired.com/story/eight-hour-workday-is-a-lie/> (“I’m positive that if you tracked knowledge worker’s time in an office the same way as I track mine—i.e., when they are actually at their computer doing something—you wouldn’t come up with 40 hours for hardly anybody. Forty hours of availability, sure. Forty hours of office presence, probably. Forty hours of thinking about work—at least, and likely more. But the amount of time you’re actually doing something, writing something, creating something? You can’t do that work for eight hours a day without breaking down.”).

<sup>121</sup> See Glaveski, *supra* note 58 (listing numerous time-wasting aspects of the typical office day, including meetings of an hour length by default, unplanned interruptions, email management, task switching, and traveling). See also Pang, *supra* note 110 (“Companies that move to four-day weeks often replace long, meandering meetings with short, small, and focused get-togethers.”); Agovino, *Is It Time*, *supra* note 120 (“In fact, many people’s workdays are consumed by such drudgery as attending unnecessary meetings or responding to one-off e-mail requests. According to a recent study by software developer Workfront, U.S. employees spent only 39 percent of their time at work actually doing their jobs in 2016, down from 46 percent a year earlier.”); Agovino, *The Phenomenon*, *supra* note 120 (“Employers often bog down staff with unnecessary e-mails and meetings that keep them from accomplishing strategic goals. For example, employees spend 1 1/2 hours a day dealing with e-mails. Workers also have their own ways to drain the day.

conceivably could be mitigated by compressed work hours that drive efficiencies. Thus, as we consider how to restructure work that was performed fully remotely during the pandemic, it is worth considering whether we really need all the hours previously allocated to it.<sup>122</sup>

One notable problem, of course, is exactly *how* to make the workweek shorter.<sup>123</sup> Many legal scholars suggest a legal mandate. Proponents of legislative change tend to promote one of two possible legal reforms in support of a shorter workweek: a statutory maximum cap on hours, prohibiting long days or long workweeks altogether; or amendment of the FLSA, reducing the overtime threshold from forty hours per week to thirty-five hours or fewer.<sup>124</sup> Enactment of a maximum cap would mark a stark

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Their two biggest time-stealing activities are checking social media and reading news online . . .”).

<sup>122</sup> See, e.g., Newport, *supra* note 64 (“[O]nce you remove time-wasting distractions and constrain inefficient conversation *about* your work, five hours should be sufficient to accomplish most of the core activities that actually move the needle.”)(emphasis in original); PANG, *supra* note 107, at 128 (describing company that experimented with a shorter workweek, and as a result meetings dropped from a default length of an hour to 30-45 minutes).

<sup>123</sup> Schultz & Hoffman, *supra* note 47, at 150 (“In the current political and economic climate, it will be difficult to reorganize working time in a way that genuinely improves workers’ lives inside and outside of the workplace.”).

<sup>124</sup> In addition to maximum caps and reduced overtime thresholds, another oft-touted reform is to increase the availability of “compensatory” time off in lieu of overtime. Also known as “comp time,” this system allows workers to trade excess hours in one workweek for “compensatory” time off in another. Currently, comp time is available under the FLSA only to employees in the public sector. See Mayer et. al, *supra* note 15, at 7. Several legislative initiatives have been advanced to expand the availability of comp time to the private sector. See generally, Bird, *supra* note 81, at 17–20 (criticizing proposed comp time legislation and noting similar past efforts). Some scholars have advocated for the expansion of compensatory time to exempt workers as well. See, e.g., DeChiara, *supra* note 18, at 182 (observing that “an absolute ban on overtime work by managerial and professional employees would not work,” because “[m]any tasks performed by managers and professionals cannot be confined to certain fixed hours, but frequently spill over into evenings and weekends” and arguing that providing them with compensatory time is the solution instead); Schultz & Hoffman, *supra* note 47, at 142 (advocating reforms including amendment of the FLSA to include comp time for hours over 35 in a week and for eliminating the executive exemption). However, there is reason to be cautious about

departure from the overtime mechanisms of the FLSA<sup>125</sup> and seems highly unlikely in our free market economy.<sup>126</sup> Alternatively, many arguments for

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adopting comp time reforms. *See* Schultz & Hoffman, *supra* note 47, at 143 (“Where employers enjoy sole control over the structure of the workplace, workers may suffer in a comp time system . . . Because most employers in the United States are ‘hours takers’ instead of ‘hours makers,’ employers are likely to control when employees work longer hours and weeks and when they can take time off . . .”).

<sup>125</sup> Recall that the FLSA itself does not place—and has not ever placed—an absolute maximum cap on hours, even though maximum hours proposals were entertained at the time of its enactment. For a discussion of the history of maximum hours legislation, *see generally* Miller, *supra* note 24, at 14–23; DeChiara, *supra* note 18, at 162–65. From a historical standpoint, enactment of the FLSA “stopped federal progress towards lowering the ceiling of maximum hours, replacing hours limits with financial disincentives such as minimum wage and overtime pay.” Miller, *supra* note 24, at 14. *See also* Schor, *supra* note 1, at 163–64 and 171–72 (“Worktime has been ignored as a public policy issue since the 1930s, when schemes to create jobs through worktime reduction were very popular. The ‘30-hour workweek for 40 hours’ pay’ proposal which had a real shot at passage was the last shorter hours legislation in this country.”).

<sup>126</sup> Other countries have experimented with maximum weeks or days. *See, e.g.,* Jack Kelly, *Iceland Tried a Shortened Workweek and It Was an “Overwhelming Success,”* FORBES (Jul. 5, 2021), <https://www.forbes.com/sites/jackkelly/2021/07/05/iceland-tried-a-shortened-workweek-and-it-was-an-overwhelming-success/?sh=3f0997d63ac8>; Ashifa Kassam, *Spain to Launch Trial of Four-Day Working Week,* THE GUARDIAN (Mar. 15, 2021), <https://www.theguardian.com/world/2021/mar/15/spain-to-launch-trial-of-four-day-working-week>; Jack Kelly, *Microsoft Japan Launched A Four-Day Workweek to Much Success: Is This the Key to Attracting Talent in the Tight U.S. Job Market?*, FORBES (Nov. 5, 2019), <https://www.forbes.com/sites/jackkelly/2019/11/05/microsoft-japan-launched-a-four-day-week-work-to-much-success-is-this-the-answer-to-attract-talent-in-the-tight-us-job-market/?sh=58739ce159ff>; Thomas Heath, *The Swedish Six-Hour Workday,* WASH. POST (Apr. 21, 2017), [https://www.washingtonpost.com/business/economy/will-a-six-hour-workday-help-you-live-longer/2017/04/21/5569f0dc-237b-11e7-b503-9d616bd5a305\\_story.html](https://www.washingtonpost.com/business/economy/will-a-six-hour-workday-help-you-live-longer/2017/04/21/5569f0dc-237b-11e7-b503-9d616bd5a305_story.html). *See also* Katie Way, *Workers of the World, Unplug: The Fight for the ‘Right to Disconnect’*, VICE (Oct. 16, 2019), <https://www.vice.com/en/article/evjk4w/right-to-disconnect-legislation-labor-movement> (noting action by France, Luxembourg, Spain, and the Philippines to legislate a cap on the 8-hour workday).

shorter workweeks are explicitly or implicitly premised on proposals for a lower threshold for overtime instead.<sup>127</sup> But reducing the overtime threshold by amending the FLSA—even if it could be accomplished—would only benefit workers who are nonexempt and therefore entitled to overtime already. To reach the overworked white-collar worker would thus require not only reduction of the overtime threshold, but also elimination of the exemptions from overtime as well.<sup>128</sup> Elimination of the exemptions would itself represent a major amendment of the FLSA. For all these reasons, even

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These international efforts, while enthusiastically promoted in popular media, have met with mixed results. *See, e.g.,* Anders Hayden, *France's 35-Hour Week*, 34 POL. & SOC'Y 503–42 (reviewing the history and impacts of the imposition of the 35-hour workweek in France and concluding it was a qualified success). Even so, international interest in shorter workweeks continues as well. *See, e.g.,* Natasha Bernal, *Coronavirus Has Shown Why We Need a Four-Day Working Week*, WIRED (Jul. 9, 2020), <https://www.wired.co.uk/article/four-day-week-coronavirus> (advocating for a 4-day workweek in the UK); *A Shorter Working Week*, NEW ECONOMICS FOUNDATION (last visited Sept. 10, 2021), <https://neweconomics.org/campaigns/shorter-working-week> (UK website promoting shorter workweeks, among other campaigns).

<sup>127</sup> Most scholars also recognize that true reform would require other measures as well, on top of any revision of the overtime threshold. *See* Schor, *supra* note 1, at 162 (“[T]here are deep structural barriers to shorter hours, which need to be addressed by regulatory and legislative reform. These include the financing of medical insurance, the payment structure of fringe benefits, and the incentive effects associated with paying employees by salary.”).

<sup>128</sup> Professor Schultz has called for just such legislation, arguing that “we must consider legislative measures to reduce the standard full-time workweek for everyone.” Schultz, *supra* note 78, at 1956–57. She continues:

[W]e should consider amending the Fair Labor Standards Act to reduce the standard workweek to thirty-five or even thirty hours per week for everyone—including the upper-level workers who are currently exempted—as a way to create a new cultural ideal that would allow both men and women more time for home, community, and nation. A reduced workweek should alleviate work-family conflict for everyone and help promote greater sharing of employment and housework among men and women. It also encourages work-sharing in a way that furthers the goal of making standard jobs available to everyone, while mitigating downward pressure on wages.

*Id.* at 1957.

the most enthusiastic scholars agree that the legislative path to workweek reform via substantive mandate faces significant obstacles.<sup>129</sup>

In light of the substantial barriers to FLSA reforms by government actors, the best hope for shorter workweeks may come from the private sector,<sup>130</sup> as businesses seek to reap the management benefits of more

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<sup>129</sup> Schultz & Hoffman, *supra* note 47, at 141 (arguing for a 35-hour standard workweek for all employees, as well as numerous other related changes, and noting that “the current political and economic environment is not conducive to such large-scale reforms”). As one scholar has predicted, “clashing political factions will prevent any considerable substantive changes to the FLSA.” Rothe, *supra* note 9, at 732. See also *id.* at 734 (“Even though ‘[e]very White House since the Carter Administration has made attempts to overhaul the rule . . . all have failed because of the complexity of the regulations and political infighting.”) (Quoting Cindy Skrzycki, *Labor Dept. to Propose New Overtime-Pay Rules*, WASH. POST., Mar. 27, 2003, at E1).

Moreover, it is worth noting that even if legislative reforms promoting a shorter workweek could be enacted, they may not even operate in the economy as intended. See Schultz & Hoffman, *supra* note 47, at 142 (“Even if the ideal legislative package were enacted, its success in actually reducing the workweek would not be guaranteed, depending on the response to the regulation. . . A traditional demand-side model predicts that employers will decrease working hours as marginal hours become more expensive, discouraging employers from using overtime or comp time. By contrast, a compensating differential model predicts that employers will simply lower straight-time wages to achieve the same total hours and salary as before the legislation was enacted, resulting in no changes in hours worked. . . Some writers believe that overtime wages create incentives for employees to work overly long hours so that both employers and employees become locked into overtime as a way of meeting production demands.”).

Finally, as with any recommended legal reform, it is worth repeating that the problem of work/life conflict is varied and complex, calling for a multi-pronged approach. A more reasonable workweek—even if it were legislatively mandated, and even if it functioned as intended—would be more successful if accompanied by other complimentary legal and social reforms. See, e.g., JACOBS & GERSON, *supra* note 3, at 169-202 (describing a “broad array” of legal reforms and various policy approaches); Schultz, *supra* note 78, at 1885 (advocating not only for a reduced workweek for everyone, but also for other social supports that would ideally be put in place to make possible work that is “sustainable over the course of a lifetime”).

<sup>130</sup> There are other possibilities as well. In between voluntary private action, on the one hand, and “top down” public mandates, on the other, there are a range of other models that hold promise for reform. “A reduced workweek could be achieved

reasonable workweeks for everyone. The pandemic has already ignited conversation on new ways of working and drawn increased attention to shorter workweeks. Popular business publications urge thought-leaders in business to move to a shorter workweek voluntarily, of their own accord, to reap the rewards of a cutting-edge idea with a promising, productive upside.<sup>131</sup> But the evidence to date suggests that only a relatively narrow

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through a negotiated solution, under which the government would set guidelines or policy goals and then provide industry some level of autonomy in determining the means with which to reach those goals.” Schultz & Hoffman, *supra* note 47, at 144. *See generally id.* at 141–49 (exploring a range of possible approaches between legislative mandate and private industry initiatives, including legislative incentives, negotiated solutions or “responsive regulation,” and collective bargaining). Many scholars increasingly advocate a middle ground, referred to as the “new governance” or “reflexive” model, in which the government imposes procedural regulations, rather than substantive ones, to influence private behavior. *See* Michelle A. Travis, *What a Difference a Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week*, 42 CONN. L. REV. 1223, 1227, 1246 (2010). The responsive regulation approach seeks to “facilitate information exchange and self-regulation” and to “provide a viable solution both to regulatory and market failures.” *Id.* at 1246. An example of this approach would be “right to request” legislation that requires employers to consider and respond to requests for alternative work schedules, and protects employees from retaliation for making such requests, but does not mandate that the request be granted. *See id.* at 1246–48; *supra* note 106 and accompanying text. It is conceivable that reflexive regulatory models could be designed to promote employer adoption of the four-day workweek, short of a substantive legal mandate. In fact, given the hurdles to adoption that would confront any “top down” legal mandate, the reflexive approach may be the most promising legal route to securing a shorter workweek. Even so, widespread adoption of the shorter workweek remains unlikely to benefit the most overworked workers, regardless of the legal mechanism by which it might come about. *See infra* notes 134–43 and accompanying text.

To aid the most overworked of workers, it may be more helpful to target the most excessive hours more directly. Taking inspiration from models of procedural regulation promoting pay transparency as a means of closing the gender pay gap, this Author has proposed that simply requiring employers to report the number of hours that their white-collar workers actually work could harness market forces to put downward pressure on egregious hours, as employers compete to recruit and retain talented white-collar workers and maintain their reputations as family-friendly employers. *See* Jennifer Haskin Will, *Following in the Footsteps of Fair Pay: The Case for Exempt “Time Transparency” and the Mandatory Disclosure of White-Collar Work Hours*, 20 GEO. J. L. & PUB. POL’Y 671 (2022).

<sup>131</sup> *See supra* note 107.



group of employers is most likely to try out a shorter workweek on their own initiative: businesses that are small, autocratic, and largely driven by creative forces.<sup>132</sup> Shorter workweeks may very well take hold with this select group, develop a niche following, and grow slowly through competition for talent;<sup>133</sup> but they are unlikely to be available to large numbers of employees soon.

Moreover, and importantly, even where shorter workweeks are put in place—whether by public mandate or private initiative—it is worth asking how likely they are to be made available to exempt, remote-ready workers who log excessive hours already. Workers with long hours are arguably most likely to be interested in a shorter workweek. However, because “those working the most hours are more likely to be highly educated and employed in managerial, professional, and technical positions, these well-educated and well-positioned workers are also more likely to experience the greatest gap between long workweeks and a shorter ideal.”<sup>134</sup> Because of that gap, the distance to a shorter workweek is longer for many white-collar workers. It is surely easier to cut a forty-hour workweek down to thirty-two than to reach the same goal starting from fifty-plus hours. Moreover, conventional jobs of forty hours per week are not only more easily reduced to a four-day workweek, those same jobs are also the ones that tend to pose less work/family conflict to begin with.<sup>135</sup> Analogous research on flextime initiatives suggests that “workers with the least severe work/family conflicts

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<sup>132</sup> See PANG, *supra* note 107, at 43 (“Most of the companies [that have experimented with shorter workdays or workweeks] share three qualities that allow them to be early innovators. First, they’re mainly small-to medium-size businesses, where significant cultural and managerial changes are easier to implement. Second, almost all are still led by their founders, whose formal position and moral authority give them the power to make big changes. Third, many companies already trade on reputations for being creative, innovative places and can sell experiments in shorter hours as yet another expression of those qualities.”).

<sup>133</sup> See Schultz & Hoffman, *supra* note 47, at 149 (“Furthermore, in industries where companies compete for highly skilled workers . . . a domino effect may take hold. As some employers reduce required work hours, others may have to follow suit or be at a comparative disadvantage.”).

<sup>134</sup> JACOBS & GERSON, *supra* note 3, at 67.

<sup>135</sup> Travis, *supra* note 130, at 1235 (“[W]orkers who have a regular forty-hour work week are typically among those who experience relatively low levels of work/family conflict as an initial starting point.”).

are likely to be helped most by flextime arrangements,”<sup>136</sup> and there is reason to believe that may be the case for compressed workweeks as well.<sup>137</sup>

At the same time that workers with “average” hours may be most helped by shorter workweeks, the increasing divergence in work hours means that fewer and fewer employees actually work the archetypal forty-hour week in the first place.<sup>138</sup> Indeed,

the percentage of the workforce that regularly works forty-hour-per-week jobs—which are most easily transitioned to a four-day workweek—has been decreasing over the last three decades. Thus, many workers with the most severe work/family conflicts are likely to be among those least likely to gain access to a four-day work week altogether.<sup>139</sup>

As we debate shorter workweeks, it is important to keep in mind that in our digital, global economy, the so-called standard forty-hour workweek is currently a meaningless referent for many overworked, white-collar, remote-ready workers, who may regularly work fifty hours a week or more as it is. Even working a “standard” forty-hour workweek would itself be shorter for these individuals, for whom the forty-hour standard is already irrelevant. Thus, “[w]hile the empirical research indeed supports the claim that a compressed work schedule can enhance work/family balance for some workers, the four-day work week is unlikely to become available for many workers whose often acute work/family conflicts arise from very long-hour positions, or from very unpredictable and insecure short-hour jobs.”<sup>140</sup> In sum, the population of employees that already works long, unpredictable hours would appear to be less likely to be presented with the opportunity to

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1234–35.

<sup>138</sup> See JACOBS & GERSON, *supra* note 3, at 32 (“While the forty-hour workweek remains the modal pattern, with just over 40 percent of both men and women reporting working this amount of time in 2000, it has become less typical than it was thirty years ago. For men and women alike, the forty-hour standard has declined by about 10 percentage points, with increases at both the higher and lower ends of the spectrum.”).

<sup>139</sup> Travis, *supra* note 130, at 1235.

<sup>140</sup> *Id.* at 1266.

work a shorter workweek or to enjoy reduction in work/life tension as a result.

Finally, as attractive as reduced workweeks may be, they lack one feature important to a flexible workplace: flexibility. A shorter workweek still requires workers to work during scheduled hours, even if those hours are reduced overall. And the reality is that both business exigencies and personal needs can arise at any time. Employees would still face acute, unexpected conflicts with their scheduled hours, even if those scheduled hours were fewer than before. And if an employee needs to be absent when they are expected to be working, all the problems surrounding leave laws, special accommodations, and stigma would remain. So, “[f]or many workers, especially those with little ability to limit their working time, flexibility and autonomy at work may matter as much as—or more than—actual working hours.”<sup>141</sup> In fact, “[f]or full-time workers in particular, forty-five flexible hours may seem less onerous than thirty-five rigidly scheduled ones.”<sup>142</sup> Accordingly, a shorter workweek would be an improvement, but not a full solution for overworked, exempt employees. A formally reduced workweek would still leave employees beholden to fixed schedules of the employer’s making, albeit shorter ones.<sup>143</sup>

In sum, despite their powerful appeal, shorter workweeks seem unrealistic in the near term. Reducing the length of the standard workweek

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<sup>141</sup> JACOBS & GERSON, *supra* note 3, at 100.

<sup>142</sup> *Id.*

<sup>143</sup> In this regard, proposals for shorter workweeks share the same deficiency as so many FWAs, insofar as they vest schedule control in the employer, not the employee. A better solution may be found in shifting time control altogether. The notion that employees’ control over their time is integral to resolving work/life tensions is presented persuasively by Professor Shirley Lung, who participated in the Four-Day Workweek Symposium described *supra* note 109. In Professor Lung’s contribution, she “emphasizes the need for work/family discourse to focus on a right of control of time as a means of challenging the unilateral control of working hours that our legal regime vests in employers.” Lung, *supra* note 79, at 1119. With a focus on expanding work/family discussions to include low-income women, immigrants, and underprivileged groups that fall outside the dominant discourse, she persuasively argues that the “common ground between workers up and down the occupational ladder is the inability to control time,” *id.* at 1136, and therefore we should “revive a call for worker control over time to forge a common agenda on the issues of working hours and work/family balance,” *id.* at 1135. Her perspectives offer one lens through which we might begin to reconcile the disparities noted in Part II.C, *supra*.

would require either substantial statutory reform, which is unlikely; or substantial voluntary reform, which is unlikely to mitigate the time squeeze for the most overworked of employees. Moreover, shorter schedules are still schedules, and schedules that are overly long already are hardest to cut. Shorter workweeks thus offer an incomplete solution to the time squeeze in any event, both because they still require employees to work a fixed schedule, and because they are least likely to help the workers who work the most hours already. As discussed in Part II.C., below, a more complete solution may be found in allowing employees to *control* their time, rather than merely curb the length of their established office hours.

C. The ROWE approach has been tested and adopted in the marketplace and is poised to be even more successful in the post-pandemic future.

For all the foregoing reasons, endless exceptions to the standard workweek carry stigmas and inequities, without challenging the rigidities of the standard workweek itself.<sup>144</sup> Shorter workweeks represent a better long-term goal, but they are not widely attainable in the near term. Therefore, we need a new approach, one that critically examines our assumptions about the conventional workweek and better reflects how work really happens now.<sup>145</sup> Accordingly, this section begins with a critique of the conventional workweek and then turns to a discussion of the Results-Only Work Environment (“ROWE”),<sup>146</sup> an approach to work that has been tested in the real world and is poised to be even more successful in the post-pandemic workplace. This section suggests that the kind of fluid integration made

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<sup>144</sup> See Kelly & Moen, *supra* note 94, at 489 (“[F]lexible work arrangements, as they are normally administered, rarely promote transformational change that deeply affects employees’ experiences on the job or their ability to manage other parts of their lives. In particular, flexible work policies rarely lead employees or leaders to question the baseline assumption that managers properly control the work process, including when and where work is done. Instead, the new ways of working are often framed as individual ‘accommodations’ that deviate from a set standard, rather than as opportunities for the organization to learn and adapt to a changing workforce and changing technologies.”).

<sup>145</sup> As Jacobs and Gerson put it so well, “We need a workplace transformation commensurate with the family transformation that has already taken place.” JACOBS & GERSON, *supra* note 3, at 55.

<sup>146</sup> See *supra* note 4.

possible in a ROWE would promote more genuine workplace flexibility for the exempt, remote-ready cohort, which already performs work both in excess of and outside of set office hours, and it could also provide a more uniform—and less stigmatizing—opportunity for work/life balance, while undermining the inflated value of long working hours. Ultimately, this part argues that the lessons of ROWE and the pandemic, taken together, point to a new way of working for white-collar, remote-ready employees, without a conventionally scheduled workweek.

1. The twentieth-century workweek is ill-suited for the modern worker and the modern family.

We should start with a critical examination of our blind adherence to the standard 40-hour workweek. Notably, what is now the universally accepted workweek had its origins at a time when most employees worked in the manufacturing sector, most work could only be performed onsite, and most workers were men with wives at home. According to Phyllis Moen, a sociology professor at the University of Minnesota who studies the interface between work and family:

We’re using concepts that were developed in the 1950s when you were tethered to a phone or desk or assembly line . . . and that’s simply not the case now. And the workforce also isn’t the same. It used to be the average full-time worker was paired with a full-time homemaker, and now neither men nor women have full-time homemakers supporting them. We need to get up to date by redesigning how we work in terms of the clock.<sup>147</sup>

With both men and women in the workplace—many of them mothers and fathers—the old breadwinner model that enabled the “ideal worker” to flourish on a nine-to-five schedule is outdated,<sup>148</sup> and employees of all kinds

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<sup>147</sup> Seth Stevenson, *Don’t Go to Work: The Management Scheme That Lets Workers Do Whatever They Want, As Long As They Get Things Done*, SLATE (May 11, 2014, 9:45 pm), <https://slate.com/business/2014/05/best-buys-rowe-experiment-can-results-only-work-environments-actually-be-successful.html>. (“For Moen, the issue is redefining the culture of the workplace to fit the changing times.”).

<sup>148</sup> Clarkberg & Moen, *supra* note 48, at 1133 (“[O]rganizational policies and employer expectations with regard to work hours have largely remained structured along the all-or-nothing breadwinner/homemaker cultural template, even as a

struggle to find time to tend to personal needs that inevitably arise during normal business hours. Legally protected absences like family and medical leave certainly help, but they implicitly accept the conventional workweek as an inviolate norm from which employees may permissibly deviate only with special accommodations—as if personal needs were an anomaly.<sup>149</sup> This implicit premise overlooks the extent to which the standard workweek itself contributes to a time squeeze, especially for dual-earner households. As Moen and her co-researcher Erin Kelly have observed, “The root problem, of course, isn’t that employees *have* family or personal commitments. The root problem is the rigid conventions of work that assume work must occur at certain times and places and that mistakenly gauge productivity by the number of hours spent at work.”<sup>150</sup>

These rigid conventions are, on closer inspection, hard to justify in the case of today’s white-collar, remote-ready worker. Much of today’s exempt, remote-ready work is cognitive and electronic. It can happen anywhere at any time, both in the office and outside it. In the face of this new reality, we need not stay wedded to the fixed, twentieth-century workweek.<sup>151</sup>

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diminishing minority of contemporary American workers have a partner at home full time. The time-squeeze that results may be due more to the growing number of husbands and wives going against their preferences and putting in the required long hours on the job than to a shift in preferences toward long hours.”).

<sup>149</sup> See Kelly & Moen, *supra* note 94, at 489 (“[Flexible work policies rarely lead employees or leaders to question the baseline assumption that managers properly control the work process, including when and where work is done. Instead, the new ways of working are often framed as individual ‘accommodations’ that deviate from a set standard, rather than as opportunities for the organization to learn and adapt to a changing workforce and changing technologies.”).

<sup>150</sup> Erin L. Kelly & Phyllis Moen, *Building Flexibility into the Way We Work*, HUFFPOST (last updated Jan. 23, 2014), [https://www.huffpost.com/entry/building-flexibility-into\\_b\\_4241132](https://www.huffpost.com/entry/building-flexibility-into_b_4241132). Yale law professor Vicki Schultz goes even further, making a valuable point about the intersection of work and family, which in and of itself is not inherently problematic. She notes, “Work is not inherently in conflict with family or civic life. In fact, working can make us *better* parents and citizens by expanding the knowledge and experience we bring to those roles.” Schultz, *supra* note 78, at 1960.

<sup>151</sup> See Glaveski, *supra* note 58 (quoting organizational psychologist Adam Grant for the proposition that “the more complex and creative jobs are, the less it makes sense to pay attention to hours at all.”). See also Agovino, *Is It Time*, *supra* note 120 (“[T]he standard American workweek, which traces its roots to the

Dictating that work must occur at certain times and places concededly allows managers to observe workers and be assured of the time those workers spend at the workplace—but that is all. Conventions of time and place do not actually ensure the performance of productive work in the case of exempt, remote-ready workers; they simply allow employers to verify workers’ “visible busyness.”<sup>152</sup> And merely watching exempt employees at work yields limited information. Recall that an exempt white-collar worker is, by definition, already one whose duties are professional, managerial, or administrative in nature, as defined by the “duties tests” under the FLSA regulations.<sup>153</sup> Such attributes of exempt work do not lend themselves well to visual observation in the first place.

Moreover, remote-ready workers, as defined for our purposes here, are exempt, white-collar workers who have the capacity to work remotely, using available tools and technologies to engage in mental labor. Mental labor is largely invisible and not readily subject to surveillance, and it can be accomplished from anywhere, at any time. For all these reasons, when applied to exempt, remote-ready workers, the rigid conventions of time and place can serve only as a proxy for productivity, at best. Meanwhile, under the pretense of measuring productivity, rigid schedules increase time pressure and time conflict, creating the stressful time squeeze that employees would be better off without. Thus, the old standard workweek creates an unnecessary “time cage”<sup>154</sup> for exempt, remote-ready workers, with low

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industrial age, may be ill-suited for a knowledge-based economy.”); Agovino, *The Phenomenon*, *supra* note 120 (“Much has changed in 96 years, leading many business experts to say it’s time to rethink that schedule—at least for employees in the knowledge-based economy.”) (referring to the standard 40-hour workweek popularized by Henry Ford in 1924).

<sup>152</sup> For use of the phrase, “visible busyness,” see Erin L. Kelly et al., *Gendered Challenge, Gendered Response: Confronting the Ideal Worker Norm in a White-Collar Organization*, 24 GENDER & SOC’Y 281, 297 (2010). See also Cal Newport, *How to Achieve Sustainable Remote Work*, NEW YORKER (July 9, 2021), <https://www.newyorker.com/culture/cultural-comment/how-to-achieve-sustainable-remote-work>.

<sup>153</sup> See *supra* note 23 and accompanying text. See also 29 C.F.R. §§ 541.100-106, 541.200-204, 541.300-304 (2021)

<sup>154</sup> See Phyllis Moen et al., *Changing Work, Changing Health: Can Real Work-Time Flexibility Promote Health Behaviors and Well-Being?* 52 J. HEALTH & SOC. BEHAV. 404, 404 (2011) (citing the work of Richard Sennet, defining “time cages”

business justification for this cohort. Rather than simply creating more exceptions to the workweek, or making it shorter, for white-collar, remote-ready workers, we should consider whether we even need to preserve it at all.

2. A Results-Only Work Environment (“ROWE”) dispenses with the outmoded workweek and promotes employee well-being.

There is another way. Nearly twenty years ago, human resources professionals Jody Thompson and Cali Ressler were charged with finding a way to attract top talent to Best Buy.<sup>155</sup> Internal surveys told them that what employees wanted was more control—or more precisely, total control—over their time.<sup>156</sup> And Thompson and Ressler delivered, instituting a revolutionary approach to work that they dubbed the Results-Only Work Environment, or ROWE.<sup>157</sup> In a ROWE, as Thompson and Ressler describe it, “people can do whatever they want, whenever they want, as long as the work gets done.”<sup>158</sup>

A ROWE rejects the confines of conventional work hours entirely. According to Thompson and Ressler, who describe their innovation without mincing words, ROWE:

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as “taken-for-granted, invisible scaffoldings confining human experience on and off the job.”).

<sup>155</sup> Thompson and Ressler describe their approach, using frank and folksy prose, in CALI RESSLER AND JODY THOMPSON, *WHY WORK SUCKS AND HOW TO FIX IT: THE RESULTS-ONLY REVOLUTION* 10-12 (Penguin Group 2008). *See also*, Culture RX, *supra* note 4.

<sup>156</sup> RESSLER & THOMPSON, *supra* note 155, at 10.

<sup>157</sup> *Id.* at 9. *See also* Michelle Conlin, *Smashing the Clock*, BUSINESSWEEK (Dec. 11, 2006) (describing rollout of ROWE at Best Buy). Several years after the rollout of ROWE, Thompson and Ressler contributed their expertise to a more recent initiative to redesign work by the Work, Family, and Health Network (WFHN), dubbed “STAR” (for Support, Transform, Achieve, Results) by its chief proponents, social science professors and researchers Erin Kelly and Phyllis Moen. *See generally* KELLY & MOEN, *supra* note 63, at 9, 78–92. *See also id.* at 81 (“The language of ‘results orientation’ and ‘results only’ comes from Cali Ressler and Jody Thompson and their Results-Only Work Environment (ROWE) initiative developed at the corporate headquarters of Best Buy, Inc.”). Although STAR is a more recent iteration of work redesign, this Article refers primarily to ROWE throughout, due to its more concentrated focus on results in lieu of scheduling.

<sup>158</sup> RESSLER & THOMPSON, *supra* note 155 at 9.



is based on simple idea: Our beliefs about work—forty hours, Monday through Friday, eight-to-five—are outdated, outmoded, out to lunch. Every day people go to work and waste their time, their company’s time, and their lives in a system based on assumptions—about how work gets done and what work looks like—that don’t apply in today’s global, 24/7 economy. . . . We go to work in the Information Age, but the nature of the workplace hasn’t fundamentally changed since the Industrial Age.<sup>159</sup>

The ROWE approach is founded on important insights about the conventional workweek, and how it functions as a pernicious premise that inflates working time without necessarily improving productivity. Its founders note, “[w]hen it comes to work our attitudes about time are so omnipresent they are almost invisible[.]”<sup>160</sup> Yet the expectations at work are clear: “most people are judged by a mixture of results and time spent in the office. You are expected to do your job and to complete your tasks, but you are also expected to put in forty hours or even more.”<sup>161</sup> The forty-hour workweek thus functions as a de facto minimum, which “somehow morphed into the gold standard for competency, efficiency, and effectiveness.”<sup>162</sup>

But what Thompson and Ressler recognize, and this Article endorses, is the proposition that “[i]n an information and service economy it doesn’t make sense to use time as a measurement for a job well-done.”<sup>163</sup> They argue that the unspoken orthodoxies of conventional workweeks and traditional notions of what work looks like are “relics of a time when we worked in a certain way because there was no alternative.”<sup>164</sup> Today’s digital,

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<sup>159</sup> *Id.* at 8.

<sup>160</sup> *Id.* at 17.

<sup>161</sup> *Id.* at 18. *See also* KELLY & MOEN, *supra* note 63, at 139 (“This fundamental mismatch between twentieth-century policies and practices and twenty-first century realities has spawned expectations that employees will somehow work at work (by being in the office or worksite during certain rigid hours) and also work anywhere, anytime (bringing work home to try to accomplish impossible demands and deadlines.”); *id.* at 27 (“Old rigidities of the workday are overlaid with new expectations of unbounded work, contributing to overload.”).

<sup>162</sup> *Id.* at 19.

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

<sup>164</sup> *See supra* note 155, at 27.

cognitive work is fundamentally different,<sup>165</sup> and the attributes of cognitive engagement are not bound by time. Accordingly, in a ROWE, the focus is on results, not attendance.<sup>166</sup> “[N]o matter how flexible a nontraditional schedule is it’s still a schedule. Flexible schedule is an oxymoron. Which is why in a ROWE there are no schedules.”<sup>167</sup> Without schedules to serve as a measure of performance, a ROWE relies on measuring defined outcomes instead, calling on management to create clear job expectations and goals for every employee.<sup>168</sup>

To implement their new model of work at Best Buy, Thompson and Ressler developed a four-part training program, which was rolled out to different teams at different times.<sup>169</sup> The first session introduced employee teams to the philosophy of ROWE; the next session invited employees to critically examine the existing work culture of time; the third session challenged participants to identify concrete changes they could make to use time differently; and the final session, several weeks later, served as a forum for questions and concerns, at which point the team was considered to be

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<sup>165</sup> *Id.* at 20 (“Knowledge work requires fluidity (ideas can happen any time, not just between eight and five) and concentration (being rested and engaged is more important than being on the clock) and creativity (again, you’re either on or you’re not on, regardless of the hour).”).

<sup>166</sup> Fawn Johnson & National Journal, *This Is What Real Work Flexibility Looks Like*, ATLANTIC (Nov. 21, 2014), <https://www.theatlantic.com/business/archive/2014/11/this-is-what-real-work-flexibility-looks-like/425823/> (“ROWE in its purest form is essentially a salary-for-service model of employment. There are no vacation days. There are no “off” hours or “on” hours. There is only a defined task and a person or team who completes that task. It is up to the employees to determine how that happens, whether it’s from a coffee shop in mid-afternoon or in a closet-sized home office at 3 a.m. If the work gets done, they get paid. If it doesn’t, they get fired.”) (quoting RESSLER & THOMPSON, *supra* note 155, at 69). *See also* Frank Jossi, *Clocking Out*, SHRM (June 1, 2007), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0607cover.aspx> (“Thompson and Ressler discovered two general principles during the flextime experiment. One was that “flexible schedule” was an oxymoron that required a lot of keeping track of people’s time. The other was that flextime enhanced the way employees in the program communicated with one another through e-mail and phone conversations outside the normal 9-to-5 workday.”).

<sup>167</sup> RESSLER & THOMPSON, *supra* note 155, at 63.

<sup>168</sup> *See id.* at 65.

<sup>169</sup> *See* Kelly et al., *supra* note 152, at 284.

working “in a ROWE.”<sup>170</sup> Participation in a ROWE was voluntary, at the option of department leaders, who also received a manager’s orientation.<sup>171</sup>

There is reliable data to show that ROWE was effective, both for Best Buy, and for its employees.<sup>172</sup> In addition, the staggered nature of the adoption of ROWE across teams at Best Buy created a “natural experiment” that was followed closely by Professors Erin Kelly and Phyllis Moen, both sociologists at the University of Minnesota at the time, and others who studied various impacts of the ROWE initiative on issues related to work, family, and gender during the rollout, using later-adopting teams as a control group.<sup>173</sup> Their research results are wide-ranging and significant,<sup>174</sup> concluding that a ROWE:

- Reduced turnover for all participating employees, regardless of gender, age, or family life stage;<sup>175</sup>
- Increased schedule control for mothers, which in turn increased mothers’ perceptions of time adequacy;<sup>176</sup>

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<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See Monique Valcour, *The End of “Results Only” at Best Buy Is Bad News*, HARV. BUS. REV. (Mar. 8, 2013), <https://hbr.org/2013/03/goodbye-to-flexible-work-at-be> (“ROWE yielded impressive results. Ressler and Thompson’s case studies as well as independent scholarly research find that ROWE increases productivity, employee well-being, and work/life balance while decreasing turnover. At Best Buy, these results produced \$2.2 million in savings over three years, according to the CultureRX website.”).

<sup>173</sup> For a collection of ROWE research, see *Flexible Work and Well-Being Center*, U. MINN. (last visited Sept. 12, 2021), <http://www.flexiblework.umn.edu/publications.shtml>.

<sup>174</sup> Notably, in each case, the researchers noted that the “natural experiment,” was limited to the conditions in which it arose, meaning that it was limited to a corporate, highly educated, relatively young group. See Moen et al, *supra* note 154, at 407–08 (2011). More research would be required to extrapolate the results to other demographics. *Id.* at 408. The proposal in this Article is similarly limited to white-collar workers—who presumably also have relatively high levels of education and work in corporate environments. Differences in race and age are not accounted for, however.

<sup>175</sup> Phyllis Moen et al., *Does Enhancing Work-Time Control and Flexibility Reduce Turnover? A Naturally-Occurring Experiment*, 58 SOC. PROBLEMS 302, 302 (2011).

<sup>176</sup> Hill, et al., *Relieving the Time Squeeze? Effects of a White-Collar Workplace Change on Parents*, 75 J. Marriage & Fam. 1014, 1023 (2013).

- Increased employees' sense of schedule control and improved work-family fit;<sup>177</sup> and
- Facilitated healthy behaviors such as getting more sleep, exercising more, being more likely to see a doctor when sick, and being less likely to go to work while sick.<sup>178</sup>

Importantly, the researchers specifically examined ROWE as compared to the more traditional "accommodations" approach to flexible work.<sup>179</sup> They noted that "[c]ompared to other flexible work policies that 'accommodate' selected individuals, [ROWE] attempts a broader and deeper critique of the organizational culture."<sup>180</sup> The researchers acknowledged that entrenched assumptions about working hours could threaten the successful implementation of ROWE.<sup>181</sup> Even so, the ROWE research strongly suggests that eliminating office-hours expectations would provide a more equitable, less stigmatizing, and more productive approach to benefit both employers and employees.<sup>182</sup> A crucial difference between a workplace innovation such as ROWE, and the accommodations approach that our society has historically pursued using FWAs, is its focus on improving the organization of work overall, for employers and employees alike, rather than simply trying

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<sup>177</sup> Erin L. Kelly et al., *Changing Workplaces to Reduce Work-Family Conflict: Schedule Control in a White-Collar Organization*, 76 AM. SOCIO. REV. 265, 284 (2011).

<sup>178</sup> See Moen et al., *supra* note 154, at 418.

<sup>179</sup> See Kelly et al., *supra* note 152, at 283–85.

<sup>180</sup> See *id.* at 297.

<sup>181</sup> See *id.* At the same time, the researchers also observed that "employees' discourse about that culture simultaneously reveals the continued strength and saliency of the entrenched ideal worker norm for employees," and "those who most visibly adopt ROWE ideas and practices may continue to be marginalized." *Id.*

<sup>182</sup> See *id.* at 299. See also Kelly & Moen, *supra* note 150 ("By contrast, with work redesign, whole teams or even whole organizations ask what might be done better and differently. Some teams cut back on unnecessary meetings or cross-train each other so customers can get quick responses while everyone has time to concentrate on projects. Employees might also come in after the morning rush hour, leave to volunteer for a child's school activity, or work at different times and places, including at home. When the whole group makes changes — recognizing that those changes need to work for employees, teams and customers — it supports everyone's personal and work commitments rather than singling out a few "flex workers.").

to make life more manageable for a single employee.<sup>183</sup> With a better work environment, the ROWE thinking goes, better work/life balance for everyone will naturally follow.<sup>184</sup> And with a collective approach, rather than an individualized one, the threat of stigma should diminish.<sup>185</sup> “The team strategy is very different from most flexible work programs, and it reduces the risk that individual employees will be penalized—in evaluations of their work and their assumed commitment to the organization—for bucking the dominant culture.”<sup>186</sup>

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<sup>183</sup> See Perlow & Kelly, *supra* note 55, at 127 (“Instead of trying to move toward more legitimated individual adjustments and more manager support for those accommodations, we argue here that pursuing coordinated, collective change in all aspects of the organizational system—cultural assumptions, interactions, work practices, and reward systems—is a more direct, and less stigmatized, path forward.”).

<sup>184</sup> See Perlow & Kelly, *supra* note 55, at 119 (“In contrast [to the accommodations approach], both PTO [another model of work re-design] and ROWE are framed as efforts to improve work itself. The shared premise of PTO and ROWE is that work process can be made more efficient and effective and, in doing so, individuals’ lives will also benefit. In other words, better work/life integration is just one of many benefits reaped by approaching work differently.”). See also *id.* at 121–22 (“This distinction between individual and collective change is the core factor differentiating the two models: Individuals are helped to accommodate the existing way of working versus groups of coworkers being empowered to work together to rethink how the work itself is done.”).

<sup>185</sup> See *id.* at 128 (“Flexible work policies target those with extensive caregiving responsibilities, and women are more likely to pursue them, especially when they are already in lower status positions. However, while less likely to use them, men who do use FWAs are judged harshly for violating gender norms as well as ideal worker norms. We contend that the Work Redesign Model is more likely to avoid these problems because the whole work group—not just mothers or others pursuing caregiving—makes changes.”). See also Erin M. Grabe, *Gradual Return to Work: Maximizing Benefits to Corporations and Their Caregiver Employees*, 37 J. CORP. L. 699, 714 (2012) (recommending corporate reform to address shortcomings under the FMLA, including adoption of a ROWE, because “[a]t the very least, such a system creates an environment that reduces the importance of face-time, thereby lessening the stereotype that because women must take time away from the office after childbirth, they are in some way contributing less than their male counterparts”).

<sup>186</sup> Kelly & Moen, *supra* note 94, at 497.

Importantly, when time ceases to serve as a measure of a job well done, employees are free to work more efficiently, and in fact have every incentive to do so in a ROWE. “When you eliminate work schedules altogether, then all employees are forced to make good decisions about how they spend their time and how to meet the needs of the business in a fluid manner.”<sup>187</sup> Thus, while there may be some concern that dismantling office hours would make workers more vulnerable to unending obligations,<sup>188</sup> an environment that truly values results will incentivize efficiencies that can counteract such pressures, because in a ROWE, “people automatically edit their own work and remove low priority tasks.”<sup>189</sup>

As Moen and Kelly opined for the Huffington Post, “[t]o move beyond decades of discussing work/life balance to meaningful change, employers need to shift from one-off accommodations. It’s time to make working efficiently, creatively, sustainably *and* flexibly the new norm.”<sup>190</sup> The ROWE innovation provides a template for what that new, more universal norm might look like, if it were adopted across the board.

3. The widespread adoption of remote work during the Covid-19 pandemic has already upended conventional assumptions about where and when work can be accomplished.

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<sup>187</sup> RESSLER & THOMPSON, *supra* note 155, at 95. For example, “In a ROWE you make the most of every interaction because you have to.” *Id.* at 103. Ressler and Thompson challenge the unspoken assumption that “the very act of meeting is a form of work,” *id.* at 105, and they explain that “What ends up happening in a ROWE is that the number of meetings goes down and the number of people attending meetings goes down, but collaboration and teamwork actually go up,” *id.* at 107. Further, they say, “People at all levels stop doing any activity that is a waste of their time, the customer’s time, or the company’s time.” *Id.* at 99.

<sup>188</sup> See, e.g., Rachel Feintzeig, *The Pain of the Never-Ending Work Check-In*, WALL ST. J. (July 19, 2021), <https://www.wsj.com/articles/the-pain-of-the-never-ending-work-check-in-11626667260>. See also *infra* notes 265-273.

<sup>189</sup> RESSLER & THOMPSON, *supra* note 155, at 112.

<sup>190</sup> Kelly & Moen, *supra* note 150.

Notably, Best Buy discontinued the ROWE initiative in 2013, when a new CEO charged with revitalizing the company took over<sup>191</sup> and cited a desire to recapture the supposed synergies of onsite interactions.<sup>192</sup> Despite Best Buy’s discontinuance of the program, the work/life lessons from the ROWE research remain.<sup>193</sup> In fact, ROWE has since been tested and implemented elsewhere,<sup>194</sup> including by public employers at both the federal and state level, albeit with mixed success.<sup>195</sup> However, the conditions for its successful

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<sup>191</sup> See Perlow & Kelly, *supra* note 55, at 113 (“[I]n 2013, ROWE was discontinued at Best Buy headquarters after a new CEO took over with the charge of turning the struggling company around.”). As company spokesperson Matt Furman explained at the time, “It makes sense to consider not just what the results are but how the work gets done . . . . ‘Bottom line, it’s ‘all hands on deck’ at Best Buy and that means having employees in the office as much as possible to collaborate and connect on ways to improve our business.” Thomas Lee, *Best Buy Ends Flexible Work Program for Its Corporate Employees*, STAR TRIB. (Dec. 13, 2013). See also Kim Bhasin, *Best Buy CEO: Here’s Why I Killed the Results-Only Work Environment*, BUSINESS INSIDER (Mar. 18, 2013), [https://finance.yahoo.com/news/best-buy-ceo-heres-why-234256785.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_referrer\\_sig=AQAAAFuabzdl7DMcHRdcK69FjnJJ4kNKofZ73g3jvaX71-kLWss-0iYXX4J6Vf-DIvOn7SXSXE73fAnw6Rh1sjBgVj0h-PsGe30zNJQk0pQ8jhQ2xQs-eYTuK7pijU1FFIR0FslgDy8-IX\\_UKfIUldlu1erxLu14z1CtEFOODDwn2dnW](https://finance.yahoo.com/news/best-buy-ceo-heres-why-234256785.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFuabzdl7DMcHRdcK69FjnJJ4kNKofZ73g3jvaX71-kLWss-0iYXX4J6Vf-DIvOn7SXSXE73fAnw6Rh1sjBgVj0h-PsGe30zNJQk0pQ8jhQ2xQs-eYTuK7pijU1FFIR0FslgDy8-IX_UKfIUldlu1erxLu14z1CtEFOODDwn2dnW). Notably, by the time Joly discontinued the program, training and support for it had apparently languished. See Newport, *supra* note 153 (“Having worked so long on the painstaking process of helping companies train the mind-set needed to support radically new ways of working, Thompson wasn’t surprised that ROWE was cancelled in an environment where that support had long since stopped.”).

<sup>192</sup> Valcour, *supra* note 172.

<sup>193</sup> See *Flexible Work and Well-Being Center*, *supra* note 173 and accompanying text. See also Valcour, *supra* note 172 (lamenting discontinuance of ROWE at Best Buy and noting that “[w]hen implemented effectively by well-trained leaders, [ROWE] is a recipe not only for promoting work/life balance, but also for maximizing the value and contribution of a firm’s human capital over the long term.”).

<sup>194</sup> See Culture RX, *supra* note 4. See generally KELLY & MOEN, *supra* note 63 (describing recent natural experiment and results of work redesign initiative similar to ROWE, called STAR).

<sup>195</sup> See, *id.* See also, Camille Tuutti, *Feds May Not Be Ready to Ditch the Clock*, FCW (Oct. 22, 2021), <https://fcw.com/Articles/2012/10/22/rowe-readiness.aspx?Page=1> (describing reasons for ultimate discontinuance of ROWE pilot at Office of Personnel Management after mixed success and noting its adoption at elsewhere at state and local level).

implementation are arguably much more favorable now, less than ten years later. The ROWE initiative at Best Buy may simply have been ahead of its time. In the years since the Best Buy experiment with ROWE, technology has greatly enhanced the potential for collaborative remote work, with the introduction and maturation of tools such as Microsoft Teams, Google Meet, Zoom, and Slack.<sup>196</sup> These robust tools make effective online collaboration much more feasible than it was only ten years ago.

More recently, the Covid-19 pandemic abruptly hastened the implementation of these same tools. The widespread adoption of remote work during the pandemic demonstrated its feasibility on a large scale, and our collective experiment with remote work has now clearly established how much of our mental labor can be performed successfully and collaboratively both outside of the office, and outside of office hours.<sup>197</sup> As Ressler and Thompson wryly noted, prior to the pandemic, the “funny thing about work is that every day most of us go to a physical space to do virtual work.”<sup>198</sup> The pandemic exposed that absurdity, and in effect, “[o]ur pandemic experiment with remote work has reset our expectations about where and when work takes

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<sup>196</sup> See Cain Miller, *supra* note 85 (“Also, only in the last few years has technology for video calls and virtual collaboration become more seamless.”). Cf. Grabe, *supra* note 185, at 714 (article published in 2012 recommending that employers implement ROWE to aid caregivers in returning to work, but acknowledging that at the time “[m]any corporations simply do not have the technical means”).

<sup>197</sup> See, e.g., KELLY & MOEN, *supra* note 63, at ix (“Executives who had been wary of remote work or had treated it as a one-off accommodation only feasible for select employees suddenly found it was actually feasible for their employees to work differently. Employees, managers, clients, and vendors quickly mastered technologies like Zoom, WebEx, and Microsoft Teams, figuring out how to get their work done virtually and how to collaborate without face-to-face contact.”). See also Prithwiraj (Raj) Choudhury, *Our Work-from-Anywhere Future*, HARV. BUS. REV. (Nov.-Dec. 2020), <https://hbr.org/2020/11/our-work-from-anywhere-future> (during pandemic lockdowns “[w]e learned that a great many of us don’t in fact need to be colocated with colleagues on-site to do our jobs”); Kathy Gurchiek, *COVID-19 Is Creating Telework Converts*, SHRM, <https://www.shrm.org/hr-today/news/hr-news/pages/covid19-is-creating-telework-converts.aspx> (last updated May 21, 2020).

<sup>198</sup> RESSLER & THOMPSON, *supra* note 155, at 100.



place.”<sup>199</sup> Indeed, the “pandemic dealt what is likely a serious blow to the five-day, nine-to-five, in-office workweek that has underpinned work life for nearly a century. Flexibility had been seeping into the workplace, but now it’s flooding the corporate world as companies have discovered that remote work didn’t slash productivity and employees valued the arrangement.”<sup>200</sup> The pandemic showed us that hybrid work is not only possible,<sup>201</sup> but also preferred by many employees.<sup>202</sup>

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<sup>199</sup> Newport, *supra* note 153. And of course, not every job in every industry is suited to remote work. *See also* Lauren Frias, *It’s Time to Implement a 4-day Workweek, Andrew Yang Says. The Pandemic Has Made It More Important than Ever*, BUSINESS INSIDER, <https://www.businessinsider.com/andrew-yang-pandemic-highlights-importance-implementing-4-day-workweek-2020-8> (Aug. 11, 2020) (“The coronavirus pandemic has brought into sharp relief the jobs can be done at home and those that cannot — and the four-day workweek also likely has industry limitations.”).

<sup>200</sup> Theresa Agovino, *The New World of Work*, SHRM (May 22, 2021), <https://www.shrm.org/hr-today/news/all-things-work/pages/the-new-world-of-work.aspx>.

<sup>201</sup> *See, e.g.*, Gurchiek, *supra* note 197; Maxim Sytch & Lindred L. Greer, *Is Your Organization Ready for Permanent WFH?* HARV. BUS. REV. (Aug. 18, 2020), <https://hbr.org/2020/08/is-your-organization-ready-for-permanent-wfh> (“As the pandemic accelerates the adoption of remote work, organizations large and small are realizing that jobs we used to assume had to be done on-site can in fact be done remotely.”). *See* Miller, *supra* note 85 (“The pandemic has shown employees and employers alike that there’s value in working from home—at least, some of the time.”) (discussing the relative benefits of onsite and remote work and suggesting a mix of both is ideal). Moreover, “While this WFH shift may seem sudden for some, the trajectory toward more remote work for knowledge workers has been accelerating for years.” Gretchen Gavett, *Do We Really Need the Office?* Harv. Bus. Rev. (July 15, 2020), <https://hbr.org/2020/07/do-we-really-need-the-office?autocomplete=true>.

<sup>202</sup> *See* Agovino, *supra* note 200 (“But even so, according to research from the Society for Human Resource Management (SHRM), 70 percent of employed Americans would prefer to work remotely on a full-time or part-time basis if given the option, and 35 percent would accept a salary reduction in return for that flexibility. Also according to SHRM’s research, nearly 20 percent of employed Americans who would prefer to work from home in some capacity would start looking for a remote position elsewhere—and 7 percent would quit their job—if their employer did not give them the option to work remotely.”). *See also*, *See* Roy

The ability to work remotely, from anywhere, at any time, should cause us to reconsider not only *where* we work, but also *how* and *when* we work, without reflexively defaulting to the forty-hour workweek. Indeed, as remote work has become more feasible, and more prevalent, so also have asynchronous hours, as employees working from their own places have begun working at their own paces. As reported in the Harvard Business Review:

[T]he 9-to-5 workday is disappearing, as the increase in remote work has allowed for more flexible hours. Employees are increasingly working asynchronously, completing tasks on their own schedules, which may be different from those of their colleagues. Asynchronous work is now essential to being part of a modern, digital economy, staying competitive in the war for talent, and building a globally distributed workforce.<sup>203</sup>

Further, “[n]ow that it’s clear *where* the work is done is not as important as people once thought, the other dimension of flexibility workers crave is the freedom to determine *when* the work is done.”<sup>204</sup>

Fortunately, the recent revolution in remote work, first precipitated by the Covid-19 pandemic, now offers us a unique opportunity to revisit the

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Maurer, *SHRM: Half of Workers Wish to Remain Remote Permanently*, SHRM (Mar. 3, 2021).

Despite general consensus that some combination of in-person and remote work is both feasible and desirable, however, employers and employees disagree as to the ideal proportions of each. See Kathy Gurchiek, *Hybrid Work Model Likely to Be New Norm in 2021*, SHRM (Jan. 27, 2021), <https://www.shrm.org/hr-today/news/hr-news/pages/hybrid-work-model-likely-to-be-new-norm-in-2021.aspx> (noting that “employees and employers disagree on how many days workers should be in the office”).

A debate rages in the popular media about whether employees should return to an office cubicle, continue to work from home, or shuttle back and forth under some sort of hybrid arrangement. See *supra* notes 198–201. See also Newport, *supra* note 153 (despite skepticism from some managers, “many employees working for these skeptical managers have come to value a professional life that doesn’t involve long commutes synchronized to rigid hours.”).

<sup>203</sup> Rebecca Zucker, *Breaking Free from a “9 to 5” Culture*, HARV. BUS. REV. (July 27, 2021), <https://hbr.org/2021/07/breaking-free-from-a-9-to-5-culture>.

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

value of a ROWE and reexamine standard working hours altogether, especially for employees who have already succeeded in working virtually during the pandemic. For remote-ready workers, measuring outcomes makes more sense than measuring time, regardless of where work is performed.<sup>205</sup> Taking a cue from ROWE, we could focus on results produced, regardless of hours logged, to protect employer interests and promote genuine employee flexibility, too. This Article argues that to solve the time-squeeze for remote-ready workers, without compromising results, employers should dispense with time as a proxy for productivity, and measure productivity more directly instead. More to the point, employers should dispense with office hours as a means of surveillance and dispense with surveillance as a substitute for more meaningful performance management. This Article proposes that we should reimagine a more fluid workweek, similar to a ROWE, by eliminating the employer-imposed expectation that exempt knowledge work must be performed on given days, at given times, and by giving white-collar, remote-ready workers the freedom to meet performance outcomes, regardless of where or when their work is performed.

The adoption of ROWE was of course an HR initiative, not a legal mandate. We could capture similar benefits more broadly with a legal requirement, one that capitalizes on the new ways that exempt work is already being accomplished outside of traditional office hours.<sup>206</sup> In Part IV, we turn to consider how we might leverage legal reform to reorganize work for white-collar, remote-ready workers, inspired by the tenets of ROWE and

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<sup>205</sup> Riva Poor, who edited a seminal text about shorter workweeks in the 1970s, has more recently made remarks about using shorter workweeks as a management tool. Her remarks are equally apt when applied to ROWE. Poor writes, “[W]ork schedules tailored to the needs of both the work and the workers at hand are win-win moves: they leave both employees and employers better off.” Poor, *How and Why*, *supra* note 109, at 1052. Further, the “main benefits to employees of work schedules that are tailored to both work and workers are greater choice of work hours and a repackaging of leisure hours that most of us find more useful.” *Id.*

<sup>206</sup> To restate, the solution proposed here is inspired by but distinct from a ROWE in important ways. As Ressler and Thompson themselves acknowledge, “ROWE is a paradigm shift in the way we do work, and it may take time for the federal regulations to catch up with how people live and work in the global, 24/7 economy. . . . What this would look like from a legislative standpoint is unclear. . . . As ROWE spreads, these are issues that we’ll all have to work together to resolve.” RESSLER & THOMPSON, *supra* note 155, at 94. This Article simply offers one vision of a ROWE-inspired legal reform.

grounded in the work experiences of the pandemic. When we are ready, it would be surprisingly easy to do.

IV. A NEW, “NO COLLAR” CONDITION COULD BE ADDED TO THE SALARY BASIS TEST UNDER THE FLSA TO ELIMINATE RIGID OFFICE HOURS EXPECTATIONS FOR WHITE-COLLAR, REMOTE-READY WORKERS.

This Article suggests that the post-pandemic debate should not focus on *where* work takes place, but rather *when*. It argues that the lessons of ROWE and the pandemic, taken together, point to a new way of working, one without conventional office hours, regardless of where the work takes place. The research on ROWE already tells us that giving employees total control over their schedules improves their well-being and reduces their sense of time conflict. So, the first question we should be asking is not whether employees should be scheduled remotely or scheduled onsite, but whether they should be scheduled at all. This Article proposes an answer, and the considered answer offered here is that we should eliminate employer-imposed office hours and rigid attendance requirements for exempt white-collar, remote-ready workers, and let these workers manage their own time instead. Further, this Article proposes that one way to do that under the FLSA would be to make scheduling freedom a prerequisite to white-collar exemption, by adding language to the salary basis test—a “no collar” condition—that restricts employers from setting required hours of work for this cohort.

In support of this proposal, this Part IV first offers specific language for revising the salary basis regulations, including both the general rule for payment on a salaried basis and its exceptions. Next, this Part further delineates the practical parameters of the proposed no-collar condition and explores its anticipated operation as a discrete complement to our wider efforts to achieve work/life balance. Finally, this Part considers the potential positive impacts of the proposed no-collar condition as a better signifier of exempt status going forward.

A. A no-collar condition could be added to the salary basis test for exemption by revising both the general rule and its exceptions.

This Part IV.A describes the specific revisions to the FLSA salary basis regulations that would effectuate the no-collar proposal, including changes both to the general rule for payment on a salaried basis and to its

exceptions. First, the general rule requiring payment on a salaried basis could be revised to add language stating that, in order to qualify for exemption, “Exempt employees must not be expected to keep regular office hours or report for scheduled shifts during the week.” As explained further below, this new language would be consistent with the original language in the general rule, and it would be consistent with the spirit of the white-collar exemptions as well. Notably, however, the FLSA regulations also contain exceptions to the general rule for payment on a salaried basis. These exceptions allow employers to make certain deductions from salary for reasons related to time and attendance. Because time-and-attendance requirements are inimical to scheduling freedom, they are at odds with the no-collar condition. Accordingly, this Part IV.A also describes the revisions to the exceptions that would necessarily flow from the proposed change to the general rule. This Part IV.A concludes by explaining how those revisions could in fact promote the coherence of the regulatory test overall, by resolving longstanding tensions between the general rule and its exceptions.

1. The no-collar condition could be added to the salary basis regulations consistent with the plain language of the general rule and the spirit of the exemptions.

First, the operative language for the no-collar condition could be inserted in the FLSA regulations by revising the general rule for payment on a salaried basis, effectively adding a new requirement that must be met for workers to qualify for exemption under the salary basis test. Recall first that payment on a salary basis is one of the basic conditions for exempt status under the FLSA’s white-collar regulations.<sup>207</sup> The salary requirements are set

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<sup>207</sup> See *supra* note 23 and accompanying text. Notably, however, the salary requirements do not apply to all exempt employees. “Some employees, such as business owners, doctors, lawyers, teachers, and outside sales employees, are not subject to salary tests. Others, such as academic administrative personnel and computer employees, are subject to special, contingent earnings thresholds.” *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51230, 51233 (Sept. 27, 2019). See also 29 C.F.R. §§ 541.600 (c)-(e), 541.101, 541.303(d), 541.304(d), 541.400(b), and 541.500(c) (2021). The legal reforms proposed in this Article would apply only to white-collar employees who are paid on a salary basis to qualify for exemption. However, while the no-collar condition would not apply to all exempt

forth in the FLSA regulations at 29 C.F.R. Part 541, Subpart G. Among other provisions, the regulations in Subpart G specify the minimum salary level required for exemption (currently \$684 per week);<sup>208</sup> they explain what it means to be paid on a “salary basis” (including permissible deductions from salary);<sup>209</sup> and they warn that the effect of making improper deductions from salary is loss of the exemption (and consequent obligation to pay overtime) if the facts demonstrate that the employer did not actually intend to pay employees on a salary basis.<sup>210</sup>

The general rule for payment on a salary basis is set forth in 29 C.F.R. § 541.602(a), which provides:

(a) General Rule. An employee will be considered to be paid on a “salary basis” within the meaning of this part if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, *which amount is not subject to reduction because of variations in the quality or quantity of work performed* (emphasis added).

Notice how the language of the general rule already presumes a substantial degree of flexibility—and indeed, variation—in an exempt worker’s weekly performance.<sup>211</sup> Further, note that the particulars of the general rule for payment on a salary basis also broadly prohibit employers from making deductions from the salary of an exempt worker, regardless of how many days or hours the employee in fact works.<sup>212</sup> As stated in 29 C.F.R. § 541.602(a)(1):

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workers, a more limited rollout of the new condition for exemption is arguably more feasible, and in any case has the potential to create ripple effects across the exempt workforce.

<sup>208</sup> 29 C.F.R. § 541.600.

<sup>209</sup> 29 C.F.R. § 541.602.

<sup>210</sup> 29 C.F.R. § 541.603.

<sup>211</sup> See also Pace, *supra* note 19, at 54 (“The workweek of a professional may vary from week to week, a slow week may be followed by a period of intense work.”).

<sup>212</sup> See 29 C.F.R. § 541.602. See also Pace, *supra* note 19, at 54 (1995) (“The practical effect of the salary basis test is that an exempt employee is not entitled to overtime when he works more than forty hours per week and the employer is not allowed to dock his pay when he works less than forty hours per week.”).

Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work *without regard to the number of days or hours worked* (emphasis added). Exempt employees need not be paid for any workweek in which they perform no work.

Again, notice how the language of the existing salary basis regulation, on its face, already discounts time as an acceptable measure of exempt, white-collar work.

From here, eliminating expectations for fixed office hours could be accomplished by natural extension of the existing language. Specifically, the language in Section 602(a)(1) could be amended by the DOL as shown below, with the proposed new language—the “no collar” condition—appearing in boldface type and italics:

Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. ***Exempt employees must not be expected to keep regular office hours or report for scheduled shifts during the week.*** Exempt employees need not be paid for any workweek in which they perform no work.

This proposed “no collar” addition is clear and simple: In order to maintain the exemption, employers must not track attendance or otherwise enforce expectations for exempt, remote-ready workers to report to work from nine to five, Monday through Friday—or on any other fixed and recurring weekly schedule or shift established by the employer. Insertion of the proposed no-collar condition fits seamlessly with the existing language of the general rule.<sup>213</sup>

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<sup>213</sup> Notably, the revision proposed here would *not* call for any changes to the final sentence of Section 602(a)(1), which provides that exempt employees need not be paid for any workweek in which they perform no work at all. Preservation of this language for purposes of the no-collar condition provides important protections for both employers and employees within the FLSA’s regulatory scheme, as explained in more detail in Part IV.A.2, below.

Before considering further impacts of the regulatory change proposed here, it is worth revisiting the attributed rationale for the white-collar exemptions in the first place. As explained in Part II above, the accepted rationale for excluding white-collar workers from overtime protections was their presumed bargaining power and autonomy, as compared to the so-called “blue collar” worker of the Industrial Age.<sup>214</sup> Moreover, at the time the FLSA was enacted, the nature of exempt work was assumed not to be susceptible to measurement by time, and therefore not a fitting subject for regulation under the overtime mechanisms of the FLSA. As the DOL has explained:

[T]he type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium.<sup>215</sup>

This view of the nature of exempt work—that is, that it defies measurement by time, and cannot be parceled out by the hour—is endorsed by legal scholars and judges alike. It has been said that the salary basis requirement “reflects the historic notion that while the work of the ‘men in overalls’ is divisible into hourly units, white-collar work is non-commodifiable.”<sup>216</sup> And “the upper-level worker was expected not to be a ‘clock watcher’ or a ‘clock puncher.’ The upper-level worker was a noncommodified worker: his labor was total, not divisible into fungible hour-

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<sup>214</sup> See also *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004) (“The legislative history indicates that the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay.”).

<sup>215</sup> *Id.*

<sup>216</sup> Rowan, *supra* note 7, at 126.



long bursts of energy to be channeled into pre-set processes.”<sup>217</sup> The salary basis requirement thus functions within the FLSA to resolve the problem of temporal indivisibility by deferring to the exempt worker’s discretion to allocate their own time. As the Third Circuit has observed:

Salary is a mark of executive status because the salaried employee must decide for himself the number of hours to devote to a particular task. In other words, the salaried employee decides for himself how much a particular task is worth, measured in the number of hours he devotes to it. With regards to hourly employees, it is the employer who decides the worth of a particular task, when he determined the amount to pay the employee for performing it. Paying an employee by the hour affords that employee little of the latitude the salary requirement recognizes.<sup>218</sup>

Notably, however, changes in the nature of white-collar work over the decades have eroded the historic distinction between the mechanized, time-bound qualities of nonexempt work and the supposed “latitude” of exempt work:

Evidence suggests that not only has the size and composition of the managerial-professional workforce changed, but so has the nature of the work. The late twentieth century has witnessed more and more professionals working as employees of large bureaucratic institutions, positions that allow them less autonomy and that make them subject to management’s efforts to routinize and rationalize their work.<sup>219</sup>

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<sup>217</sup> Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2294 (1998). See also Pace, *supra* note 19, at 67 (“Congress exempted professional, administrative, and executive employees from the FLSA’s overtime provisions because these employees, unlike hourly employees, are paid for the general value of their services, not for the number of hours they work.”).

<sup>218</sup> *Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184 (3d Cir.), *cert. denied sub nom. Claridge Hotel and Casino v. McLaughlin*, 488 U.S. 925 (1988).

<sup>219</sup> DeChiara, *supra* note 18, at 155.

As a result, “[t]he modern white-collar worker . . . resembles the blue-collar worker of the 1930s.”<sup>220</sup> And as compared to the earliest white-collar workers, “in today’s service-oriented economy, white-collar workers are no longer middle-class managers, but are more likely to share class traits typically associated with their blue-collar counterparts. Modern white-collar jobs involve repetitive, mechanical duties, rather than intellectual or creative responsibilities.”<sup>221</sup> In fact, so blurred has the boundary become between exempt and nonexempt work that scholars have argued the white-collar exemptions should be abolished outright.<sup>222</sup>

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<sup>220</sup> Rothe, *supra* note 9, at 731. *See also* Miller, *supra* note 24, at 32 (“There is little difference today between white-collar managers and administrators and blue-collar workers. Professionals have lost their independence, becoming salaried specialists, working within private and public bureaucracies.”); Shawn D. Vance, *Trying to Give Private Sector Employees a Break: Congress’s Efforts to Amend the Fair Labor Standards Act*, 19 HOFSTRA LAB. & EMP. L.J. 311, 315-16 (2002) (“[I]n today’s economy, blue-collar workers and white-collar workers are not always easily distinguishable.”).

<sup>221</sup> Rowan, *supra* note 7, at 120. *See also* Miller, *supra* note 24, at 33 (“Most office work is repetitive, manual, monotonous, and mechanical rather than intellectual and mentally creative.”); Rothe, *supra* note 9, at 730 (“The erosion of the distinction between blue-collar and white-collar workers is well-documented by social scientists.”).

<sup>222</sup> *See* Michael Cicala, Note, *Equalizing Workers in Ties and Coveralls: Removal of the White-Collar Exemptions from the Fair Labor Standards Act*, 27 SETON HALL LEGIS. J.139, 141 (2002) (arguing that the white-collar exemption “should be eliminated, due to the diminishing of perceived differences between white and blue-collar workers, the original intentions of the passers of the FLSA, and the difficulties in administering the white-collar exemptions.”); Schultz & Hoffman, *supra* note 47, at 141 (recommending “eliminating the executive exemption for overtime, to reduce artificial incentives for employers to require long working hours for managerial and professional employees”); JACOBS & GERSON, *supra* note 3, at 184 (“Expanding the FLSA to include overtime protections for salaried as well as hourly workers would reduce employers’ incentives to push these workers to put in very long weeks and thus to divide workers into overworked and underworked groups.”); KELLY & MOEN, *supra* note 63, at 210 (“One critical policy change would be to revise overtime laws so that professionals and other workers who are now classified as exempt from the current Fair Labor Standards law are also paid overtime wages.”).

We need not go so far, nor should we, when so many jobs still exist that are genuinely incompatible with a fixed schedule. The erratic, on-demand schedules of so many exempt workers, as detailed in Part II above, illustrate the difficulty of corralling modern cognitive labor within the confines of standard office hours. At the same time, because so much exempt work today has become functionally indistinguishable from non-exempt work, adding a no-collar condition for exemption would give renewed meaning to the exemptions, returning their determinants to the difficulty of quantifying the time required, and to the workers’ supposed discretion to allocate that time.<sup>223</sup> In sum, the proposal to add a no-collar condition may be new, but it fits easily into the plain language of the regulations, and it would restore the focus of the salary basis test to important, well-accepted justifications.

2. Adding a no-collar condition to the general rule would also require revising the existing exceptions to the salary basis test, but the revisions would promote internal consistency within the test overall.

Inserting a no-collar condition in Section 602(a)(1) of the general rule would require further revisions to other provisions of the salary basis regulations, including Section 602(b), which states exceptions to the general rule, and Section 602(c), which provides instructions for their administration. Notably, however, these further revisions would not unduly disrupt the FLSA’s regulatory scheme as a whole. In fact, the existing exceptions to the salary basis test are, by definition, somewhat in tension with the general rule, and the exceptions are increasingly out of step with the rhythms of modern knowledge work as well. Thus, revising the exceptions would bring the salary basis test into better alignment with today’s remote-ready work environment and promote the overall coherence of the test.

- a. Section 602(b) contains numerous exceptions that are in tension with the general rule and increasingly out of step with remote-ready work.

Despite the general rule in Section 602(a)(1), which prohibits deductions from salary that are based on the number of days or hours worked,

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<sup>223</sup> DeChiara, *supra* note 18, at 141.

the salary basis regulations currently include several exceptions in Section 602(b) that explicitly permit certain deductions from salary, including exceptions that are specifically based on time and attendance.<sup>224</sup> For example, the regulatory exceptions permit employers to make deductions from salary when an employee is absent for one or more full days for personal reasons, other than sickness or disability;<sup>225</sup> when an employee is absent for one or more full days occasioned by sickness or disability, if the deduction is made in accordance with a short-term disability insurance or similar plan;<sup>226</sup> and for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.<sup>227</sup> Notably, these exceptions are in addition to the language in Section 602(a)(1), which provides that exempt employees need not be paid for any workweek in which they perform no work at all,<sup>228</sup> without regard to the reason. Against this baseline, the exceptions in Section 602(b) permit further deductions for lesser absences of one or more full days, for covered reasons. The deductions are permitted in increments of a full day only, in deference to the indivisible nature of salaried work. In contrast, partial-day deductions—which begin to resemble hourly measurements—are generally not allowed and are deemed improper. Under 29 C.F.R. § 541.603, employers that make improper deductions from salary risk “failing” the salary basis test, resulting in loss of the exemption and, in turn, incurring an obligation to pay overtime<sup>229</sup> unless the employer satisfies certain “safe harbor”<sup>230</sup> requirements to cure the improper deduction.

These exceptions for attendance are unsurprising and understandable. Until quite recently, exempt work, like other work, could only be done *at work*, which is why time-in-attendance has served so readily and for so long as an easy proxy for productivity. Physical attendance has historically been a necessary prerequisite to work, and one that employers

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<sup>224</sup> See generally 29 C.F.R. §§ 541.602(b)(1)-(7) (2021).

<sup>225</sup> 29 C.F.R. § 541.602(b)(1).

<sup>226</sup> 29 C.F.R. § 541.602(b)(2).

<sup>227</sup> 29 C.F.R. § 541.602(b)(7). The regulations also include exceptions for reasons related to safety and disciplinary infractions, as well as others set forth in more detail below. See 29 C.F.R. § 541.602(b)(3)-(6).

<sup>228</sup> 29 C.F.R. § 541.602(a)(1).

<sup>229</sup> The regulations currently provide that “[a]n employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis.” 29 C.F.R. § 541.603(a).

<sup>230</sup> 29 C.F.R. § 541.603(d) (2021). Section 603(c) also permits reimbursement for “isolated or inadvertent” deductions without loss of the exemption.

have had a legitimate interest in policing, despite the time-transcendent quality of cognitive labor. Even so, the very idea of condoning deductions for absences stands at odds with the principle of prohibiting deductions for days or hours worked, and this contradiction gives rise to an inherent tension between the general rule for payment on a salaried basis in Section 602(a), and its manifold exceptions in Section 602(b). By virtue of the very nature of exceptions, the salary basis test is thus internally inconsistent and confusing to some extent, making it difficult for employers to comply. Indeed, over the years the salary basis regulations have been a source of substantial dispute regarding what constitutes an impermissible “partial day” deduction—and when, how, and whether an employer can remedy an improper deduction under Section 603 to preserve the exemption.<sup>231</sup>

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<sup>231</sup> Notably, “[i]n 1938, when the FLSA was written, employees were generally not paid when they did not work. The concept of paid sick time, vacation time, holidays or compensatory time off was virtually unknown. The definition of a salary was therefore simple and easily understood. Employees were either paid on an hourly basis for hours they actually worked or were paid a weekly salary.” Robert D. Lipman, et al, *A Call for Bright Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L. J. 357, 366 (1994). Over the years, the salary basis test became much more difficult for employers and courts to apply, as ever more “varied and sophisticated” policies for paid time off became a standard part of employee compensation. *See id.* at 366–77. The resulting ambiguities resulted in significant costly litigation with conflicting court rulings. *See* Michael A. Faillace, *Automatic Exemption of Highly-Paid Employees and Other Proposed Amendments to the White-Collar Exemptions: Bringing the Fair Labor Standards Act into the 21<sup>st</sup> Century*, 15 LAB. L. 357, 365–66 (2000) (“In fact, this salary basis test has resulted in an inordinate amount of senseless litigation over minor technicalities that in no way reflect Congress’ original intent in passing the FLSA.”). For a historical perspective on such disputes, as matters stood before the regulations were revised in 2004, *see* Pace, *supra* note 19, at 56 (“The unsettled nature of the law has left employers exposed to potentially enormous and generally unexpected liability for back overtime for employees who would have been exempt except for the court’s recent interpretations that certain long standing pay policies may now fail the salary basis test. Examples of such conflicting interpretations include: (1) whether the employee’s pay must actually be docked before he loses his salaried status or whether the mere possibility of a deduction is sufficient to fail the salary basis test; (2) whether employers can dock their employees’ accrued vacation or compensatory time for partial day absences; and (3) when, if ever, the ‘window of correction’ applies to relive a company from inadvertent violations. The circuits are split in their

Revisions to the salary basis regulations in 2004 clarified many previously unsettled questions about permissible salary deductions;<sup>232</sup> but to this day, inherent tensions persist between the general rule and its exceptions, both of which take as an unexamined given the presumption that exempt workers will normally be present at work during set hours. Thus, the current state of the law—from the plain language of the exceptions to their interpretation by the DOL and the courts— supports the application of regular office hours and seemingly hourly pay practices to exempt white-collar workers.<sup>233</sup> Many such pay practices, and the authorities approving them, are summarized by the Eighth Circuit Court of Appeals in *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039 (8th Cir. 2020). In *Coates*, the court reiterated that “reductions for partial day absences are inconsistent with a salary that is ‘not subject to reduction because of variations in the . . . quantity or quality of work performed’” as provided in the general rule.<sup>234</sup> At the same time, the *Coates* Court recognized the various regulatory exceptions to the general rule,<sup>235</sup> and their judicial and administrative interpretations, as follows:

- “Employers ‘may take deductions from [salaried employee] leave accounts’ and may require exempt employees ‘to record

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interpretation of these and other issues regarding an employee’s salaried status, leaving employers without guidance as to the legitimacy of their pay and leave policies.”). *See also* Cicala *supra* note 222, at 150 n. 66 (“This salary basis test has produced a wealth of litigation to deal with minor technicalities that call into question whether an employee is salaried or not... These types of problems include but are not limited to: docking of pay for hourly absences, additional compensation beyond salary level for extra time worked by employees, whether the docking was part of an established policy or just simple practice.”); Vance, *supra* note 220, at 334 (“While on its face the salary basis test appears to be straightforward, the actual application of the test has generated enormous controversy.”).

<sup>232</sup> Compare 29 C.F.R. § 541.602(b) with 29 C.F.R. § 541.118 (1973).

<sup>233</sup> Interpretations of the salary basis test over the years would seem to run counter to how salaried status is commonly understood by the public at large. *See* Cicala, *supra* note 222, at 155 (noting that courts historically applied the salary basis test inconsistently and the “lack of consistency . . . stands contrary to societal perceptions on what a salaried employee is”).

<sup>234</sup> *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1043 (8th Cir. 2020) (quoting rule regarding salary basis regulations, as published in Federal Register).

<sup>235</sup> *Id.* at 1043.

and track hours,’ so long as the employee’s predetermined salary is not reduced.”<sup>236</sup>

- “Exempt status ‘is only affected by monetary deductions for work absences and not by non-monetary deductions from fringe benefits such as personal or sick time.’”<sup>237</sup>
- “Employers can ‘make deductions for absences from an exempt employee’s leave bank in hourly increments, *so long as the employee’s salary is not reduced.*’”<sup>238</sup>

After summarizing these authorities, the *Coates* Court acknowledged that “[t]his is a complex, intricate regulatory scheme, one that has changed relatively little in the last 80 years.”<sup>239</sup> The Court then turned to the facts of the case before it, in which the plaintiffs claimed they had been improperly classified as exempt, in part because their employer “required them to clock in and out of work and to track the projects on which they worked on an hourly basis,” ostensibly to help the employer determine project costs,<sup>240</sup> and because the employer deducted leave time on an hourly basis when the employee recorded fewer than 40 hours in a week.<sup>241</sup> Despite the hourly

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<sup>236</sup> *Id.* at 1043 (quoting *Ellis v. J.R.’s Country Stores, Inc.*, 779 F.3d 1184, 1200 (10th Cir. 2015)).

<sup>237</sup> *Id.* (quoting *Schaefer v. Ind. Mich. Power Co.*, 358 F.3d 394, 400 (6th Cir. 2004)). For an example of the distinction between permissible and impermissible deductions, see Lawrence P. Postol, *The New FLSA Regulations Concerning Overtime Pay*, 20 LAB. L. 225, 237 (2004) (“In terms of maintaining the salary basis requirements, the prohibition against partial-day deductions is most problematic. For example, if a salaried worker leaves work early to visit a child at school, his salary cannot be reduced. Salaried workers can only be docked in whole-day increments. One solution is to charge the salaried employee’s vacation in partial-day increments. The theory is that the worker’s salary for the week remains intact, and only a fringe benefit is affected (i.e., his vacation time is reduced). If a worker has no vacation time, his account can go into the negative. While the worker cannot be required to pay the negative balance, the negative balance can be offset against vacation time as it accrues”) (citing Dept. of Labor Opinion Letter, dated Apr. 9, 1993 and Apr. 5, 1994).

<sup>238</sup> *Id.* (quoting U.S. Dept. of Labor, Wage & Hour Div. Opinion Letter on FLSA (Jan. 16, 2009, at \*2) (emphasis added) and further noting that several other circuits have applied this DOL guidance, including *McBride v. Peak Wellness Center, Inc.*, 688 F.3d 698, 705 (10th Cir. 2012)).

<sup>239</sup> *Coates*, 961 F.3d at 1043.

<sup>240</sup> *Id.* at 1044.

<sup>241</sup> *Id.* at 1044–45.

connotations of such practices, the *Coates* Court nonetheless observed that if it were determined that the employer “complied with those fact-intensive interpretive rules” under the salary basis test, then the plaintiffs would be properly classified as exempt, “no matter how much [the employer]’s method of compensation resembled payroll procedures for the typical hourly wage-earner.”<sup>242</sup>

In *Jones v. New Orleans Regional Physician Hospital Organization, Inc.*, 981 F.3d 428 (2020), the Fifth Circuit similarly summarized the many myriad ways in which employer policies can permissibly follow hourly practices, without running afoul of the FLSA. As the court explained, the law:<sup>243</sup>

(1) does not prohibit an employer from requiring its employees to track their attendance at work; (2) does not prohibit an employer from requiring a forty-hour workweek from a salaried employee; (3) allows for deductions from pay when a salaried employee does not work a forty-hour week so long as those deductions are not for absences of less than a day; and (4) allows an employer to require employees to make up missed days for a partial day or otherwise use appropriate leave when not working a full day.<sup>244</sup>

These precedents further reinforce the apparent contradiction between the general rule and its exceptions. By condoning penalties for attendance, including hourly deductions from paid and unpaid leave banks, administrative and judicial decisions alike support the notion that employers are free to impose workday schedules with set hours on exempt employees, notwithstanding the obvious tensions with salaried status.<sup>245</sup>

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<sup>242</sup> *Id.* at 1045. Ultimately, the Eighth Circuit in *Coates* concluded that genuine issues of material fact precluded such a determination on the limited record before the district court and reversed the grant of summary judgment. *Id.*

<sup>243</sup> Notably, the Fifth Circuit refers to the “FMLA” in the quoted text that follows, but this reference is presumably in error, given the context in which it was made, and the substance of the case cited in support of it.

<sup>244</sup> *Jones*, 981 F.3d at 434 (citing *Cowart v. Ingalls Shipbldg., Inc.*, 213 F.3d 261, 265 (5th Cir. 2000)).

<sup>245</sup> These internal tensions do not comport with common conceptions of exempt status and can be confusing to the uninitiated. *See Cicala, supra* note 222, at 153, n.



Such pay practices—and the precedents approving them—are not only difficult for employers to follow as a practical matter, such practices are also increasingly problematic as applied to today’s white-collar, remote-ready worker. At a time when physical presence was a prerequisite to productivity, tolerating the tension created by employers’ attendance expectations made sense. The problem with the exceptions and their interpretations now—a problem thrown into stark relief by the sudden shift to remote work during the recent pandemic—is that physical attendance today is much less clearly associated with either a worker’s effective presence or their productivity.<sup>246</sup> Today, the exceptions and their precedents create the possibility of a windfall for employers, who are technically permitted both to make deductions for absences during regular office hours and also to require unpaid efforts outside of them. This opportunity for injustice should not persist. Revising the exceptions could thus promote the integrity of the salary basis test by reducing the tensions inherent in its exceptions all along.

- b. Selectively revising the language in Sections 602(b) and 602(c) could eliminate contradictory “hourly” connotations in the exceptions, while preserving the fundamental structure of the regulatory scheme.

The existing exceptions, as written and interpreted, thus presume that exempt workers will follow fixed schedules; while the no-collar condition, as proposed, assumes that they *may*—or may not. Some revision of the

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89 (“Society would normally determine that a person who has to account for hours they miss during a workweek is actually being paid only for the hours they have worked, and thus not a salaried employee.”).

<sup>246</sup> See Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J. L. & POL’Y 203 (2021), [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol64/iss1/13](https://openscholarship.wustl.edu/law_journal_law_policy/vol64/iss1/13) (“The successful shift of millions of employees into remote and flexible work arrangements due to COVID-19 has rendered indefensible the judicial treatment of full-time face-time requirements as “essential job functions” under the ADA. The biggest change has been the massive increase in work-from-home arrangements, which makes it inexcusable for courts to continue treating onsite presence as a presumed essential function.”).

exceptions is therefore unavoidable if the no-collar condition is to become operative.

Eliminating the exceptions entirely, however, is not a solution for several reasons. First, actually working is of course a prerequisite to productivity, even if hours worked are not a measure of it. Even in a results-oriented work environment, employees who are sick or on vacation will not be making progress toward results, for good reasons. The revised regulations should protect both the employer and the employee against the potential adverse performance impacts of planned time away from work by preserving a mechanism for deduction to some degree.<sup>247</sup> Moreover, the notion of the workweek is deeply embedded both in the FLSA's regulatory scheme as a whole, and in the actual business operations of employers in the United States.<sup>248</sup> It is important to be mindful of the long history of the FLSA and its application, as well as the anticipated continuance of regular weekly schedules for nonexempt employees, and regular business hours for customers. Preserving the relevance of the workweek to some degree has value, both for ease of integrating the proposed revisions in the existing regulatory scheme and for ease of implementing them in the workplace as well.

This Article therefore proposes a compromise – one that promotes a revolutionary reorganization of exempt worker time, inspired by the model of a ROWE, but one that also operates within the existing confines of the FLSA to some degree, recognizing the extent to which the timeclock so fully pervades the FLSA's complex regulatory scheme (and the American workplace) as to make its total extraction impracticable. Specifically, this Article advocates deleting or amending the attendance-based exceptions to the salary basis test in Section 602(b), but only to the extent the exceptions are otherwise strictly incompatible with insertion of the no-collar condition for exemption. At the same time, this Article also proposes retaining certain limited references to the workweek in the salary basis regulations in order to maintain their integrity to the greatest extent possible and also to give both

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<sup>247</sup> In a productive, collegial work environment with a high degree of mutual trust, there may be no need for employers to make deductions, even in the face of extended sickness or vacation. Yet the function of the law is often to provide guidelines when friendly relations break down, hence the provisions for deductions here.

<sup>248</sup> See *supra* notes 11–14 and accompanying text (regarding the “workweek” as the standard unit of measurement under the FLSA).

employees and employers recourse for those periods of time when, for legitimate reasons of one kind or another, no work is performed, and work results are negatively impacted.

The remainder of this section sets out the specific proposed revisions to the salary basis regulations in full. It first repeats the proposed new version of Sections 602(a)(1), which would not only add the “no collar” condition, but also preserve the existing rule that no payment is required for full workweeks in which no work is performed at all. Proposed revisions to Sections 602(b) and (c) follow. The section concludes with further explanation, to the extent the proposed revisions may not be self-explanatory.

The specific proposed revisions to 29 C.F.R. §§ 541.602(a)-(c) are as follows:

- (a)(1) Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. *Exempt employees must not be expected to keep regular office hours or report for scheduled shifts during the week.* Exempt employees need not be paid for any workweek in which they perform no work.

...

- (b) Exceptions. The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:<sup>249</sup>

- (1) ~~Deductions from salary may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee’s salaried status will not be affected if deductions are made from the salary for two full day absences. However, if an exempt employee is absent for one and a half days for personal reasons,~~

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<sup>249</sup> For ease of reference, the seven exceptions have not been renumbered for purposes of this blackline, even though the first exception is recommended to be deleted.

~~the employer can deduct only for the one full day absence.~~

- (2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability, [and the employee requests or the law requires benefits under the plan, policy or practice](#). The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made [retroactively for full-day absences](#) before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, [and the employee requests coverage under the plan](#), the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary benefits are provided [at the employee's request, if the employer designates the employee's absences as FMLA leave and requires paid leave to be substituted for unpaid FMLA leave, or by operation of law](#) under a State disability insurance law or under a State workers' compensation law.
- (3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury

duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption. [NO CHANGE]

- (4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines. [NO CHANGE]
- (5) Deductions from pay of exempt employees may be made for ~~unpaid disciplinary suspensions of one or more full days~~ penalties imposed in good faith for infractions of workplace conduct rules. Such ~~suspensions~~ penalties must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may ~~suspend an exempt employee without pay for three days~~ make deductions from pay as a penalty for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may ~~suspend an exempt employee without pay for twelve days~~ make deductions from pay as a penalty for violating a generally applicable written policy prohibiting workplace violence.
- (6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee’s full salary for the ~~time actually worked~~ days actually employed in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee’s full salary for the ~~time actually worked~~ days actually employed will meet the requirement. However, employees are not paid on a

salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

- (7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid FMLA leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary ~~for time actually worked~~ *discounted for unpaid leave time actually taken*. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.
- (c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee, *as if the employee were scheduled to work five, eight-hours days in the week, Monday through Friday*. A deduction from pay as a penalty for violations of major safety rules under ~~paragraph~~ *paragraphs (b)(4) and (b)(5)* of this section may be made in any amount.

The foregoing proposed revisions are intended to be limited and strategic, designed to preserve as much of the existing language of the exceptions as possible while deleting outdated references to time, attendance, or similar language that connotes hourly or daily work in contradiction of the no-collar premise. And as the foregoing blackline illustrates, adding the no-collar condition would require no edits whatsoever to the exceptions for jury duty in Section 602(b)(3) or safety infractions in Section (b)(4). Only limited edits would be warranted in Section (b)(5), to eliminate unnecessary references to disciplinary suspensions of a "full day," and in Section (b)(6),

to shift the focus from “time actually worked” in the first and last weeks of employment to “days actually employed.”

Proposed edits to the remaining exceptions are concededly more significant and warrant further explanation. The most assertive revision is the proposed elimination of Section 602(b)(1) in its entirety. Section 602(b)(1) currently permits deductions from pay for absences of one or more full days for personal reasons. This language is wholly incompatible with the proposed no-collar condition, which would eliminate the expectation that exempt employees report for office hours, with the express purpose of allowing more flexible time off for personal reasons. If employees are not required to keep office hours in the first place, then attendance is irrelevant, and penalties for personal absences would have no place in the new regime. A no-collar employee should be free to take “off” a traditional workday, as long as the work gets done—which may be later that evening, or on the next day, or over the weekend. The notion of docking white-collar, remote-ready workers for personal days “off” is outdated and should not persist in the regulations. Logical consistency dictates deletion of Section 602(b)(1) under a no-collar exemption.

Despite the latitude that the elimination of Section 602(b)(1) represents, however, it is not unlimited. Recall that the proposal here would retain the last sentence of Section 602(a)(1), which provides: “Exempt employees need not be paid for any workweek in which they perform no work.” Retaining this language preserves the concept of the workweek in the regulatory scheme and strikes a middle ground that protects both employers, and employees. It protects employers against potential abuse, because it allows deductions from the salary of employees who routinely abandon work for days at a time.<sup>250</sup> And it also protects employees by preserving their opportunity to take vacation time, without risking negative evaluation of their productivity. During active periods of work, an exempt no-collar employee should be able to flow freely between work tasks and personal pursuits, greatly reducing the need for paid time off in the first place. But there may

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<sup>250</sup> The performance of such employees would surely suffer, and eventually, poor performance would give employers disciplinary recourse even in a results-focused environment. It often takes time, however, for employers to reach a well-supported disciplinary decision. Keeping the concept of the workweek in the regulations mitigates this dilemma, because even if Section 602(b)(1) were to be deleted entirely, employers could still deduct for entire workweeks in which no work is performed.

still be occasions when no-collar employees need more extended time away from work for the express purpose of rest, and this recuperative time should not count against the employee's measurable work results. If employers maintain the right to withhold salary for workweeks when no work is performed—and to replace salary with any available paid vacation under their policies—then both employer and employee interests are protected, even with the elimination of the exception in Section 602(b)(1).

The interests of both employers and employees are similarly protected by the revisions proposed in Sections 602(b)(2), regarding full-day absences for paid sickness or disability leave. Again, under the new no-collar exemption, an exempt worker who experiences minor illness or injury should have the latitude to lay low for a few days and then step up the pace again after she recovers, in her own discretion and without the necessity of requesting and recording sick days, as if she were an hourly worker. Indeed, the overworked exempt executive may find that she works from home while under-the- weather, anyway; and while she may be less than optimally productive for a few days, the employer should not retain the prerogative to dock her sick leave account while still reaping the benefits of her productivity, reduced as it may be. At the same time, it is important to keep in mind that sometimes, employees experience serious illness that impacts their productivity to a meaningful extent. In that instance, even in a workplace that is focused on results, not attendance, it would be unfair to require employers to pay full salary for periods when no work is performed; similarly, it would be unfair to expose the employee to risk of job loss or other adverse consequences for poor performance, when the performance is outside the employee's control.

The proposed edits to Section 602(b)(2) address both concerns by calling on the employee to initiate the payment of any available paid leave for sickness or disability in the first instance. Absent employee action—and except as affected by the FMLA, as detailed below—the employer would be required to pay full salary, and the employee would be held accountable for results, even if the employee performed little to no work for one or more full days during the week, due to sickness or disability. In other words, if the employee is willing and able to manage a minor illness in a particular workweek and still produce results, the exception in Section 602(b)(2) would



have no effect.<sup>251</sup> If, however, the employee believes their performance will be impacted by illness, or simply desires the opportunity to recuperate without juggling other responsibilities, then the employee could elect to take paid time off for sickness or disability pursuant to the employer’s existing policies.<sup>252</sup>

Notably, in some cases the employee may be suffering from a serious health condition under the FMLA. In that case the employer would have an obligation to designate the employee’s time away from work as FMLA-qualifying when the employer has enough information to determine that the employee is not working due to an FMLA-qualifying reason.<sup>253</sup> The direct implications of FMLA leave are addressed in Section 602(b)(3), discussed below; but FMLA leave also has an indirect effect on the operation of Section 602(b)(2), to the extent the FMLA allows the employer to require available paid leave to be substituted for unpaid FMLA leave.<sup>254</sup> Consistent with the employer’s rights and obligations under the FMLA, therefore, the invocation of paid sick and disability leave under Section 602(b)(2) cannot be left entirely to the employee’s discretion. The proposed revisions to Section 602(b)(2) would protect the employer’s prerogative in such situations.

The usual mechanisms for FMLA leave would likewise be largely preserved under the proposed revisions to Section 602(b)(3), which would simply shift the focus of the exception from the employee’s “time actually worked” (which is problematic under the no-collar condition) to the employee’s “unpaid leave time actually taken” (which is much less so, especially when applied in tandem with the proposed revisions to Section

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<sup>251</sup> As a practical matter, it may very well be the case that most employers, most of the time, do not take such deductions, and in fact wait for employees to elect sick pay, anyway. But part of the whole idea here is to bring the regulations—including the exceptions—more in line with how work actually gets done by exempt employees today and to shift the wording of the regulations to better support employee time control.

<sup>252</sup> Moreover, an employee who is incapacitated longer than first expected may request paid sick leave after a few days. The retroactive language in the proposed revisions would allow the employer to make deductions from pay even for the days before the employee requested leave, if the employee initially planned to continue working through illness but later became unable or unwilling to do so. And again, recall that the employer could make deductions from salary for absences of a full week in any event.

<sup>253</sup> 29 C.F.R. § 825.300(d)(1) (2021).

<sup>254</sup> 29 C.F.R. § 825.207 (2021).

602(c), explained more fully below).<sup>255</sup> As with paid vacation time or sick leave, FMLA leave represents time away from work, when it would be unfair to require full payment of salary by the employer, as well as to require full productivity by the employee. The proposed changes protect employee FMLA leave rights and insulate employers from the effects of employee nonwork as well.

A final proposed change to the salary basis regulations that warrants further explanation is the amendment of Section 602(c),<sup>256</sup> which explains how any deductions made pursuant to the exceptions in Section 602(b) are to be calculated. Section 602(c) currently provides that the employer “may use the hourly or daily equivalent of the employee’s full weekly salary or any other amount proportional to the time actually missed by the employee” to measure permissible deductions. Like so many provisions in the FLSA regulations, this language operates on the assumption that the employer will use the exempt employee’s regularly scheduled workdays for purposes of determining absences and deductions. Yet no such regularly scheduled workdays will exist if the no-collar condition is adopted. Because actual scheduling expectations would be expressly prohibited under the new no collar exemption, the proposed new language in 602(c) would direct

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<sup>255</sup> Importantly, the correlative FMLA regulation itself is already expressed in terms of leave time taken, rather than time worked, so no corresponding revisions would be required to the FMLA. *See* 29 C.F.R. § 825.206(a) (2021) (“Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee (under regulations issued by the Secretary, 29 C.F.R. part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. *See* 29 C.F.R. § 541.602(b)(7) (2021). This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 C.F.R. part 541.”).

<sup>256</sup> Other salary requirements set forth in 29 C.F.R. part 541, subpart G would not be substantially affected by the addition of the no-collar condition in Section 602(a)(1).

employers to substitute the most common, 40-hour, Monday-to-Friday workweek as a means of calculating permissible deductions from pay for periods when no work, by design or by default, is performed. This suggested change merely articulates the presumption that essentially underlies all the exceptions, anyway, which is that the employee works a fixed schedule from which measurable, full days can be deducted. And importantly, by directing the employer to take deductions “as if the employee were scheduled to work five, eight-hour days in the week, Monday through Friday,” the proposed new language in Section 602(c) would also act indirectly as a check on employee workload, memorializing existing norms regarding how many hours a full week of work should typically take—and theoretically preserving two days for the weekend.

In sum, despite the spirit of the salary basis test, which defies measurement by time, and the plain letter of the general rule, which eschews hourly accounting, the salary basis regulations contain numerous exceptions that are replete with references to time and attendance. The exceptions presume the legitimacy of attendance expectations and implicitly condone fixed schedules, even for exempt employees—and despite the stated requirements for payment on a salaried basis in general. This tacit approval of the typical workday creates internal tension within the salary basis test itself. The internal contradiction makes the salary basis test difficult for employers to follow and courts to apply, resulting in conflict, confusion, and uncertainty. Tolerating that internal contradiction was appropriate and even arguably necessary, when exempt work could only be accomplished in the office, during office hours. But today, with the temporal and geographic mobility of cognitive labor, there is no need to condone expectations for physical attendance that are outdated—and potentially unfair. Instead, insertion of the no-collar condition justifies deletion or amendment of the problematic, attendance-based exceptions, to the extent they are incompatible with an unscheduled work environment. At the same time, the proposed changes to the exceptions are intended to keep the original language intact to the extent possible, for ease of adoption and administration in American workplaces long shaped by the FLSA, where nonexempt employees and customers will presumably continue to follow the employer’s established workweek.<sup>257</sup> In this way, the insertion of the no-collar condition

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<sup>257</sup> Of course, if the legal reforms proposed here were instituted, over time it may seem less and less necessary to retain other aspects of the FLSA regulatory scheme—

and its related edits would eliminate the internal tension nested in the salary basis test from the beginning, bringing greater coherence to the salary basis regulations as a whole.

Together, the foregoing changes to the FLSA regulations, both in the general rule and subsequent exceptions, should effectively eliminate conventional office hours expectations for exempt, remote-ready workers and give them freedom to meet performance expectations on their own terms.<sup>258</sup>

- B. Objections notwithstanding, the no-collar condition could operate to mitigate the time bind for white-collar workers in a manner that complements but does not replace other efforts to promote work/life balance.

As demonstrated above, despite the historical intransigency of the time squeeze, and the resistance of the FLSA to change, the post-pandemic reconstitution of the workplace allows us to imagine a new way of working for at least one group of workers, and a new way of leveraging the FLSA to reduce the time bind for white-collar, remote ready employees.<sup>259</sup> This Article has already pointed out how resolving the time squeeze for the majority of workers will require a multipronged, multi-year approach, leveraging diverse tools and techniques in diverse directions over an extended period of time. As part of these diverse efforts, the proposal to add a no-collar condition for exemption puts at least one new mechanism at our

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or other familiar features of our labor law landscape, for that matter. *See* RESSLER & THOMPSON, *supra* note 155, at 135 (“Once this change moves beyond Best Buy, we envision human resources policies across corporate American coming under question. Mealtimes, break times, sick leave, bereavement policies—any tool we currently use to deal with employees as people starts to look strange in a ROWE, where people get to be people all the time.”).

<sup>258</sup> *See* Thomason & Williams, *supra* note 45 (“Now is a time for companies to step back and reexamine which traditional ways of working exist because of convention, not necessity. Executives and managers have the opportunity to choose quality work over quantity of work. They can stop rewarding the faster response over the better response, or the longer workday over a more productive workday.”).

<sup>259</sup> A shorter workweek would require significant changes to the fundamental structural attributes of the FLSA statutory scheme itself. In contrast, the changes proposed here are designed to align with the existing regulatory scheme, and the action required would be the province of the Department of Labor, not Congress.

disposal. This section outlines more clearly how that mechanism is intended to operate in practice. In the process, this section considers and counters possible criticisms of the proposal that may arise from the following features of the no-collar exemption, which: (1) is not designed to cover all employees; (2) challenges traditional attendance expectations and conventional ways of working; and (3) aids employees in managing overwork, but yet does not purport to impose outer limits on that work. For the following reasons, none of these features should inhibit adoption of the no-collar condition.

First, skeptics may criticize the proposed no-collar condition for its targeted focus on white-collar workers, in the face of a time squeeze that affects the broader workforce as well. However, it should be emphasized that the no-collar condition is a discrete proposal with a defined purpose, offered as but one component of a more comprehensive work/life agenda; as such, it is deliberately circumscribed to protect employer interests and is necessarily complimentary to our broader efforts to achieve more reasonable workweeks for all workers. Because the proposal does not purport to serve as a one-size-fits-all solution, its scope is narrow by design, to best accomplish its targeted effects. Notice the limited parameters of the no-collar proposal, which draws inspiration from, but is not the same as, a ROWE. Nothing in this Article is intended to discourage the full, widespread, voluntary implementation of ROWE or other private initiatives for work redesign. But in light of the mandatory nature of legal reform, and in respect of stark business realities and anticipated employer concerns, the proposal here is carefully circumscribed in important ways. As a threshold matter, the proposal here is limited to employees who are currently and correctly classified as exempt professional, managerial, or administrative workers under the FLSA. In this respect it differs markedly from a ROWE. In a ROWE as conceived by Thompson and Ressler, all employees, both exempt and nonexempt, are eligible to participate.<sup>260</sup> Available literature about ROWE does not dwell on the mechanics of time recording, rest breaks, and other wage-and-hour requirements for nonexempt employees, but it is easy to imagine that FLSA compliance might be more challenging when nonexempt employees are included in a ROWE. By focusing on exempt employees only, the proposal

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<sup>260</sup> RESSLER & THOMPSON, *supra* note 155, at 78 (“people at all levels” participate). But even in a ROWE, there is some debate regarding the extent to which the model could be implemented to all jobs, in all industries. “To be sure, some workers, such as those in retail and service positions, need to do their work ‘at work.’” Kelly & Moen, *supra* note 150.

here avoids those challenges and focuses specifically on that growing group of employees who suffer the problem of overwork, without the protections of overtime.<sup>261</sup>

Second, critics of the no-collar proposal may worry, as did Best Buy's new CEO, about a loss of collaboration when employees are no longer working the same hours in the same physical space with one another, with overlaps that allow serendipitous encounters to occur. Importantly, however, the proposal here is limited not only to exempt workers, but also to those exempt employees defined in this Article as "remote ready," meaning that their jobs are amenable to performance off-site.<sup>262</sup> Notice the focus on *readiness* in this definition: a "remote-ready" worker is not necessarily a *remote* worker. While the prevalence of remote work during the pandemic highlighted the question of location, this Article is not a defense of the wholly virtual workplace, any more than it is a defense of working onsite. For it is not the virtue of a virtual workplace *per se*, but rather the capacity to accomplish many aspects of work remotely, that could free remote-ready workers from the time-bind. Remote work, standing alone, does not eliminate the time pressures of a conventional workweek. Even fully remote work, if expected to be performed between set hours on specific days, can fall prey to the time squeeze, if workers are expected to be at the ready, at their laptops, according to the clock and not according to their workloads. Remote work is therefore instrumental for scheduling autonomy but not a solution in and of

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<sup>261</sup> Moreover, there is reason to believe that a results-oriented environment may be most suitable for a white-collar, remote ready worker. See Kelly & Moen, *supra* note 94, at 5 ("Schedule control is perhaps most likely to flourish in white-collar work-places where (a) some work can be performed at different hours and even off-site and (b) employees are accustomed to coordinating their work using technology as well as face-to-face interactions."). However, this is not to suggest that nonexempt employees are free from overwork, only that the existing mechanisms of overtime and leave laws may already provide their clearest path to a solution. As explained in Part II and III, these mechanisms are ineffective for or unavailable to exempt workers. And as explained in Part IV, the change proposed here could in fact lead to an increase in the number of workers entitled to overtime.

<sup>262</sup> In contrast, for those workers who must complete their work onsite—even those who are currently classified as exempt—the continued adherence to conventional work hours is likely warranted. The continued classification of exempt status, however, may not be, as discussed in Part IV.C below.

itself.<sup>263</sup> Moreover, this proposal does not privilege remote work, because there may very well be merit to employer concerns about onsite collaboration, even with the help of virtual tools.<sup>264</sup> It is plausible that work improves when

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<sup>263</sup> Research resulting from the STAR initiative, discussed *supra* at note 157, supports this concern. See KELLY & MOEN, *supra* note 63, at xi–xii (“One critical lesson [of STAR] is that shifting to remote work should not be the only or primary focus of work redesign initiatives. A policy declaring that people must work remotely, or even one saying that they can work wherever and whenever they want, can easily become pressure to work longer hours and be available for work 24/7.”). See also *id.* at 139 (“[R]esearch suggests that there is a real risk that working a varied schedule and especially working at home may increase working hours. Permission to work whenever and wherever you want could turn into pressure to work all the time and everywhere.”). Notably, however, the STAR research shows “a null effect on work hours.” See *id.* at 139. In any case, it is important to recognize that schedule control may yet matter more to employees than shorter hours, *per se*. See *supra* notes 141–142 and accompanying text. It is also important to consider the proposal for adoption of a no-collar condition within the context of larger legal and nonlegal efforts to reduce employee overload. See *infra* notes 265–271 and accompanying text.

<sup>264</sup> See, e.g., David Streitfeld, *The Long, Unhappy History of Working from Home*, N.Y. TIMES (last updated Jan. 4, 2021), <https://www.nytimes.com/2020/06/29/technology/working-from-home-failure.html> (describing failed attempts by employers, including Best Buy, to embrace remote work in the past, and noting the benefits of shared physical space and serendipitous meetings). Whether the benefits of onsite collaboration are myth or reality, however, is unclear. For example, critics of remote work have bemoaned the supposed loss of networking opportunities during the pandemic, especially for younger workers. See e.g., Marc Daniel Davies, *Fears of Stunted Careers and Struggles with Loneliness Are Driving Many Back to Their Desks*, BLOOMBERG (June 13, 2021, 11:00 PM CDT), <https://www.bloomberg.com/news/articles/2021-06-14/return-to-office-young-people-seek-wellbeing-at-home-purpose-at-work>. However, others have debated whether mentoring was effective before the advent of the pandemic, in the first place. See e.g., Ed Zitron, *How to Mentor Younger Workers in a Remote World*, THE ATLANTIC (Jan. 14, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/good-management-mentorship-remote-world/621219/>.

Even assuming onsite work improves the experience of younger workers or new employees, there are two ways to address this issue under the no-collar condition. First, employers could choose to classify entry-level roles as nonexempt, even if the role would otherwise qualify for exemption, by requiring workers in those roles to

employees meet in person, together or with clients. But in a results-oriented environment, it is the nature of the work, not the time on the clock, that should dictate when and where those in-person encounters occur. Accordingly, the proposal here is agnostic as to place.

Moreover, there is no call to eliminate face time or in-person meetings altogether. Instead, the no-collar language is carefully phrased to eliminate employer *expectations* for office hours, and specifically, for *regular* office hours. Thus, the proposal is simply and specifically to eliminate the employer expectation that exempt, remote-ready workers must regularly perform their work between certain hours of the day, on specific days of the week, on a fixed and recurring weekly basis—not to eliminate in-person performance altogether. Instead, the idea is to eliminate rigid attendance requirements to promote genuine flexibility—or more precisely, fluidity—and thereby relieve time pressures. Nothing in the no-collar language would prevent employers, for example, from maintaining normal hours of operation for their customers or establishing standard workweeks for nonexempt employees. And importantly, nothing in the no-collar language would prevent employers from arranging *ad hoc* meeting times with exempt, remote-ready employees.<sup>265</sup> Well-defined work outcomes may

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work a fixed schedule, for the purpose of making them more predictably available to each other and their managers. Full scheduling freedom could be reserved for more senior and seasoned employees. Second, because the no-collar condition would be focused on performance outcomes, managers could be explicitly evaluated on their mentoring activities. In this way the no-collar condition could even *improve* mentoring outcomes, by elevating mentorships from the realm of chance encounters to explicit managerial performance expectations.

<sup>265</sup> In comparison, in a ROWE, all meetings are optional. *See* RESSLER & THOMPSON, *supra* note 155, at 105. The training sessions for ROWE actively challenge a culture of endless meetings. *See, e.g.,* Kelly & Moen, *supra* note 94, at 498 (“The ROWE sessions state that ‘every meeting is optional’ and teach employees to ask for an agenda and to clarify what their role will be in a meeting before agreeing to attend. Meetings that are not clearly related to the individual’s results can (and should) be avoided.”). The proposal here stops short of that approach, in respect of business discretion, insofar as this Article entails legal reform that has mandatory effect. However, there can be no doubt that the proliferation of compulsory meetings contributes to long hours, overwork, and burnout—often with questionable returns. *See* Feintzeig, *supra* note 188. While the regulatory change proposed in Part IV would not go so far as to make meetings optional, individual employers of course



call for personal presence and collaboration at discrete and specific times, meaning that some work will still be best performed in person, at mutually agreeable times that may well continue to fall within the conventional workweek that nonexempt workers and customers still follow.<sup>266</sup> Indeed, many exempt, remote-ready employees may choose to continue to perform most if not all of their duties during what we have historically considered to be normal working hours.<sup>267</sup> The difference is that there would be no

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remain free to adopt additional measures to maximize the benefits of a no-collar schedule.

<sup>266</sup> Such collaborative patterns are already emerging organically, as employees who were working remotely during the pandemic found ways to work both together, and apart. Analyzing these new patterns, The Harvard Business Review recently published recommendations for managers of the new, “endless digital workday.” See Arjun Narayan et. al, *supra* note 62. In the article, the authors first note an important difference between working 9-to-5 in the office and working remotely: “One of the basic factors in determining these new work norms is the concept of “team overlap” i.e., the extent to which the work hours of different team members coincide. In the physical workplace, having regular work hours typically guarantees a high degree of overlap between one team member and the rest of the team. With remote and hybrid work, that level of overlap is not as common.” *Id.* In recognition of this trend, HBR recommends developing a team charter that establishes norms around shared working hours, but which also refrains from micromanaging and protects employee prerogatives to log off. *Id.* While the proposal here would prohibit employers from actually establishing set expectations for core hours, as discussed in Part IV, it is interesting to note that in the HBR study, “In our data, most team members appeared to naturally conduct their work at the times of the day when those business processes could be most efficiently performed.” *Id.*

Similarly, the idea proposed here is to dismantle outdated fixed schedules for the very purpose of allowing new norms to emerge naturally, dictated by the demands of the digital work, and not by the hands of the clock.

<sup>267</sup> In fact, there are important societal benefits to the shared 40-hour workweek that weigh strongly in favor of maintaining normal business hours for customers and customary shifts for nonexempt employees. As Professor Silbaugh argues, “the coordination of work days and work hours is not an unfortunate coincidence in need of correction. The coordination and synchronization of work time and what is alternatively called leisure, family, or private time, is the product of its value to people.” Silbaugh, *supra* note 67, at 1280. She argues that “all things being equal, regularity of hours plays a beneficial role in maintaining social rhythms that support families and communities in some ways.” *Id.* at 1279. In other words, we all benefit when we can largely spend and enjoy our nonworking time together. Nothing in this

employer-enforced *expectation* that they do so. This is a nuanced but important distinction, and one that makes all the difference for employee autonomy and work/life balance. Exempt, remote-ready employees may choose to concentrate their efforts during a conventional workweek—and this may prove most feasible, as a practical matter—but they should be free to work outside of normal office hours as well, when the task at hand allows.

Even more importantly, these employees should be free *not* to work during formerly conventional times, without fear of disapproval, discipline, or reprisal.<sup>268</sup> This freedom is essential to the proposal here—but it could also conceivably remove guardrails that currently operate, at least in theory, to keep employee workloads in check. Thus, critics may argue that the elimination of standard office hours would result in even longer workdays. To be clear, this Article is not an endorsement of working 24 hours a day—quite the opposite. This Article instead advocates for true employee choice regarding *when* during the day to work, or not. The function of the no-collar condition is to eliminate an arbitrary minimum. It is not meant to encourage the lack of boundaries, only to acknowledge the realities of the 24/7 business cycle and propose a means to better support domestic affairs in the face of those realities.<sup>269</sup> There is no denying that many employees already work 24/7—white-collar, remote-ready workers in particular—and that remote work during the pandemic only exacerbated the problem.<sup>270</sup> But at the same

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Article is intended to eviscerate those community rhythms; in fact, if white-collar, remote-ready workers were freed from strict office hours, they might even have the latitude to participate in shared leisure hours more fully.

<sup>268</sup> This approach would have important implications for existing employee entitlements such as vacation and family and medical leave. For the exempt, remote-ready worker, the freedom to come and go during the day would obviate the need to record daily paid or unpaid time off. Leaves and vacations may still be advisable for periods when no work can or will be performed. *See supra* notes 248–52 and accompanying text for a more complete discussion of periods of nonwork for exempt workers.

<sup>269</sup> As Ressler and Thompson explain, “What we’re advocating is that all of us, both employer and employee, acknowledge that people’s demands are getting higher and higher, and since you can’t make those demands go away, then we absolutely must give everyone more control over how they meet those demands.” RESSLER & THOMPSON, *supra* note 155, at 34.

<sup>270</sup> *See supra* note 263 and accompanying text. *See also* KELLY & MOEN, *supra* note 63, at xi (“The pandemic has fostered similar fears. . . Remote workers often

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feel pressured to be available at any time, desperately working to demonstrate their dedication and prove their value to the company at a time when layoffs are either happening or expected.”); Opinion, *supra* note 87 (“The pandemic, and especially remote work, has created new opportunities to work too hard.”); Roy Maurer, *Remote Employees Are Working Longer Than Before*, SHRM (Dec. 16, 2020), <https://www.shrm.org/hr-today/news/hr-news/pages/remote-employees-are-working-longer-than-before.aspx?linktext=remote-employees-are-working-longer-than-before> (“While the shift to working from home in 2020 has provided much-needed flexibility for professional workers during the COVID-19 crisis and shown that a remote workforce can maintain productivity, negative aspects of the experience— isolation, diminished collaboration and burnout—have emerged. . . . Research shows remote employees are working longer, spending time in more meetings and having to keep up with more communication channels.”); Michelle Davis & Jeff Green, *Three Hours Longer, the Pandemic Workday Has Obliterated Work/life Balance*, Bloomberg (Apr. 23, 2020) <https://www.bloomberg.com/news/articles/2020-04-23/working-from-home-in-covid-era-means-three-more-hours-on-the-job> (“America’s always-on work culture has reached new heights. . . . Whatever boundaries remained between work and life have almost entirely disappeared.”); Charlie Warzel, *You Are Not Working from Home*, N.Y. TIMES (May 26, 2020) (“The WFH Forever revolution promises to liberate workers from the chains of the office. In practice, it will capitalize on the total collapse of work/life balance.”).

Notably, however, remote workers during the pandemic were not only trying to work during normal office hours, but do so under drastically and suddenly changed conditions, and in some cases they were shouldering childcare responsibilities as well. *See, e.g.*, KELLY & MOEN, *supra* note 63 at x (“For many professionals and managers, the pandemic has ramped up work demands because so many processes needed to be reimagined and reconstructed on top of ‘regular’ workloads.”); Jo Craven McGinty, *With No Commute, Americans Simply Worked More During Coronavirus*, WALL ST. J. (Oct. 30, 2020), <https://www.wsj.com/articles/with-no-commute-americans-simply-worked-more-during-coronavirus-11604050200> (“Attempting to assess productivity during the unusual circumstances of a pandemic is far from ideal, but other research has pointed to gains when employees are allowed to work from home.”). Michael Gibbs et. al., *Remote Workers Work Longer, Not More Efficiently*, THE ECONOMIST (Jun. 10, 2021), <https://www.economist.com/business/2021/06/10/remote-workers-work-longer-not-more-efficiently> (as a result of more meetings, “[d]espite working longer hours, the employees had less focus time than before the pandemic.”). Accordingly, remote work during the pandemic is not an approximation of work in a ROWE.

time the pandemic heightened this issue, it gave us new impetus and new tools to address it.<sup>271</sup> Instead of repeatedly trying to wrangle inherently unpredictable demands of modern work into a fixed schedule, the more liberating approach may be to eliminate the very idea of a schedule itself, releasing blocks of time that were formerly held captive by rigid office hours. Indeed, experience with ROWE-related initiatives shows that employees valued the increased control over their schedules—and that their work hours did not, in fact, collectively increase.<sup>272</sup> True freedom to do only the work required to achieve results, without regard to when the work is performed or how much time it takes, should ultimately drive efficiencies that could reduce working time overall.<sup>273</sup>

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<sup>271</sup> See KELLY & MOEN, *supra* note 63, at xii (“Work post-COVID represents a challenge but also an opportunity. The pandemic has disrupted old patterns, opening up possibilities for not only remote work or more flexible schedules, but for reassessing previously taken-for-granted ways of working.”). See also, Thomason & Williams, *supra* note 45 (“As people postulate how the country may be changed forever by the pandemic, we can hope that one major shift will be a move away from the harmful assumption that a 24/7 work culture is working well for anyone.”); Warzel, *supra* note 270 (“Working from home is sustainable only under the right conditions. To truly get it right, working remotely is an adaptation — getting rid of the inefficient and maddening parts of the office — that feels like a little act of protest.”).

<sup>272</sup> See RESSLER & THOMPSON, *supra* note 155, at 357 (in a ROWE, “You may not work fewer hours. You may even work more, but you do it on your terms”). Importantly, research results from the more recent STAR initiative showed that when employees had freedom to work where and when they chose, there was an overall “null effect” on work hours, see KELLY & MOEN, *supra* note 63, at 139, with “a mix of people who have cut their total work hours and people who have increased their work hours a bit,” *id.* at 140. “But even without dramatic decreases in work hours, employees and managers consistently tell [the researchers] that the work feels more manageable.” *Id.*

<sup>273</sup> Eliminating work hours is not the same as eliminating work. “Just because your effectiveness at work is no longer measured by time doesn’t mean that work no longer consumes time.” RESSLER & THOMPSON, *supra* note 155, at 82. The efficiency arguments in support of a ROWE are similar to those in support of four-day workweeks, too, which encourage shorter meetings, fewer interruptions, and more focused working time. See Wilkie, *supra* note 120 (“By shortening the time when employees are at work, you’re forcing them to hyper-prioritize and cut out low-value work and activities to be more efficient. . . That could range from shortening

That is not to say that maximum-hours legislation, lower overtime thresholds, or other calls for a more reasonable workweek would be rendered moot by the no-collar condition; only that eliminating minimum office hours for white-collar workers adds to the mix an important element of schedule control, which shorter workweeks alone cannot achieve. Mandates or incentives for shorter workweeks may ultimately offer more complete protection against overwork for both exempt and nonexempt employees alike.<sup>274</sup> But pending more widespread reform, the no-collar condition at least offers the hope of reprieve from the time-bind for affected workers. And

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or canceling meetings altogether—similar to how Microsoft in Japan moved standard meeting times from one hour to 30 minutes—or spending less time on administrative work, checking e-mail or perusing social media accounts.”) (quoting Joyce Maroney, executive director at The Workforce Institute). *See also* PANG, *supra* note 107, at 207 (“A shorter workday creates a clear incentive for individual innovation and great opportunity to benefit directly from improvements you make to a company’s efficiency.”).

No matter how efficient workers become, however, there is no denying the psychological toll that comes from always being “on.” *See* Bird, *supra* note 81, at 22 (“Employees receiving assignments that require immediate attention during a family meal, a personal activity, or time with children force that employee to mentally transition almost immediately from the personal to the professional. That transition has a psychological cost. Such interruptions disrupt the recovery and relaxation process that is a necessary part of work/life balance.”). *See also* Kelly & Moen, *supra* note 94, at 499 (“Future research should also examine any negative effects of schedule control. Does schedule control facilitate excessively high levels of work—by making it easier to work whenever and wherever, but harder to say no to work demands—and therefore negatively affect employees’ health and well-being?”). However, the fact is that exempt workers face incessant interruptions after hours already, with the added pressure to be always responsive to prove their worth. If the realities of the modern global and digital office make the interruptions themselves difficult to eliminate, then it may make sense to tackle the rigid work hours first.

<sup>274</sup> Accordingly, this Article endorses the no-collar condition not as a “silver bullet,” as but one initiative among many to add to our wider efforts to solve the problem of exempt overwork, as part of a multi-pronged approach. *See supra* notes 90–92 and accompanying text. The research from the recent STAR initiative supports this multi-pronged approach, noting the importance of making “complimentary changes” as part of a wholistic approach to work redesign, rather than relying too heavily on a single change to solve the problems of employee overload. *See* KELLY & MOEN, *supra* note 63, at ix, xii; *see also supra* note 263 and accompanying text.

while the needs of those without enough work are clearly more pressing, and warrant our continued attention, we would be remiss to ignore the implications of our recent experiences for white-collar, remote-ready workers. In other words, we should continue to create appropriate exceptions to the workweek for non-exempt workers, and we should continue our efforts to make a shorter workweek accessible, to everyone—but for white-collar, remote-ready workers in particular, we should also take the present opportunity to dispense with the conventional workweek entirely. Doing so would provide an important complement to the many multiple and varied approaches to promoting the balance of work and life in the digital age.

Even within these three carefully circumscribed parameters—exempt status, remote readiness, and an emphasis on scheduling expectations over work hours—the proposed revisions to the FLSA regulations set forth above concededly represent a significant change from our past approach to white-collar work. But as Cal Newport writes, reflecting on the future of sustainable remote work for *The New Yorker*:

If you want to radically change when and where work happens in your organization while still achieving results, you also have to change the very definition of “work” itself, moving it away from surveillance and visible busyness, and toward defined outcomes and trust.<sup>275</sup>

...

Moving our professional efforts away from in-person surveillance and toward results not only makes remote work sustainable—it can also change the very nature of our jobs into something more enjoyable, and productive, and in tune with the unequal and unpredictable demands of life.<sup>276</sup>

Accordingly, we should reimagine the workweek for exempt, remote-ready workers by eliminating the employer expectation that they perform their work in certain places, at certain times, on specific days. Eliminating prescribed office hours for at least some workers is a feasible first step in the reorganization of work and, as detailed more fully below, portends a productive disruption of the status quo.

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<sup>275</sup> Newport, *supra* note 152.

<sup>276</sup> *Id.*

- C. Adding the no-collar condition for exemption would provide a more rational marker of exempt status in today’s economy and extend overtime protections to workers who are more appropriately classified as nonexempt.

The no-collar approach would concededly require a new management mindset. And yet, as shown above, the addition of a no-collar condition would be entirely consistent with the ostensible underlying purpose and rationales of the white-collar exemptions—even more so than the existing tests alone, especially when applied to the modern, remote-ready worker. Moreover, the new condition could generally be inserted without disrupting the regulatory scheme of the salary basis test as a whole, and in fact, might bring new coherence to its most disputed provisions. With the addition of the new condition, employees could not be classified as exempt white-collar workers if they were required to report for regular office hours or scheduled shifts.

For these reasons, as explained below, the new, no-collar condition could ultimately provide a more rational marker of exempt status in today’s economy, resulting in overtime protections for any previously exempt workers whose jobs are reclassified pursuant to the new criterion for exemption. A no-collar condition could also operate to disrupt fixed conceptions of the workweek, undermine the perverse prestige previously associated with long hours, and set the stage for further change.

First, adding a no-collar condition would not only give exempt employees more control over their time and promote the logical consistency of the FLSA regulations; it would also reveal who in the workforce actually has sufficient control over their time, in our new age, to be defensibly classified as exempt in the first place. A no-collar exemption may not be suitable for every employer or every employee.<sup>277</sup> Importantly, employers would be free to decide which positions are suitable for unscheduled work. By choosing to control employees’ work hours, or not, employers would

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<sup>277</sup> That is equally true for a ROWE. See Johnson & National Journal, *supra* note 166 (“This [ROWE] is how employment in the future could look as digital innovations make an office-centric environment less necessary and employers are searching for more productivity from fewer people. But it’s certainly not for everyone. Workplaces with deeply engrained hierarchical cultures won’t make the adjustment.”).

retain control over the application of the no-collar exemption to their workers, or not. The change proposed here would not by itself require the employer to reclassify any employees.

However, if an employer were to require an employee to regularly report to work on specific days and at specific times, for a particular duration, then arguably the employer would be controlling the employee's time to the extent that the employee should be compensated on an hourly basis, including payment of overtime for hours worked in excess of forty. With the addition of the no-collar condition to the salary basis regulations, therefore, employees whose weekly work hours and physical presence are subject to employer supervision and control would be reclassified as nonexempt. This may be the case for many workers who are currently classified as exempt but who work in non-office settings, such as restaurants, health care facilities, or construction sites. In fact, this Article argues that workers whose jobs are too time-and-place dependent to qualify for a no-collar exemption—such as store managers and registered nurse managers, for example—may arguably be more properly classified as nonexempt in today's remote-ready economy, anyway. If these employees truly must be present during a dedicated shift in order to supervise their subordinates and perform other location-based aspects of their jobs, then surely, we can measure the hours that these employees are required to be at work and pay them proportionally for their time. The fact that their jobs are not capable of performance anywhere, anytime, indirectly exposes the fact that their jobs do not defy measurement by the hour as presumed for exempt status, after all.

This approach would at least more fairly compensate those purportedly exempt workers who currently show up at the workplace all day, every day, only to suffer further impositions on their nights and weekends. And addition of the no-collar condition would force employers either to relinquish what amounts to hourly control over their employees, or else acknowledge the essentially hourly-based requirements inherent in what have previously passed as exempt positions. In this way the proposed no-collar condition for exemption could have the indirect effect of extending overtime protections to the substantial number of modern service workers whose duties fit the letter but not the spirit of the existing white-collar tests, thus resolving decades of "exemption creep."<sup>278</sup>

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<sup>278</sup> Notably, after much controversy, the DOL recently increased the salary level under 29 C.F.R. § 541.600 in an effort to bring the standards for exemption up to



date and bring more workers within the overtime protections of the FLSA. *See supra* note 26. The increase to the salary level, which went into effect in 2020, was lower than originally proposed, following to challenges to the DOL’s authority to raise the threshold. *Id.* In *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 531 (E.D. Tex. 2016), a federal district court enjoined the DOL from implementing its Final Rule as originally intended, concluding that the FLSA’s statutory delegation of authority to the DOL to define and delimit the executive, administrative, and professional exemptions did not include authority to utilize a salary level test or increase it automatically. *Nevada* 218 F. Supp. 3d at 530-31. As of this writing, the district court’s decision in *Nevada* technically still stands. *See* Ashley Singrossi, *The Final Rule: A Call for Congressional Action to Return the FLSA and the Middle Class to Its Former Glory*, 26 U. MIAMI BUS. L. REV. 117, 133 (2018) (“Though the DOL initially filed a notice of appeal to the U.S. Circuit Court of Appeals for the Fifth Circuit, under new leadership of the Trump administration, it has since dismissed its appeal.”). *See also* Practical Law Labor & Employment, Practice Note, *Latest Developments: DOL Rulemaking to Increase the Minimum Salary for White Collar Exemptions Under the FLSA*, PRACTICAL LAW W-005-0644 (current through Feb. 08, 2022).

The staying power of the *Nevada* decision, however, is questionable. *See* Singrossi, *supra*, at 133 (“Contrary to the court’s conclusion, enacting the Final Rule was well within the DOL’s scope of authority, as granted by Congress through the FLSA.”). It is arguably telling that Congress has not acted to invalidate the salary-level or salary-basis tests in the many decades of their enforcement. *See id.* at 137. Even the *Nevada* court itself expressly stated, “The Court is not making a general statement on the lawfulness of the salary-level test for the EAP exemption. The Court is evaluating only the salary-level test as amended under the Department’s Final Rule.” *Nevada*, 218 F. Supp. 3d at 534, n.2. Moreover, post-*Nevada* courts have continued to enforce the salary basis test. *See, e.g.,* Charbonneau v. Mortgage Lenders of Am., 487 F. Supp. 3d 1081, 1089 (D. Kan. 2020) (applying salary basis test and giving reasons for declining to follow *Nevada*, including the existence of other post-*Nevada* decisions applying the salary basis test).

Even so, by the same logic that applies to the salary-level test, the *Nevada* decision nonetheless represents a challenge to the DOL’s authority to utilize a salary-basis test for exemption. To the extent courts after *Nevada* continue to recognize the DOL’s authority to utilize salary in defining the white-collar exemptions, the no-collar condition proposed here could work in tandem with further increases in the salary level to bring overtime protections to an even larger group of workers. But even if the reasoning of the Texas district court in *Nevada* were ultimately to prevail, undermining the validity of the salary basis test altogether, the substance of the proposal here remains the same: Adding the no-collar condition provides a more

Meanwhile, adoption of the no-collar condition could begin to change traditional ideas about working hours, for the benefit of all. Employees who continue to be classified as exempt consistent with the no-collar condition would have every incentive to work even more efficiently. With complete control over their time, and without pressure to work long hours, they may even be able to get more done, in less time. The prestige associated with working long hours may begin to fade, as the more impressive feat of producing results efficiently gets noticed. Newly non-exempt employees, who do not qualify for the no-collar exemption, may also end up working fewer hours if employers are otherwise required to pay them overtime. This downward pressure on formerly exempt workers' hours could potentially also give an uplift to workers on the other side of the time divide, by incentivizing work spreading.

In the end, the no-collar condition for exemption would promote flexibility and fairness for everyone: greater schedule control for exempt, remote-ready workers, who would be free to truly flex work and life; and greater schedule control for newly non-exempt workers bound to office hours, whose employers will have new incentive to reduce after-hours add-ons, or else pay a premium for interrupting personal time. And collectively, the disruption to the norms of exempt overwork could ultimately contribute to a redistribution of hours that results in a more reasonable and sufficient workweek for nonexempt employees and contingent workers.

## V. CONCLUSION

In sum, the five-day, forty-hour workweek is a relic of the Industrial Age, and it is ill-suited for the mental labor performed by digital service workers in the Information Age. Conventional schedules put white-collar, remote-ready workers in a time bind that is unnecessary to accomplish their work. Our valiant efforts to chip away at the standard workweek have not solved the problem, to the extent it arises from the rigidity of the workweek itself. Dispensing with rigid expectations for office hours, and setting expectations for defined outcomes and results instead, could provide truer workplace flexibility for exempt, remote-ready workers, and a truer measure

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rational basis for defining and delimiting executive, administrative, and professional exemptions in the modern digital age than the duties tests, standing alone. Whatever shape FLSA reform may take, exempt status should require employee schedule control, as the best indicator of work that is not measurable by the hour.

of their performance. Eliminating conventional office hours expectations for today’s exempt, remote-ready workers could promote workplace flexibility without unduly disrupting post-pandemic business operations, and it could create a new conceptual framework that legitimizes and normalizes shorter working hours. In the process, it could extend new overtime protections to other employees whose jobs are more time-and-place dependent.

A few strategic edits to the salary basis regulations could effect this change under the FLSA, but the change would require a national willingness to innovate. After the disruptions of the Covid-19 pandemic, we have a rare opportunity to reimagine work, at a point in time when we have the technology to work differently from how we have ever worked before. As Cal Newport observed, writing about shorter workweeks for *The New York Times*, our “approach to cognitive work . . . is at best ten to twenty years old.”<sup>279</sup> Given that short tenure, the “history of technology and commerce teaches us that we should be skeptical of the idea that we’ve somehow figured out the best way to conduct knowledge work in the network age in such a short time.”<sup>280</sup> Instead, Newport admonishes us to imagine new ways of working for our new era:

To believe . . . that our current approach to knowledge work—which is brand-new on any reasonable scale of business history—is the best way to create valuable information using the human mind is both arrogant and ahistoric. . . . If I’m right and we’re still early in this new phase of digital knowledge work, then more productive — and hopefully much more meaningful and much less draining — approaches to executing this work remain on the horizon.<sup>281</sup>

We are indeed in the early phases of digital knowledge work, but already it is apparent that clinging to the conventional workweek is not a fruitful approach; it only ensures that the remote-ready worker will put in a full, eight-hour day, as scheduled, *and* complete unscheduled work outside of

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<sup>279</sup> Newport, *supra* note 64.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* (comparing Henry Ford’s innovative assembly line method of production to the former “craft” approach and arguing that we should similarly innovate and not simply “scale up” our work the way we have always done it).

office hours, whether or not all of those office hours are really necessary. As we begin to explore “more meaningful,” “less draining” approaches to cognitive work in the digital age, we should start by disposing of a workweek that was designed for the manufacturing floor. For the white-collar, remote-ready worker, there is no good reason to keep it.

Releasing exempt, remote-ready workers from the confines of the conventional workweek will free them to adapt and devise new ways of working. Those new ways of working may continue to include time in the office, as well as time outside it. New ways of working will likely also continue to require leave laws, for times when employees are unable to perform any work at all. And new ways of working may eventually lead to shorter, condensed bursts of work, with better barriers between work and leisure. But in the meantime, eliminating expected office hours for exempt, remote ready workers would promote more genuine workplace flexibility than adding more leave laws or cutting down workweeks, and it would set a better stage for organic innovation in the workplace of the future. It is time to reimagine knowledge work for the digital era. Eliminating office hours expectations for white-collar, remote-ready workers is an important, tangible, and attainable first step.