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REMOTE LAW: THE GREAT RESIGNATION, GREAT GIGIFICATION, PORTABLE BENEFITS, AND THE OVERDUE RESHUFFLING OF WORK POLICY

Orly Lobel*

The shift to widespread remote work in 2020 during the COVID-19 pandemic accelerated changes to the labor market, including flexibility of time, place, and nature of traditional office jobs, and a steep rise in gig economy work. As vaccines became available and employers began to require their employees to return to in-person work, many employees instead chose to move to jobs with more competitive pay, more flexibility, and better remote work options. Now, law and policy must evolve to address this changing labor market, including the uncertainties and risks created by remote work. This Article identifies inequities that have deepened with the availability of remote work and calls for systems to better support work-life balance and worker mobility, and to protect both gig workers and employees whose jobs do not lend themselves to working remotely. Post-pandemic labor policy must also address the portability of benefits for employees and independent contractors, as well as the issues employers face when their remote employees work across state lines. Following the Great Resignation, heightened workforce insecurity and mobility presents new risks and opportunities for both employers and workers, yet measured policy reforms in response to the new labor landscape are needed to maximize human capital and social welfare.

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I. INTRODUCTION

The changing nature of work in the waning months of the global pandemic has received various monikers, many of them paired with the word “great”: the Great Resignation, the Great Reshuffling, the Great Renegotiation, the Great Realignment, and the Great Enlightenment.¹ In late 2021, when

1. Greg Rosalsky, *The Great Resignation? More Like the Great Renegotiation*, NPR (Jan. 25, 2022, 6:30 AM), <https://www.npr.org/sections/money/2022/01/25/1075115539/the-great-resignation-more-like-the-great-renegotiation> (defining “The Great Resignation” as the mass exodus of the American workforce that saw more than 33 million Americans voluntarily quit their jobs between spring of 2021 and the beginning of 2022); Jason Noakes & Jeff Landmann, *The ‘Great Enlightenment’: Why and How Employees Have Rethought Their Relationship With Work*, NORTON ROSE FULBRIGHT (Dec. 17, 2021), <https://www.nortonrosefulbright.com/en/knowledge/publications/cd034ae8/the-great-enlightenment-why-and-how-employees-have-rethought-their-relationship-with-work#autofootnote1>; Marcus Buckingham & Nela Richardson, *What’s Really Driving the ‘Great Resignation’*, BARRON’S (Apr. 29, 2022, 10:48 AM), <https://www.barrons.com/articles/great-resignation-job-flexibility-adp-research-51651243602>; Daniel S. Wittenberg, *The Great Resignation and the Business of Law*, AM. BAR ASS’N (Aug. 10, 2022), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/july-august/great-resignation-business-law/.

vaccinations became available and employers began to require employees to return to in-person work, record numbers of employees chose to quit their jobs.² Some partook in this Great Resignation in pursuit of jobs with more competitive pay and increased flexibility—including remote work options, as so many had effectively worked from home during the pandemic. Others chose to leave the workforce entirely: by March 2022, a record four-and-a-half million Americans (or 3 percent of workers nationwide) had quit their jobs.³ The leisure and hospitality industry, including accommodation and food services, had the highest rate of resignation (6.4 percent), followed by the retail trade industry (4.4 percent).⁴

The COVID-19 pandemic and its aftermath accelerated labor market developments that were already underway in the United States and around the world. These developments in recent decades included both increased flexibility (in the time, place, and nature) of work for core workers, and the rise of gig economy work (freelancers, independent contractors, and the self-employed) defined by what they are not—traditional employees with full-time, long-term employment contracts.⁵ As job security has continued to decline, job-hopping has become much more common in recent years; under some circumstances, it is now perceived as an advantage in enriching a worker's experience and skills.⁶ Many workers,

2. Kim Parker & Juliana Mensace Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, PEW RSCH. CTR. (Mar. 9, 2022), <https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/>.

3. Amy Fontinelle, *The Great Resignation*, INVESTOPEDIA (Apr. 21, 2022), <https://www.investopedia.com/the-great-resignation-5199074>; U.S. Bureau of Lab. Stats., *Quits: Total Nonfarm*, FED. RSRV. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/JTSQUR> (last visited Sept. 9, 2022).

4. *Quit Rate 6.6 Percent in Accommodation and Food Services in September 2021* (Nov. 21, 2022), <https://www.bls.gov/opub/ted/2021/quits-rate-6-6-percent-in-accommodation-and-food-services-in-september-2021.htm> [hereinafter *BLS Quit Rate Report*].

5. See generally Orly Lobel, *The Gig Economy and the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017); see also Orly Lobel, *We Are All Gig Workers Now: Online Platforms, Freelancers, & Battles Over Employment Status & Rights During the COVID-19 Pandemic*, 57 SAN DIEGO L. REV. 919 (2020).

6. Goh Chiew Tong, *How Much Job-Hopping is Too Much? Here's what Hiring Managers Say*, CNBC (Mar. 30, 2022, 1:06 AM),

because of declines in job security, job opportunities, and real wages, are also supplementing traditional jobs with work within the gig economy.

This symposium essay explores both aspects of the reshuffling of work relations: the shift to more flexible, remote work patterns among traditional employees and the rapid rise of the gig workforce. The essay highlights how remote work options require employers to implement new protections and to consider how remote work arrangements fit within the regulatory schemes of traditional employment law. When addressing gig workers, regulators must consider how to extend the social welfare protections historically afforded to traditional employees to a new and growing segment of the labor force. In response to the growing American gig workforce, federal and state legislators have proposed bills to provide independent contractors with portable benefits—including healthcare, unemployment insurance, worker compensation, and retirement saving—that follow workers from gig to gig without interruption or loss of coverage.⁷ Such legislation, though in its nascent stages, has the potential to help address the dearth of benefits for nontraditional workers who rely on jobs with flexible scheduling as their primary source of income. In addition, policy must recognize the new normal of reshuffling, resignation, and rapid recruitment to protect and support labor market mobility, rejecting the problematic practice of restraining employees' post-employment opportunities through non-competes and other restrictive measures.

The article proceeds as follows. Part II describes the shifts to remote work during the pandemic and the demand by many workers to remain remote in both the near and long-term future.⁸ This section presents law and policy challenges that employers may face with the shifts to remote work, including tax, privacy and cybersecurity, wage and hour laws, and health

<https://www.cnn.com/2022/03/30/great-resignation-what-hiring-managers-think-of-job-hopping.html>.

7. Leah Shepard, *Federal Bill Would Offer Some Legal Protections for Gig Workers*, SOC'Y FOR HUMAN RES. MGMT. (Aug. 1, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/gig-workers-independent-contractors-bill.aspx>.

8. See *infra* Part II.

and safety regulation. The purpose of the discussion is not to suggest solutions to each policy field but to underscore the many ways in which law and policy must evolve to address the uncertainties and risks created by remote work.

Part III considers labor market inequities that have deepened with the availability of remote work for some segments of the labor force, from both the perspective of gender inequities in balancing work-family challenges and the perspective of the more vulnerable segments of the workforce that lack the option of remote work.⁹ This discussion points to the need to address these inequities by creating systems that better support work-life balance and by addressing the great divide between those who have the privilege to work remotely and those who do not; those who are covered by the traditional Social Security network of benefits through regular employment relations and those who are not.

Part IV builds on the insights of Part III to argue that policy must address the lack of benefits and security by broadening the coverage of welfare benefits to include independent contractors, including exploring new initiatives on portable benefits at the state and federal levels.¹⁰ In addition, the section argues that heightened workforce mobility requires protection of the portability of human capital. Policy needs to ensure workers' freedom to move within the market by rejecting the expansion of post-employment restrictive covenants, including non-competes, non-solicitation, and non-poaching clauses. The article concludes with a call for further connection between labor market developments, antitrust law, technological innovation, and education policy.

II. REMOTE WORK AND EMPLOYMENT REGULATION FRONTIERS

A. *What Workers Want*

In March 2020, many of us said goodbye to our offices for what we thought would be a couple of weeks. More than two years later, many of us are still remote or semi-remote. In response to this transition, some companies have adopted new

9. *See infra* Part III.

10. *See infra* Part IV.

policies for remote work. On April 28, 2022, Airbnb announced on Twitter its remote work policy for all its employees.¹¹ CEO Brian Chesky described how Airbnb employees can “live and work anywhere.”¹² Chesky described Airbnb’s remote policy as having five key features: (1) employees have a choice to work from home or office, according to what works best for them; (2) employees are free to move anywhere in the country and their compensation will not change; (3) employees can live and work in 170 countries for up to ninety days a year in each location; (4) teams will have regular in-person meetings, such that most employees will connect in person every quarter for about a week; and (5) the company will have a multi-year roadmap that will allow coordination of all remote employees toward company goals.¹³ Chesky explained that the world is recovering from the global pandemic more quickly thanks to the millions of people working from Airbnb’s around the world, and that Airbnb is leading the way in offering its employees flexibility and remote work while growing in productivity.¹⁴

With this public promotion of its remote work arrangements, Airbnb seeks to follow work trends accelerated by the pandemic, appeal to a diverse employee base, recruit new talent globally, and retain its current workers.¹⁵ Leading companies around the globe are emulating this model of flexibility and remote work.¹⁶ As the world is beginning to normalize around the post-COVID reality, remote work has evolved beyond its initial purpose of stemming the pandemic into a viable long-term option that serves both employees’ and employers’ interests.¹⁷ Before the pandemic, only 23% of U.S. employees worked remotely on a regular basis; at the height of

11. Airbnb (@Airbnb), TWITTER (Apr. 28, 2022, 5:52 PM), <https://twitter.com/Airbnb/status/1519841939905990657?cxt=HHwWgsCy7aOMyJcqAAAA>.

12. *Airbnb’s Design for Employees to Live and Work Anywhere*, AIRBNB (Apr. 28, 2022), <https://news.airbnb.com/airbnbs-design-to-live-and-work-anywhere/>.

13. *Id.*

14. *Id.*

15. *Id.*

16. Derek Thompson, *The Workforce Is About to Change Dramatically*, ATLANTIC (Aug. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/just-small-shift-remote-work-could-change-everything/614980/>.

17. *Id.*

the pandemic, this rate rose to 71%.¹⁸ As of February 2022, 61% of Americans who work from home do so by choice, even though many companies offer in-person work options.¹⁹ Before the pandemic, under 4% of jobs offered remote work options, compared with more than 15% by the end of 2021.²⁰ The percentage of available remote work options is projected to grow.²¹ As a recent *Forbes* article puts it, “remote work is here to stay and will increase into 2023.”²²

While debates abound over the benefits and disadvantages of remote work, many studies find that remote work can increase productivity and employee satisfaction—and in turn improve worker retention.²³ Several studies have found that remote employees are generally more productive than those who work at the office, and that those who *choose* to work from home are the most productive.²⁴ Remote work can decrease work exhaustion and reduce turnover by increasing

18. See Kim Parker et al., *COVID-19 Pandemic Continues to Reshape Work in America*, PEW RSCH, CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/>.

19. Jennifer Liu, *61% of people working from home are doing so because they want to, even though their office is open*, CNBC (Feb. 18, 2022, 9:00 AM), <https://www.cnbc.com/2022/02/18/people-are-working-from-home-out-of-preference-not-just-necessity.html>.

20. *25% of all professional jobs in North America will be remote by end of next year*, LADDERS (Dec. 7, 2021), <https://www.theladders.com/press/25-of-all-professional-jobs-in-north-america-will-be-remote-by-end-of-next-year>.

21. Cassandra Brumback & Robin Burroughs, *I Wonder as They Wander: Revisiting Remote Work Policies*, JD SUPRA (Mar. 17, 2022) <https://www.jdsupra.com/legalnews/i-wonder-as-they-wander-revisiting-5836321/>.

22. Bryan Robinson, *Remote Work Is Here To Stay And Will Increase Into 2023, Experts Say*, FORBES (Feb. 1, 2022, 6:24 AM), <https://www.forbes.com/sites/bryanrobinson/2022/02/01/remote-work-is-here-to-stay-and-will-increase-into-2023-experts-say/?sh=1970025820a6>.

23. Jed Brown, *Embracing Mobility as the New Normal for Flexible Work*, FORBES (June 4, 2020, 7:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2020/06/04/embracing-mobility-as-the-new-normal-for-flexible-work/?sh=74ab5759aa66>; but see Edward Glaeser & David Cutler, *You may get more work done at home. But you'd have better ideas at the office*, WASH. POST (Sept. 24, 2021, 4:14 PM), <https://www.washingtonpost.com/outlook/2021/09/24/working-home-productivity-pandemic-remote/> [<https://perma.cc/RE6B-K52M>] (arguing that remote work could decrease innovation and creativity).

24. See Isaac Mamaysky, *The Future of Work: Exploring the Post-Pandemic Workplace From an Employment Law and Human Resources Perspective*, 21 U.C. DAVIS BUS. L.J. 257, 270-71 (2021); see also Robinson, *supra* note 22.

commitment to the organization.²⁵ For better or worse, depending on the perspective (i.e., employers versus workers), studies show that working from home extends the workday by an average of 10-20%.²⁶

Remote work also expands the talent pool, allowing employers to hire and retain employees who have work challenges due to personal or geographic limitations, and to hire beyond geographical boundaries.²⁷ Additionally, employees or job seekers with disabilities or child or elder caregiving responsibilities are often better accommodated by remote work.²⁸ And remote work options can benefit employees who are immunocompromised and remain at heightened risk despite the availability of COVID-19 vaccines.²⁹

The benefits of remote work are not limited to employees. Viewed through the lens of corporate cost-saving, remote work has the benefit of reducing employers' overhead costs.³⁰ A company or organization can downsize its physical office spaces, furniture and infrastructure requirements, in-person meal provision, certain safety and security measures, and other line item expenses that accompany a traditional operating model.³¹ Remote work also allows employees to gain more control over their work schedules in addition to saving time and money ordinarily spent traveling to and from work.³² The impact of such savings is even more impactful considering recent inflation and the surge in gas prices.

25. See Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25, 35 (2020).

26. Mamaysky, *supra* note 24, at 265.

27. See *id.* at 266-67.

28. See Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J. L. & POL'Y 203 (2021).

29. Brandy L. Wagstaffe & Jacob Quasius, *The ADA, Telework, and the Post-Pandemic Workplace*, REG. REV. (Sept. 7, 2020), <https://www.theregreview.org/2020/09/07/wagstaff-quasius-ada-telework-post-pandemic-workplace/>; see also Charlotte Carne, *Remote Work as a Reasonable Accommodation*, DYKEMA LAB. & EMP. L. BLOG (May 20, 2022), <https://www.laboremployment-lawblog.com/remote-work-as-a-reasonable-accommodation/> (describing ADA "pitfalls" when requiring immunocompromised employees to return to work).

30. Hickox & Liao, *supra* note 25, at 35; Brown, *supra* note 23.

31. Mamaysky, *supra* note 24, at 266.

32. See Mamaysky, *supra* note 24, at 267; see also Robinson, *supra* note 22; Hickox & Liao, *supra* note 25, at 34.

B. Multi-Jurisdictional Compliance

Alongside its advantages, working from home also presents risks and challenges for employers, workers, and public social goals. First, employers that rely heavily on remote work are more likely to hire out-of-state employees or allow their employees to relocate out of state,³³ which requires the employer and employee to comply with employment laws of the state and local jurisdiction where the employee resides and works.³⁴ Because employment laws cover a vast range of issues—including wage and hours, meal and rest breaks, overtime pay, workers' compensation, unemployment insurance, payroll taxes, family and medical leave, antidiscrimination, health and safety, and privacy and drug testing—employers must follow the relevant laws to ensure compliance.³⁵ For example, wage and hour laws often differ quite dramatically from state to state, with different definitions of exempt versus non-exempt employees for purposes of overtime pay, different minimum wage thresholds, and different requirements pertaining to meal breaks.³⁶

Failure to adhere to state and local laws for the jurisdiction in which the employee is working presents an increased risk of local and state enforcement actions and possible charges for wage shortfalls, interest, and liquidated damages.³⁷ Even more intricate issues arise for employees who

33. Debra Mastrian, *Hiring Remote Employees in Other States? Make Sure Your Business is Compliant*, JD SUPRA (June 15, 2022), <https://www.jdsupra.com/legalnews/hiring-remote-employees-in-other-states-6346144/>.

34. E.g., Michael J. Nader, *Managing a California Remote Work Policy: Determining Which Laws Apply*, OPEN LEGAL BLOG ARCHIVE (Apr. 1, 2022) <https://www.openlegalblogarchive.org/2022/04/01/managing-a-california-remote-work-policy-determining-which-laws-apply/>.

35. Mastrian, *supra* note 33; Christopher Katsimagles & Brian Turoff, *Remote Work Due to COVID-19 Triggers Compliance Issues*, JD SUPRA (Apr. 5, 2021), <https://www.jdsupra.com/legalnews/remote-work-due-to-covid-19-triggers-9912113/>; Paul E. Cirner, *Multistate Compliance for Employers With Out-Of-State Remote Employee*, NAT'L L. REV. (Apr. 23, 2021), <https://www.natlawreview.com/article/multistate-compliance-employers-out-state-remote-employee> [Perma] (Failure to comply with state and local posting requirements, leave entitlements, wage and hour laws, etc. can result in liability for lost wages, penalties, noneconomic damages, and attorneys' fees.”).

36. See Mastrian, *supra* note 33; see also Cirner, *supra* note 35.

37. Mark Goldstein & Saranne Weimer, *Legal Considerations for Managing Remote Employees*, REUTERS (Dec. 20, 2021),

work part of the day in the office in one state and the rest of the day remotely in a separate state.³⁸ In these situations, the burden is on the employer to determine which state's laws apply to the employee as they move from one state to the next.³⁹ Employers may also need to register to do business in states where employees are located for tax purposes and purchase additional insurance policies to cover out-of-state workers.⁴⁰ To alleviate the challenges of compliance with multiple legal regimes, some employers are creating lists of approved remote locations.⁴¹ From a policy perspective, the rising patterns of remote work present another reason for the federal government to step in and create more national protections and consistency across legal regimes in employment and labor law.

Antidiscrimination laws vary across states as well. For example, under New York state law, an out-of-state employee working for an employer located in the state cannot succeed in a discrimination lawsuit because, according to New York's "impact test," courts will evaluate conduct based on the state in which the impact of the alleged discriminatory act was felt.⁴² However, employees in other jurisdictions, such as the District of Columbia, may bring discriminations lawsuits against an employer even if they were working outside of the District's bounds; D.C. law considers where the alleged discrimination was *initiated* in addition to where it took place.⁴³

<https://www.reuters.com/legal/legalindustry/legal-considerations-managing-remote-employees-2021-12-20/>.

38. Cirner, *supra* note 35.

39. Mastrian, *supra* note 33.

40. Benjamin Dudek, Fisher Phillips & J. Hagood Tighe, *Accept the Challenge and Develop a 6-Step Plan to Legally Manage Your Remote Employees*, JD SUPRA (June 7, 2022), <https://www.jdsupra.com/legalnews/accept-the-challenge-and-develop-a-6-2362352/>.

41. *Id.*

42. Elizabeth Houghton LaGreca & Adam M. Tomiak, *New York's Anti-Discrimination Laws Do Not Protect Out-of-State Remote Workers*, EPSTEIN BECKER GREEN (May 12, 2022), <https://www.workforcebulletin.com/2022/05/12/new-yorks-anti-discrimination-laws-do-not-protect-out-of-state-remote-workers/>.

43. *Id.*

C. Cybersecurity and Privacy

New security concerns have emerged now that employees are increasingly working outside of the secure office space.⁴⁴ Popular applications like Zoom, Slack, and other collaborative online tools set default security preferences, but when an employee uses an unsecured network, such as a coffee shop's Wi-Fi, any unsecured digital communications are an invitation to cybercriminals who can easily hack the employer's network and access company data.⁴⁵ Before the COVID-19 pandemic, threats like phishing and ransomware could be mitigated in the physical workplace because of the security of face-to-face communication, and because network access can be tightly controlled within the physical confines of an office. Now, employers need to ensure that remote workers have secure connections to prevent data breaches whether the employee is working at home, at a coffee shop, or from an airport.⁴⁶

Remote work has also created a disjointed environment of at-home offices in which employers face difficulty monitoring their employees. In response, employers are using new surveillance tools, such as software that counts keystrokes, takes screenshots, and records audio or video, to monitor work productivity remotely.⁴⁷ However, some of these monitoring technologies are in tension with privacy laws.⁴⁸ Privacy laws vary from state to state, and employers must learn to monitor employees without infringing on an employee's privacy.⁴⁹

44. See Mark Nevins, *New Dangers of Working From Home: Cybersecurity Risks*, FORBES (May 19, 2021, 9:18 PM), <https://www.forbes.com/sites/hillennevins/2021/05/19/new-dangers-of-working-from-home-cybersecurity-risks/?sh=24fdaf322fb1> [<https://perma.cc/5MU4-M73A>].

45. 30 No. 14 Cal. Emp. L. Letter 7; *How to Safely Use Public Wi-Fi Networks*, FED. TRADE COMM'N (May 2021), <https://consumer.ftc.gov/articles/how-safely-use-public-wi-fi-networks>.

46. *Id.*

47. Danielle Abril & Drew Harwell, *Keystroke Tracking, Screenshots, and Facial Recognition: The Boss May Be Watching Long After the Pandemic Ends*, WASH. POST (Sept. 24, 2021, 7:00 AM), <https://www.washingtonpost.com/technology/2021/09/24/remote-work-from-home-surveillance/> [<https://perma.cc/AW9R-S73F>].

48. *In the Workplace 2021: Legal Implications of Remote Work in the COVID-19 Era*, WRIGHT LINDSAY JENNINGS (Jan. 8, 2021), <https://wlj.com/in-the-workplace-2021-legal-implications-of-remote-work-in-the-covid-19-era/>.

49. *Id.*; see also Matthew T. Bodie, *Employers as Information Fiduciaries*, 63 SANTA CLARA L. REV. 35 (2023).

Moreover, technology has made it possible—and probable—for workers to take work calls or check work emails beyond their scheduled hours, which means that employee work time is also increasingly defying set boundaries.⁵⁰ In Europe, some countries have passed laws creating a right to disconnect. Earlier this year, Belgium announced that its federal workers would not be obligated to answer work calls or emails outside work hours in effort to preserve work-life balance.⁵¹ Portugal also passed an addition to the Portuguese Labor Code that prohibits employers from contacting employees during non-work hours except in emergencies.⁵² Portugal's policy applies to both on-site and remote workers; if violated, employers can be punished by fines.⁵³

D. Health and Safety

In the realm of health and safety, more clarity is needed around the regulation and coverage of worker compensation with regard to accidents or injuries that occur while working remotely.⁵⁴ To prevent work-related accidents while working outside of the office, employers should set safety guidelines and expectations for remote work employers such as encouraging employees to designate a work area and providing workstation setup training that covers safety measures and ergonomics.⁵⁵

The pandemic has of course also raised deeper questions about the scope of occupational health and safety regulation. In 2021, the United States Secretary of Labor, acting through

50. Mark Goldstein & Saranne Weimer, *Legal Considerations for Managing Remote Employees*, REUTERS (Dec. 20, 2021, 7:40 AM), <https://www.reuters.com/legal/legalindustry/legal-considerations-managing-remote-employees-2021-12-20/>; see also *State Family and Medical Leave Laws*, NAT'L CONF. STATE LEGISLATURES (Apr. 29, 2022), <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [<https://perma.cc/U8BY-WUFU>].

51. Jack Kelly, *Belgium, Portugal and Other European Countries Prohibit Managers from Contacting Employees Outside of Working Hours*, FORBES (Feb. 3, 2022), <https://www.forbes.com/sites/jackkelly/2022/02/03/belgium-portugal-and-other-european-countries-are-ahead-of-the-us-prohibiting-managers-from-contacting-employees-outside-of-working-hours/?sh=2eebb0e51d00>.

52. *Id.*

53. *Id.*

54. Maureen Minehan, *Safety Policies for Remote Workers*, 38 EMP. ALERT 1 (2021).

55. *Id.*

the Occupational Safety and Health Administration (OSHA), enacted a vaccine mandate requiring employers with 100 or more employees to ensure that their employees are vaccinated against COVID-19, or that they wear masks and undergo weekly COVID-19 testing.⁵⁶ Similarly, the Department of Health and Human Services, acting through the Centers for Medicare and Medicaid Services (CMS), issued a rule mandating medical facilities nationwide to order their employees, volunteers, contractors, and other workers to get vaccinated.⁵⁷

Shortly after the rules and mandates were announced, several lawsuits were filed around the country, arguing that the vaccine mandate exceeded OSHA and CMS's authority.⁵⁸ In *Biden v. Missouri*, the Supreme Court upheld the federal rule requiring that all CMS healthcare workers be vaccinated.⁵⁹ However, in *National Federation of Independent Businesses (NFIB) v. Department of Labor*, the Court held that OSHA exceeded its authority in issuing the rule requiring workers at companies with 100 or more employees to either be vaccinated or be regularly tested for COVID-19.⁶⁰ The Court majority in *NFIB* opined that OSHA would have the ability to regulate only specific occupations' increased risks related to COVID-19: "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID-19 virus."⁶¹ The dissent, filed by Justices

56. *Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies*, WHITE HOUSE (Nov. 4, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>.

57. *Id.*

58. Amy Howe, *Justices will hear arguments on Jan. 7 in challenges to Biden vaccine policies*, SCOTUSBLOG (Dec. 22, 2021, 8:55 PM) <https://www.scotusblog.com/2021/12/justices-will-hear-arguments-on-jan-7-in-challenges-to-biden-vaccine-policies/>.

59. *Biden v. Missouri*, 595 U.S. ____ (2022) (per curiam).

60. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (NFIB)*, 142 S. Ct. 661 (2022) (per curiam); Ian Millhiser, *The Stakes in the Supreme Court's Vaccine Cases Are Even Bigger than They Seem*, VOX (Jan. 5, 2022 6:30 AM), <https://www.vox.com/22865247/supreme-court-vaccination-covid-omicron-osha-missouri-biden-nfib>.

61. *NFIB*, 142 S. Ct. at 665-66.

Stephen Breyer, Sonia Sotomayor, and Elena Kagan, argued that in deciding that the OSHA rule was unauthorized, the majority ignored the ways that COVID-19 directly affects the safety of workplaces and that OSHA has a broad authority to mandate regulations that attempt to mitigate the spread and danger of COVID-19.⁶² The dissent argued the COVID-19 pandemic is sufficient to authorize the implementation of regulation meant to protect employees from “all hazards present in the workplace.”⁶³ Rather than providing clarity, these two opposing cases on the authority to regulate occupational safety and health during a global pandemic created confusion that will likely have to be reevaluated in the face of future risks.

E. Taxation

The increase in remote work also presents questions for tax policy. Although remote work existed prior to the pandemic, “taxation of remote workers is still in its relative infancy.”⁶⁴ Specifically, states with “double taxation,” or income taxes paid twice on the same amount of income when taxes are filed at both the corporate and the personal level, could lose a significant number of workers to states with lower or no income taxes.⁶⁵ Though some states offer tax credits to offset double taxation, a question emerges: which state—where the worker lives or where the company is based—has priority?⁶⁶ This question is further complicated by the broad

62. Richard Lempert, *The Vaccine Mandate Cases, Polarization, and Jurisprudential Norms*, BROOKINGS (Jan. 15, 2022), <https://www.brookings.edu/blog/fixgov/2022/01/15/the-vaccine-mandate-cases-polarization-and-jurisprudential-norms/>.

63. NFIB, 142 S. Ct. at 673 (Breyer, J., dissenting).

64. Bryan Cannon, *How to Handle 2021 Taxes as a Remote Worker*, BLOOMBERG (Feb. 16, 2022, 1:45 AM), <https://news.bloomberglaw.com/tax-insights-and-commentary/how-to-handle-2021-taxes-as-a-remote-worker>.

65. *Id.* (“Currently, there are seven states where workers incur a tax liability from their state of residence and the state where their company is located: Arkansas, Connecticut, Delaware, Massachusetts, Nebraska, New York, and Pennsylvania.”); Julia Kagan, *Double Taxation*, INVESTOPEDIA (June 9, 2022), https://www.investopedia.com/terms/d/double_taxation.asp.

66. Young Ran Kim, *Taxing Teleworkers*, 55 U.C. DAVIS L. REV. 1149, 1152 (2021) (noting that generally, resident states have the right to tax residents “regardless of where the income is sources” and source states generally “impose taxes on nonresidents’ income only for the work they performed while physically within the source states.”).

definition of “residency”—specifically, whether a remote worker who temporarily relocates to another state during the pandemic should still be considered a resident of the former state.⁶⁷

Additionally, employers hiring out-of-state workers must be aware of the tax implications relating to proper withholdings and potential corporate tax obligations.⁶⁸ The uncertainty surrounding the tax implications for remote workers led to Congress’s introduction of the Remote and Mobile Worker Relief Act of 2021, a bipartisan bill that aims to prevent states from “tax[ing] or requir[ing] withholding on nonresident employees who are in a state for less than thirty days.”⁶⁹ A similar bill, the Mobile Workforce State Income Tax Simplification Act of 2021, has also been introduced and is pending further action in the House of Representatives.⁷⁰

The issue of reimbursement of expenses has also become contentious as increasingly more remote workers incur additional business-related expenses.⁷¹ Such expenses include costs for cell phones, internet, and electricity services, all used when working from home.⁷² During the pandemic, employment law firms have seen an increase in employees suing employers for compensation for overhead expenses.⁷³

67. *Id.* at 1154; see generally Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 MICH. J. INT’L L. 271, 274-75 (2017) (defining residency as domicile, the traditional method, or as statutory residence).

68. Goldstein & Weimer, *supra* note 50.

69. S. 1274, 117th Cong. (2021); Cannon, *supra* note 64.

70. H.R. 429, 117th Cong. (2021).

71. Hugo Martín, *Workers are suing their bosses to get their work-from-home costs reimbursed*, L.A. TIMES (Apr. 7, 2022, 5:00 AM), <https://www.latimes.com/business/story/2022-04-07/covid-work-from-home-lawsuits-pandemic-business-expenses-litigation>.

72. Angela Reddock-Wright, *COVID-19 Remote Work Reimbursement Lawsuits: PAGA and California Employees*, OPEN LEGAL BLOG ARCHIVE (Apr. 18, 2022), <https://www.openlegalblogarchive.org/2022/04/18/covid-19-remote-work-reimbursement-lawsuits-paga-and-california-employees/>.

73. *Id.*

III. REMOTE WORK AND ITS DISCONTENTS

A. *Work-Family Balance and Hybridization*

The effects of the COVID-19 pandemic and the Great Resignation deepened ongoing inequities and accelerated many of the changes occurring between employees and the labor market. Changing work patterns risk deepening disparities, both for those who choose to work remotely but suffer the negative aspects of remote work and for those who do not have the option to work remotely and flexibly within traditional employment relations.

Texas A&M University professor Anthony Klotz—who coined the term “the Great Resignation”—describes how numerous workers struck new “epiphanies” about “family time, remote work, commuting, passion projects, life and death” during the pandemic.⁷⁴ LinkedIn CEO Ryan Roslansky coined the term “the Great Reshuffle,” signifying that workers were not leaving the labor market but rather seeking different work patterns that allow for better work-life balance.⁷⁵ Dr. Kirstin Ferguson calls the phenomenon “the Great Realignment,” meaning that employees are reconsidering where and how they want to work.⁷⁶ There is even a new podcast *Quitters*, conveying the fact that many people are choosing to quit their jobs and reassess their lives.⁷⁷

Before the Great Resignation, during the pandemic, many employees working at home found that they enjoyed the benefits of working remotely. In 2021, 47.8 million workers quit their jobs, giving 2021 the highest average quit rate in the United States on record.⁷⁸ In December 2021 alone, 4.4 million

74. Arianne Cohen, *How to Quit Your Job in the Great Post-Pandemic Resignation Boom*, BLOOMBERG (May 10, 2021, 3:00 AM), <https://www.bloomberg.com/news/articles/2021-05-10/quit-your-job-how-to-resign-after-covid-pandemic#xj4y7vzkg>.

75. John Simons, *Gen Z and Millennials Are Leading a ‘Great Reshuffle.’ Here’s What That Means*, TIME (Oct. 17, 2021, 7:00 AM), <https://time.com/6107587/linkedin-ceo-ryan-rolansky-interview/>.

76. Also called, the Great Enlightenment. Noakes & Landmann, *supra* note 1.

77. See generally QUITTERS, <https://www.quitterspod.com> (last visited Aug. 13, 2022).

78. *Interactive Chart: How Historic Has the Great Resignation Been?*, SHRM (Mar. 9, 2022), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/interactive-quits-level-by-year.aspx>.

workers, or 3% of the workforce, quit their jobs.⁷⁹ According to projections conducted in November 2021, 23% of American workers were expected to quit in 2022 because of working conditions and a pursuit of higher pay.⁸⁰ These projections have continued as predicted: in March 2022, 4.5 million workers left their jobs for reasons other than retirement.⁸¹

Management has been forced to consider why their workers may be leaving their positions for opportunities such as remote work arrangements or better compensation and benefits. Some companies have addressed these concerns and offered employees hybrid or fully remote work positions and increased wages.⁸² Facing pressures from employers to return to in-person work, many employees chose to search for jobs that offer higher compensation, more control over their work schedules, and better remote work arrangements, or chose to quit the workforce entirely. As the pandemic transitions into an endemic, some employees will likely return to the office. Even so, remote work as a common practice is here to stay.⁸³

The shift to remote work can provide employees with more flexibility beyond just where to work. Employees also seek more flexibility in their schedules, including four-day workweeks to improve mental health and work-life balance and allow for exploration of interests outside of the workplace.⁸⁴ Highly skilled workers in positions of high

79. *Id.*

80. Fontinelle, *supra* note 3.

81. *Job Openings and Labor Turnover – March 2022*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/news.release/archives/jolts_05032022.pdf (last visited Aug. 13, 2022).

82. Michelle Fox, *The Great Resignation has changed the workplace for good. 'We're not going back,' says the expert who coined the term*, CNBC (May 10, 2022, 2:22 PM), <https://www.cnbc.com/2022/05/10/-the-great-resignation-has-changed-the-workplace-for-good-.html>.

83. Sarun Charumilind et al., *Pandemic to endemic: How the world can learn to live with COVID-19*, MCKINSEY & CO. (Oct. 28, 2021), <https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/pandemic-to-endemic-how-the-world-can-learn-to-live-with-covid-19>; Susan Lund et al., *The future of work after COVID-19*, MCKINSEY & CO. (Feb. 18, 2021), <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19>.

84. Jennifer Liu, *Thousands of employees are testing a 4-day workweek starting today, and 'It's inevitable we'll see bigger companies doing this,'* CNBC (Apr. 1, 2022, 12:36 PM), <https://www.cnbc.com/2022/04/01/thousands-of-employees-are-testing-a-4-day-workweek-starting-today.html>.

demand are able to advocate for such conditions.⁸⁵ Organizational psychologist Adam Grant describes a new demand and supply within the high-end job market for freedom to work with whom, on what, and when one chooses.⁸⁶ The Great Resignation has also marked an exodus from Big Tech to smaller start-ups, fueled in part by burnout and criticism of Big Tech corporate culture, ethics, lack of diversity, and stagnation in innovative thinking.⁸⁷ Some corporations have revamped their flexible work schedules, provided enhanced counseling benefits, added on-site gyms, and instituted four-day workweeks.⁸⁸ A 2021 survey conducted by the *Harvard Business Review* shows that more than 40% percent of employees would start looking for another job or quit immediately if forced to work in the office full-time.⁸⁹ By not offering remote work options, employers risk losing their top performers to rival employers who will offer more attractive

85. Christi Mathis, *SIU professor explores long-term implications of 'Great Resignation' and what employers can do*, SIU (Jan. 5, 2022), <https://news.siu.edu/2022/01/010522-SIU-professor-explores-long-term-implications-of-Great-Resignation-and-what-employers-can-do.html>.

86. Adam Grant, *The Real Meaning of Freedom at Work*, WALL ST. J. (Oct. 8, 2021, 10:54 AM), <https://www.wsj.com/articles/the-real-meaning-of-freedom-at-work-11633704877> [Perma]. Furthermore, remote work has also removed the geographical barriers of traditional on-site positions. See Lynn Kier, *Remote Work: The Ultimate Equalizer for Talent Acquisition and Employee Experience*, FORBES (Aug. 10, 2020, 8:30 AM), <https://www.forbes.com/sites/forbescommunicationscouncil/2020/08/10/remote-work-the-ultimate-equalizer-for-talent-acquisition-and-employee-experience/?sh=42d6beca7986> [Perma] (“Businesses no longer need to limit their recruiting efforts to candidates located within commuting distance of their offices or headquarters.”).

87. Jon Swartz, *Big Tech is suffering from a 'Great Resignation' of workers, who say 'It's a good time to leave'* (Aug. 9, 2021, 9:27 AM), <https://www.marketwatch.com/story/big-tech-is-suffering-from-a-great-resignation-of-workers-who-say-its-a-good-time-to-leave-11628267291>; Scott Stephenson, *Why Talented Workers are Leaving Big Tech for Start Ups*, FORBES (Jan. 18, 2022, 9:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2022/01/18/why-talented-workers-are-leaving-big-tech-for-startups/?sh=bf10e653027b>.

88. Kelly Greenwood & Julia Anas, *It's a New Era for Mental Health at Work*, HARV. BUS. REV. (Oct. 4, 2021), <https://hbr.org/2021/10/its-a-new-era-for-mental-health-at-work>.

89. Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *Don't Force People to Come Back to the Office Full Time*, HARV. BUS. REV. (Aug. 24, 2021), <https://hbr.org/2021/08/dont-force-people-to-come-back-to-the-office-full-time>.

salaries and more flexible work arrangements.⁹⁰ Although it is cheaper to hire workers who are unemployed or who are coming from lower positions,⁹¹ it is a better investment to spend more money to recruit higher-level workers from rival companies.

While remote work options have multiple benefits, the shifts to work from home and to hybrid formats of work (which include some workers coming back to the office and others remaining remote) can create disparities within the workforce. Remote work can deepen feelings of isolation; distractions from children, family members, or roommates; blurred lines between work and relaxation time; lack of advancement or networking opportunities; and “not having the space, resources, or knowledge to properly set up an effective and productive home office.”⁹² The pandemic also disproportionately impacted women—especially women from lower socioeconomic classes and women of color.⁹³ Women still fill traditional gender roles and carry a far greater burden of work-family balance, which means that working at home can be a mixed blessing: women often—and disproportionately—must juggle work and family demands simultaneously during work hours.⁹⁴ Remote work has been hailed as an advantage for those who carry the burden of childcare or have healthcare challenges: “those with caring responsibilities or with disabilities will tend to stay at home.”⁹⁵ And yet the problem

90. *Id.*; Renato Faccini, Leonardo Melosi & Russell Miles, *The Effects of the “Great Resignation” on Labor Market Slack and Inflation*, FED. RESERV. BANK OF CHI. (Feb. 2022), <https://www.chicagofed.org/publications/chicago-fed-letter/2022/465#:~:text=According%20to%20our%20estimates%2C%20the,declined%20slightly%20in%20September%202021>.

91. Faccini et al., *supra* note 90.

92. Mamaysky, *supra* note 24, at 263.

93. See, e.g., Lucy Erickson, *The Disproportionate Impact of COVID-19 on Women of Color*, SOC’Y FOR WOMEN’S HEALTH RSCH. (Apr. 30, 2020), <https://swhr.org/the-disproportionate-impact-of-covid-19-on-women-of-color/>; *COVID-19 and Its Economic Toll on Women: The Story Behind the Numbers*, UN WOMEN (Sept. 16, 2020), <https://www.unwomen.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women>.

94. Anu Madgavkar et al., *COVID-19 and Gender Equality: Countering the Regressive Effects*, MCKINSEY GLOB. INST. (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects>.

95. Joanna Partridge, *Switch to More Home Working After Covid ‘Will Make Gender Inequality Worse’*, GUARDIAN (Jun. 19, 2021),

of family care and work balance may become further invisible and framed as a private challenge, as opposed to a systemic collective problem, when addressed through private decisions about whether to continue to work from home, return to the office, or quit altogether.

A recent article in the *ABA Journal* states that “diversity advocates are concerned that COVID-19 could negatively impact the number of women at [law] firms, and particularly women of color,” which would further exacerbate retention rates in these populations.⁹⁶ The legal field already struggles with retaining female employees. A Yale-led study, which sampled 19,179 respondents, suggests that “telecommuting mothers feel more stressed and depressed than fathers who are working remotely during the crisis.”⁹⁷ School shutdowns have made it even harder for mothers to keep working.⁹⁸ Even in houses where both parents are able to work from home, “men perform 7.2 hours of childcare per week versus 10.3 hours for women.”⁹⁹ The additional pressure that women unequally shoulder has driven them to quit jobs at higher rates than men.¹⁰⁰ Professor Joan C. Williams, a leading work-family policy scholar, warns that if policymakers and employers do not act to mitigate these effects on women, “we risk facing a generational wipeout of mothers” in the workforce.¹⁰¹ Caregivers tend to be women, so if women stay at home, hybrid work models will benefit men returning to work in the office while women or people with disabilities will continue to work

<https://www.theguardian.com/business/2021/jun/19/switch-to-more-home-working-after-covid-will-make-gender-inequality-worse>.

96. Liane Jackson, *Female Lawyers Face Unique Challenges During the COVID-19 Pandemic*, *ABA J.* (Oct. 1, 2020, 2:50 AM), <https://www.abajournal.com/magazine/article/female-lawyers-face-pandemic-challenges>.

97. Mike Cummings, *Study Reveals Gender Inequality in Telecommuting*, *YALE NEWS* (Jul. 17, 2020), <https://news.yale.edu/2020/07/17/study-reveals-gender-inequality-telecommuting>.

98. Eleni X. Karageorge, *COVID-19 Recession Is Tougher on Women*, U.S. BUREAU LAB. STAT. (Sept. 2020) <https://www.bls.gov/opub/mlr/2020/beyond-bls/covid-19-recession-is-tougher-on-women.htm>.

99. *Id.*

100. Jackson, *supra* note 96.

101. *Id.*

from home.¹⁰² Generational gaps exist as well: baby boomers and Gen Xers are retiring at a higher pace, deterred by health and safety concerns.¹⁰³

Compounding the problem, disparities in workers' abilities to work in person creates a potential problem of unequal "face time" with company executives, which can negatively impact advancement opportunities.¹⁰⁴ Women (and others who choose to work from home) risk appearing less committed to their jobs to their colleagues and supervisors and consequently may fall behind in their promotions, evaluations, professional network ties, and pay.¹⁰⁵ Human resources specialists caution against the tendency to put remote workers out of sight, out of mind.¹⁰⁶ To avoid this tendency, employers should consider remote workers when creating policies for hybrid work, for legal reasons as much as social-ethical ones: "if you don't offer these remote workers the same support and opportunities for advancement as your in-office workers, you could be faced with sex discrimination and disability discrimination lawsuits."¹⁰⁷ The shift to remote and hybrid work models should consider equity between remote and in-person workers in terms of training, promotions, and visibility.¹⁰⁸

As more companies are switching to remote work models, policymakers and employers must consider the consequences that remote or hybrid work from home/office schedules have on different populations. Unlike other wealthy, industrialized nations, child and elder care in the United States is considered a private responsibility rather than an issue for policymakers or employers. To address these inequities, policy should be designed to support childcare demands and stronger worker

102. Theresa Agovino, *Out of Sight, Out of Mind?*, SOC'Y FOR HUMAN RES. MGMT. (July 9, 2022), <https://www.shrm.org/hr-today/news/all-things-work/pages/out-of-sight-out-of-mind.aspx>.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Rich Henson, *Drafting a Remote Work Policy: 5 Legal Pitfalls to Watch For*, HRMORNING (Mar. 18, 2020), <https://www.hrmorning.com/articles/drafting-remote-work-policy-5-legal-pitfalls/>.

108. *Id.*

protections, which would mitigate the challenges of work-life balance.

1. *The Gig Economy and its Discontents*

The lack of remote work options disproportionately affects workers of color, women,¹⁰⁹ and employees living with disabilities.¹¹⁰ In general, courts have held that most employers are legally able to require employees to return to work, and courts frequently uphold in-person aspects of a position as essential functions, even if in theory they could be completed remotely.¹¹¹

Once vaccinations became widely available in the United States, employers were allowed to require employees to return to the office, as long as management had legitimate reasons for doing so and followed safety standards set by OSHA.¹¹² OSHA's Guidance on Returning to Work says that "employers have the responsibility to provide a safe and healthful workplace that is free from serious recognized hazards under the General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970."¹¹³ This clause states that each employer has the duty to give its employees "a place of employment [that is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."¹¹⁴

Specific to the COVID-19 pandemic, OSHA enacted safety standards for employers to ensure access to personal protective equipment, respiratory protection, and sanitation.¹¹⁵ Employers must also make reasonable accommodations for employees with disabilities. Applicable accommodations include teleworking, socially distant workplaces, and providing

109. Erickson, *supra* note 93.

110. *Id.*

111. Katie Deutsch, *The Future of Teleworking Accommodations Under the ADA Post-Covid-19*, 70 U. KAN. L. REV. 105, 110-13 (2021).

112. Colin Walker, *Can Employers Force Employees to Return to the Workplace?*, JD SUPRA (Apr. 15, 2021), <https://www.jdsupra.com/legalnews/can-employers-force-employees-to-return-4819858/>.

113. OCCUPATIONAL SAFETY AND HEALTH ADMIN., OSHA 4045-06 2020: GUIDANCE ON RETURNING TO WORK, <https://www.osha.gov/sites/default/files/publications/OSHA4045.pdf>.

114. 29 U.S.C. § 654(a)(1).

115. GUIDANCE ON RETURNING TO WORK, *supra* note 113.

personal protective equipment for workers who need it.¹¹⁶ Other than these standards, employers have the right to set their own work expectations, including when and where employees will work.¹¹⁷ While employees cannot choose to work wherever they want (i.e., at home or remotely), they have the right to refuse to work in unsafe conditions and to seek other employment.¹¹⁸ Furthermore, accommodations other than telework will often suffice.¹¹⁹ The Equal Employment Opportunity Commission provides several examples, including but not limited to providing additional protective equipment, eliminating non-essential job functions, and modifying an employee's schedule.¹²⁰

Thus, remote work varies by profession and level and is more common in managerial and professional occupations than fields such as transportation, production, construction, and maintenance.¹²¹ Around two-thirds of remote workers have at least some college education, while roughly one in ten have just a high school diploma.¹²² Industries that are especially suited for remote work include technology, finance, insurance, management, and law.¹²³ Certain industries, including the service industries, restaurants, schools, childcare centers, hotels, tourist destinations, factories, delivery companies, transportation providers, museums, theaters, brick and mortar retailers, gyms, research labs, and healthcare facilities, have been less likely to allow the continuation of remote

116. Walker, *supra* note 112.

117. *Id.*; Danielle Abril, *Ask Help Desk: What Happens if You Refuse to Go Back to the Office?*, WASH. POST (Apr. 8, 2022, 8:00 AM), <https://www.washingtonpost.com/technology/2022/04/08/return-to-office-employee-rights/>.

118. *Id.*

119. Carlton Fields, *COVID-19 Accommodation Trends Relating to Vaccination and Remote Work*, JD SUPRA (Oct. 28, 2021), <https://www.jdsupra.com/legalnews/covid-19-accommodation-trends-relating-6281750/>.

120. *Id.*

121. Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L. J. 25, 32 (2020) ("Part-time remote work is practiced by more than 20% of employees in managerial, professional, and sales occupations, compared to rates of less than 10% in transportation, production, construction, or maintenance occupations.").

122. *Id.*

123. Mamaysky, *supra* note 24, at 262.

work.¹²⁴ Women and people of color disproportionately work in industries, including nursing, caregiving, service, and retail, that by nature offer less access to remote work opportunities.¹²⁵ Corporate professionals are more likely not only to be allowed to work remotely, but also to be supported by receiving technology stipends and wage increases.¹²⁶ Perhaps not surprisingly, resignations over the past two years have been most pronounced in the service industries.¹²⁷

Importantly, the shift to the gig economy was happening before the Great Resignation and the COVID-19 pandemic brought mass layoffs. According to a 2017 report, the percentage of gig economy workers in the United States rose between 9.4 and 15%, depending on the definition of the term, compared with a 7.5% increase in total U.S. employment.¹²⁸ Between 2010 and 2014, independent contractors accounted for 29.2% of all new jobs.¹²⁹

Yet as the economy faced a downturn in the first months of the pandemic, many employees found themselves laid off. The Walt Disney Company, for instance, laid off more than 30,000 employees and furloughed more than 30,000 more in 2020.¹³⁰ Many others resigned, or retained their jobs but found

124. *Id.* at 261.

125. Jackson, *supra* note 96, at 9.

126. See, e.g., Madison Hoff, *This Chart Shows the Type of Jobs That Are Still Working from Home*, BUS. INSIDER (July 9, 2021, 2:08 PM), <https://www.businessinsider.com/chart-jobs-remote-work-still-working-from-home-2021-7>; Patrick Thibodeau, *Stipends for Remote Work Emerge as Polarizing Issue*, TECHTARGET (June 13, 2022), <https://www.techtargt.com/searchhr/software/news/252521455/Stipends-for-remote-work-emerge-as-polarizing-issue>.

127. Thomas Franck, *Hardest hit industries: Nearly Half the Leisure and Hospitality Jobs were Lost in April*, CNBC (May 8, 2020, 11:14 AM), <https://www.cnbc.com/2020/05/08/these-industries-suffered-the-biggest-job-losses-in-april-2020.html>; Megan Leonhardt, *The Great Resignation is Hitting these Industries Hardest*, FORTUNE (Nov. 16, 2021, 11:39 AM), <https://fortune.com/2021/11/16/great-resignation-hitting-these-industries-hardest/>.

128. DOUGLAS HOLTZ-EAKIN, BEN GITIS, & WILL RINEHART, *THE GIG ECONOMY: RESEARCH AND POLICY IMPLICATIONS OF REGIONAL, ECONOMIC, AND DEMOGRAPHIC TRENDS* (2017), <https://www.aspeninstitute.org/wp-content/uploads/2017/02/Regional-and-Industry-Gig-Trends-2017.pdf>.

129. *Id.*

130. Sarah Whitten, *Disney Increases Layoffs to 32,000 Workers as Coronavirus Batters its Theme Park Business*, CNBC (Nov. 26, 2020, 1:15 AM), <https://www.cnbc.com/2020/11/26/disney-increases-layoffs-to-32000-amid-coronavirus-pandemic.html>.

their incomes insufficient to cover living expenses. Some traditional workers laid off during the pandemic had time to consider whether they wanted to rejoin the traditional work economy; others have been forced to find employment elsewhere or enter the gig economy.¹³¹ Many who found their main or supplemental income during the pandemic insufficient decided to stay with the gig economy due to the flexibility of working for themselves.¹³² According to *Forbes* magazine, the gig economy grew 33% in 2020; that year alone saw two million new gig workers in the United States.¹³³

The demographic of workers entering the gig economy has expanded from a largely millennial and Gen Z base to include Gen X and baby boomer workers.¹³⁴ Additionally, more Americans have turned to opportunities within the gig economy during the current inflation period to supplement income from traditional jobs.¹³⁵ And the gig economy continues to expand. There were 23.9 million independent workers in the American gig economy in 2021, an increase from the 12.9 million independent workers who made up the American gig economy in 2017.¹³⁶ As of January 2022, some estimates indicate that one-third of workers in the United States participate in the gig economy.¹³⁷ Analysts project that there will be 86.5 million gig workers by 2027.¹³⁸ Examples of jobs

131. Mike Swigunski, *The Great Resignation Has Caused a Perfect Storm for the Gig Economy*, FORBES (Mar. 2, 2022, 10:30 AM), <https://www.forbes.com/sites/mikeswigunski/2022/03/02/the-great-resignation-has-caused-a-perfect-storm-for-the-gig-economy/?sh=763adda8e331>.

132. Monica Anderson, Colleen McClain, Michelle Faverio & Risa Gelles-Watnick, *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>.

133. Marcin Zgola, *Will the Gig Economy Become the New Working-Class Norm?*, FORBES (Aug. 12, 2021, 8:20 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/12/will-the-gig-economy-become-the-new-working-class-norm/?sh=53189a9aee6>.

134. Cirner, *supra* note 35, at 10.

135. Megan Leonhardt, *Inflation Is Driving the Gig Economy as Americans Try to Make Ends Meet*, FORTUNE (Apr. 14, 2022), <https://fortune.com/2022/04/14/inflation-americans-gig-economy-work/>.

136. BRANCH, 2022 GIG PAYMENTS REPORT (2022), <https://www.branchapp.com/resources/2022-gig-payments-report>.

137. Anna Petrini, *Portable Benefits for Gig Workers*, NCSL (Jan. 21, 2022), <https://www.ncsl.org/research/labor-and-employment/portable-benefits-for-gig-workers.aspx>.

138. BRANCH, *supra* note 136.

within the gig economy include dog walkers, rideshare drivers, and freelance digital creators. However, gig workers are not only prevalent in the service, transportation, and hospitality industries. Even in tech, “armies of coders, data cleaners, page raters, porn filterers and checkers, [and] subcontractors who are recruited through global sites” are not considered or compensated as company employees.¹³⁹

The shift of workers to the gig economy has vast implications. Nontraditional workers are not classified as employees for the purposes of labor organization or employment protections, and nontraditional opportunities such as subcontracting or temporary work offer few to no benefits.¹⁴⁰ As a result, millions of workers in the United States work without access to basic benefits like health insurance, retirement savings, and paid time off.¹⁴¹ Work within the gig economy does offer some advantages, including being one’s own boss, more control over earnings, and the opportunity to be paid at the end of a task.¹⁴² However, most nontraditional workers do not have access to basic protections and benefits that traditional workers enjoy, such as: minimum wage, overtime, leave rights, antidiscrimination rights, unionization rights, worker compensation benefits, and unemployment insurance.¹⁴³ The cost burdens that such benefits place on employers—along with the current dearth of regulatory requirements to do so—precludes many companies from offering these benefits to independent workers.¹⁴⁴

But the tide is starting to turn: the stagnant wages, challenges of the pandemic, and ongoing disparities in the

139. Judy Wajcman, *Automation: Is it Really Different this Time?*, BRITISH J. SOCIO. (2017); KATE CRAWFORD & VLADAN JOLER, ANATOMY OF AN AI SYSTEM (2018), <https://anatomyof.ai/> (report on the planetary impact of the Amazon Echo and other personal assistants).

140. See LIBBY REDER, SHELLY STEWARD, & NATALIE FOSTER, ASPEN INST., DESIGNING PORTABLE BENEFITS: A RESOURCE GUIDE FOR POLICYMAKERS (2019), <https://www.aspeninstitute.org/publications/designing-portable-benefits/>.

141. Petrini, *supra* note 137.

142. Anderson, McClain, Faverio & Gelles-Watnick, *supra* note 132; BRANCH, *supra* note 136.

143. See, e.g., Maeve Allsup, *Prop. 22 Backers Appeal Ruling Striking California Gig Work Law (1)*, BLOOMBERG (Sept. 23, 2021, 7:16 AM), <https://news.bloomberglaw.com/daily-labor-report/prop-22-backers-appeal-ruling-striking-california-gig-worker-law>.

144. Petrini, *supra* note 137.

labor market have empowered and mobilized workers to seek collective representation. In 2020, the first U.S. Starbucks successfully unionized, and by the spring of 2022, more than 250 U.S. Starbucks locations had filed petitions to vote in favor of unionizing.¹⁴⁵ On April 1, 2022, the Amazon Labor Union (ALU) successfully unionized an Amazon warehouse in Staten Island, New York.¹⁴⁶ The ALU is calling for higher pay, stronger medical benefits, antidiscrimination policies, and better leave, among other changes.¹⁴⁷

In my research, I have called for several paths of reform that together can address the gaps identified in this article and elsewhere. First, the definition of who is covered by employment and labor law protections must be simplified and broadened. Second, gig workers should receive tailored protections that fit their risks and labor market realities. Third, benefits should be delinked from a single employer and designed by policy to cover all those in the labor market regardless of their classification¹⁴⁸ As I have argued in previous research, these paths are complementary rather than mutually exclusive. The next section focuses on initiatives to address this third path—namely, the concept of portable benefits.

IV. PORTABLE BENEFITS AND PORTABLE SKILLS: PROTECTING MOBILITY AND WELFARE

A. *Portable Benefits*

In recent years, multiple states have proposed legislation to institute systems of portable benefits for workers in the gig

145. Andrea Hsu, *Starbucks workers drive nationwide surge in union organizing*, NPR (May 1, 2022, 5:00 AM), <https://www.npr.org/2022/05/01/1095477792/union-election-labor-starbucks-workers-food-service-representation>.

146. Katherine Long, *An Amazon Warehouse in New York Has Successfully Voted to Unionize, the First of Its Kind*, INSIDER (Apr. 1, 2022, 9:30 AM), <https://www.businessinsider.com/amazon-warehouse-new-york-staten-island-alu-union-nlrb-vote-2022-4>; Chris Mills Rodrigo, *Amazon Labor Union Guns for Second Win*, HILL (Apr. 23, 2022), <https://thehill.com/policy/technology/3460422-amazon-labor-union-guns-for-second-win/>.

147. *What Do Workers Demand From Amazon*, AMAZONLABORUNION.ORG, <https://web.archive.org/web/20220401235205/https://www.amazonlaborunion.org/demands/> (last visited Aug. 13, 2022).

148. Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017).

economy. Portable benefits are benefits for independent workers that follow the worker from job to job without loss of coverage or funding, even when a worker moves often, works part-time, works as a freelancer, or is defined as an employee under traditional employment law.¹⁴⁹ The goal of portable benefits is to improve financial security for independent workers and their dependents. In turn, portable benefits boost the economy by creating more equity between traditional workers and nontraditional workers.¹⁵⁰ A recent study found that 31% of independent workers have no money saved for emergencies, which is reflective of the lack of benefits for workers in the gig economy.¹⁵¹ There are existing portable benefits for nontraditional workers in the United States, such as the Affordable Care Act and Social Security, but such benefits are not enough to support and protect the growing market of independent workers.¹⁵²

Portable benefits are not a novel concept. The Social Security program provides a model for how portable benefits can aid workers. The Social Security Act of 1935 was enacted to provide government-backed social assistance, even though its reach has always been limited.¹⁵³ Early in the spring of 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which unprecedentedly included freelancers and the self-employed among those receiving unemployment funds during the most difficult months of the COVID-19 pandemic.¹⁵⁴ Thus, models for including independent workers do exist, yet there is much to research and learn on the best practices of effective and equitable portable benefits systems.

Questions on how to structure portable benefits programs include who qualifies for the benefits, who funds the program, and who administers and governs the program. Proposals vary

149. REDER ET AL., *supra* note 140.

150. *Id.*

151. BRANCH, *supra* note 136.

152. *Id.*

153. ALEXANDRA GERVIS, SHELLY STEWARD, CAMRYN BANKS, & MOHONA SIDDIQUEU, ASPEN INST., PORTABLE BENEFITS IN ACTION: A ROADMAP FOR A RENEWED WORK-RELATED SAFETY NET (2021).

154. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-36, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C. §§ 9001-9141); Lobel, *supra* note 5, at 922-24.

on whether the funding would come prorated from the companies that benefit from the labor of gig workers or also from the state and nonprofit organizations. Under some proposals, the funds would be completely discretionary, where the independent contractors can elect to put the money toward a retirement account, health benefits, or paid time off.¹⁵⁵ Under other proposals, the funds are designated for a specific purpose, such as worker compensation in case of injury. As Sarah Kessler, author of *Gigged: The End of the Job and the Future of Work*, describes, portable benefits are becoming a popular vision, but “parties who agree that they’re a good idea disagree on who should facilitate and pay for them.”¹⁵⁶

In the past several years, several states across the political spectrum—including Alabama, California, Connecticut, Georgia, Massachusetts, New Jersey, New York, Pennsylvania, Vermont, Washington, and Wisconsin—have introduced legislation on portable benefits for gig workers.¹⁵⁷ Washington State was the first state to introduce portable benefits legislation with the 2017 Washington House Bill 2109.¹⁵⁸ This bill proposed that nonprofits would administer benefits such as health insurance, paid time off, retirement, and workers’ compensation based on the number of hours an independent contractor works or the fees the worker collects.¹⁵⁹

Other local and state legislators have proposed legislation to implement portable benefits for independent contractors to carry from gig to gig.¹⁶⁰ In August 2021, Wisconsin proposed Assembly Bill 487, which would establish a portable benefits account structure for app-based drivers and delivery workers that gig network companies would be required to adopt.¹⁶¹ If passed, Wisconsin would have a portable benefits framework that includes compensation for lost income from medical leave or work-related accidents, retirement accounts, and health

155. Curran McSwigan, *Explainer: Benefits Models for Gig Workers*, THIRD WAY (Apr. 12, 2022), <https://www.thirdway.org/report/explainer-benefits-models-for-gig-workers>.

156. SARAH KESSLER, *GIGGED: THE END OF THE JOB AND THE FUTURE OF WORK* 196-98 (2018).

157. Petrini, *supra* note 137.

158. H.B. 2109, 65th Leg., Reg. Sess. (Wash. 2017).

159. *Id.*; H.B. 1601, 66th Leg., Reg. Sess. (Wash. 2019).

160. McSwigan, *supra* note 155.

161. Assemb. B. 487, 2021-2022 Leg., Reg. Sess. (Wis. 2021).

insurance.¹⁶² In November 2021, Pennsylvania proposed Senate Bill 949, which would establish a statewide portable benefits fund that provides benefits to app-based drivers and delivery workers.¹⁶³ The fund would distribute benefits, such as guaranteed contributions, income replacement, and occupational accident insurance, to app-based independent contractors.¹⁶⁴

In the context of transportation platforms workers, such as Uber and Lyft drivers and Grubhub and DoorDash delivery workers, these schemes are controversial because they come during heated worker classification debates—like those in California and Massachusetts—competing with proposals that would classify app-based transportation workers as employees, and thereby eligible for portable benefits coverage. In other words, some view portable benefits as a partial solution that concedes the bigger battle of defining more workers as core employees.

What is important here, however, is to recognize that regardless of any particular classification battle, the logic of extending benefits coverage in ways that acknowledge changing patterns of work is a necessary path forward in today's economy. As the Bell Policy Center has argued:

[A]t a minimum, universal portable benefits provide a baseline that can be built upon to develop a more robust set of tailored worker supports. Though not the only services needed to foster a healthy and prosperous workforce, their creation enables a solid foundation for workplace security and updates the long-standing social contract between businesses and their employees.¹⁶⁵

The United States Senate introduced the Portable Benefits for Independent Workers Pilot Program Act in mid-February 2022.¹⁶⁶ The bill authorized \$20 million for competitive grants to states, local governments, and nonprofits for pilot projects to design, implement, and evaluate models of portable benefits for independent workers such as contractors,

162. *Id.*

163. S. 949, Gen. Assemb., Reg. Sess. (Pa. 2021).

164. *Id.*

165. *What Are Universal Portable Benefits?*, BELL POL'Y CTR. (Jul. 1, 2019), <https://www.bellpolicy.org/2019/07/01/universal-portable-benefits/>.

166. Portable Benefits for Independent Workers Pilot Program Act, S. 3674, 117th Cong. (2022).

temporary workers, and self-employed workers.¹⁶⁷ The bill aims to “support broad innovation and experimentation with respect to portable benefits” at the state, local government, and nonprofit level.¹⁶⁸ Moreover, as I have argued in my research, as a next step in supporting development in the labor market, governments should consider delinking social welfare provision from the workplace altogether—for example, healthcare and retirement funds that would be provided universally and directly to all those who need them rather than to workers through participation in the labor market.¹⁶⁹

B. *Portability of Human Capital*

In an article by the law firm Seyfarth Shaw titled “Preparing for the ‘Great Resignation’ and Remote Employee Departures,” the authors advise clients to “future-proof” employment contracts by including notice periods and post-employment restraints.¹⁷⁰ They also suggest “re-writing the playbook for remote exits” to protect misuse of confidential information upon departure.¹⁷¹ The article warns employers that a major consequence of the Great Resignation may be workers’ mobility to join competitors.¹⁷² It predicts that “2022 may well be the year for a resurgence in litigation about the reasonableness of restrictions on working for competitors or soliciting customers from former employers.”¹⁷³

As I have argued in my research and my book *Talent Wants to be Free*,¹⁷⁴ the rise of employers requiring employees to sign restrictive employment agreements has multiple negative impacts on the economy. Non-competes, non-solicitation, non-poaching, broad non-disclosure clauses and

167. *Id.*

168. *Id.*

169. Lobel, *supra* note 148.

170. Ben Dudley & Lauren Crossman, *Preparing for the “Great Resignation” and Remote Employee Departures*, SEYFARTH (Dec. 20, 2021), <https://www.workplacelawandstrategy.com.au/2021/12/preparing-for-the-great-resignation-and-remote-employee-departures>.

171. *Id.*

172. *Id.*

173. *Id.*; see also Nicholas J. Simonson, *Noncompete Agreements in the Great Resignation*, FRYBERGER L. FIRM (Apr. 5, 2022), <https://www.fryberger.com/articles/noncompete-agreements-in-the-great-resignation>.

174. See generally ORLY LOBEL, *TALENT WANTS TO BE FREE* (2003).

pre-innovation assignment clauses, and other post-employment agreements not only make it difficult for employees to find other work arrangements, but they also restrict human capital and have adverse effects on the market at large.

Restrictive employment agreements originated to protect trade secrets, but they have expanded over time to cover a vast range of areas to be kept restricted, industries that are affected, and jobs that employees cannot take after exiting a former place of business.¹⁷⁵ Millions of workers have signed them in the past decade, and they have expanded to every industry.¹⁷⁶ A survey conducted in 2021 found that non-compete agreements are common for non-executives with base salaries below \$100,000 a year.¹⁷⁷ This expansion runs contrary to the reality of mobility and decline in job security that workers face in today's market. The corollary of shifts away from traditional long-term employment relations is workers' ability to use their human capital—their skills, experience, and talent—in flexible and dynamic ways, including moving between competitors and leaving incumbent competitors to start their own entrepreneurial ventures.

In addition to non-competes' general negative effects on job growth, entrepreneurship, and wages, the ubiquity of restrictive employment agreements may have disproportionate, adverse effects on certain identities.¹⁷⁸ Non-competes may disproportionately affect women employees because women, on average, may have greater geographic restrictions and work-family coordination challenges, thus limiting their potential job opportunities when they search for

175. See generally Orly Lobel, *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV., 781 (2020).

176. Orly Lobel, *Companies Compete But Won't Let Their Workers Do the Same*, N.Y. TIMES (Apr. 4, 2017), <https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html>.

177. Christopher B. Seaman, *Noncompetes and Other Post-Employment Restraints on Competition: Empirical Evidence From Trade Secret Litigation*, 72 HASTINGS L.J. 1183, 1188 (2021).

178. Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition*, 45 J. CORP. L. 931, 935 (2020) (describing studies from multiple academic disciplines on the effect of noncompetes on the labor market).

new jobs.¹⁷⁹ These restrictions also exacerbate the gender pay gap.¹⁸⁰ Post-employment restrictions have persistent wage-suppressing effects that last throughout a worker's job and employment history.¹⁸¹ As I have shown in my research, job mobility fuels innovation, increases wages, and helps correct gender and racial pay gaps.¹⁸² In my 2021 Day One Project report coauthored with Mark Lemley, we called on the Biden administration to adopt a federal ban on non-competes, to actively educate the public about labor-mobility rights, and to take proactive steps to ensure compliance with labor-mobility policy.¹⁸³

V. CONCLUSION

The COVID-19 pandemic launched a domino effect that accelerated shifts in employment relations and labor market structures. As employees were forced to work from home to adhere to stay-at-home mandates—and, in turn, as many were required to come back to work in person—scores of employees opted to quit their jobs and seek work elsewhere. Others remained working remotely, and still others had to shift from regular full-time employment to working as freelancers in the gig economy. Remote work presents many advantages and efficiencies, but it also raises new challenges for employment policy. Moreover, remote and hybrid work arrangements may impose disproportionate harms on certain worker demographics, in particular on women balancing work-family demands. Finally, remote and flexible work is only available in certain types of jobs and industries, and many workers have had to face difficult career choices.

179. Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L.J. 547, 587 (2020).

180. *Id.* at 557.

181. See Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete*, 72 ILR REV. 783, 812 (2019), <https://doi.org/10.1177/0019793919826060>.

182. See generally LOBEL, *supra* note 174; Lobel, *supra* note 175; Lobel, *supra* note 178; Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015).

183. MARK A. LEMLEY & ORLY LOBEL, BANNING NONCOMPETE AGREEMENTS TO CREATE COMPETITIVE JOB MARKETS (2021), <https://ssrn.com/abstract=3773893>.

The rapid rise of the gig economy presents new policy challenges as many workers are stripped of basic employment and labor protections and social welfare benefits. Extending benefits to gig workers, including through the availability of portable benefits systems, and protecting workers' rights to freely work in an industry post-employment are important steps in addressing changing patterns of the labor market.