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

By

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Millions of Americans are under intense pressure to balance work and family responsibilities. The feeling of overwork is rampant, with nearly half of US employees feeling overworked or overwhelmed by their workplace responsibilities.¹ Many are so constrained by the time and place of their working hours that they cannot balance their personal and family time.² Working mothers who dare ask for time off or other leave to attend to family responsibilities risk being relegated to the dead-end “mommy track” of corporate employment.³ Working fathers fear taking paternity leave because of financial pressures and social stigma.⁴ Low income workers of both sexes face substantial overtime work without notice, receive little or no sick time, and risk retribution or even termination if they even ask for any control over their own schedule.⁵

What too many employees urgently want, and too few employers willingly grant, is a measure of control over their working time. This employee control over working time, also known as flextime, allows the employee at least some choice over how, when, and where work obligations are completed. Even though flextime would bring relief to so many workers, family-friendly legal protections for beleaguered families remain woefully insufficient. It is the purpose of this article to argue for change the current regulatory environment.

This manuscript argues for a suite of legal protections that would allow working families, especially single-parent and low-income families, basic access to the rights and protections of flexible work. Part I of this article asserts that inflexible work practices impose a significant social cost on workers. Part II claims that, while efforts have been made to obtain flextime protections under established laws, current employment regulatory regimes are insufficient to protect employees from the consequences of employer-imposed working time. Part III argues against a current pending initiative in Congress, the Working Families Flexibility Act (WFFA), which appears only on the surface to protect employees rather grants most working time control to the entities with the most bargaining power – the employers. Part IV argues for a suite of statutory and judicial reforms to grant employees the right to access to flexible working time. This Part will argue for incorporation of specific reforms into established legal regimes. This Part will also develop and present a novel legislative solution – a hybrid statutory model based upon an emerging right to request legislation buttressed by key elements of ADA accommodation process. This solution represents a feasible and practical solution that not only provides workers meaningful access to flexible work but also does so in a way that limits the impact of such flexible work on an employer’s efficient operations. This manuscript concludes that legal reforms in the area of flexible work are essential for sustaining a healthy and productive workforce, as well as society, into the twenty-first century.

I. Inflexible Work Extracts a Substantial Cost on Workers, Especially Women and Low-Wage Earners

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Inflexible work places a burden on most employees, rendering them unable to achieve the work-life balance they desire, inhibiting appropriate child care, and impeding on the preferred use of personal time for medical visits, elder care, or other familial obligations. Women and low-wage workers are especially vulnerable to inflexible work, creating a precarious work environment. Each suffers from inflexible work through a combination of social and financial pressures that places great burdens on these workers and their families.

While all workers suffer from a climate of inflexible work, it is low wage workers that are the most vulnerable. Workers at the low end of the wage spectrum are under constant pressure to make ends meet. 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.6

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.7 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 and when an expected shift will be cancelled.8 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.9 Such additions or cancellations place continual stress on workers who, already harried with more difficult day-to-day obligations, are constantly in a state of uncertainty about how many hours, and by extension how much pay, they will receive each week. Short notice about an additional shift can wreak havoc with picking up children from school, finding babysitting, and cancelling and rescheduling personal and medical appointments.10

When unexpected personal issues arise requiring flexible time, low wage workers have even fewer resources with which to manage their lives than other workers. Seventy-five percent of low-income workers have no access to paid sick leave.11 Forty percent report having no paid sick days, vacation days, or personal days of any kind.12 Even those that have paid leave cannot use it until they have earned the right by working for their employer for an extended period of time.13

Whereas wealthier flextime workers can choose the time of their working day, low wage workers have no choice when to work and no chance of participation in the design and implementation of shift schedules. Supervisors may be uninterested in accommodating replaceable employees for preferred shifts or even permitting employees broad opportunity to choose their break times.14 Worse, they may even exact retribution for even asking. Between 20% and 30% of workers are required without notice to work extra overtime and 58% reported overtime cannot be refused without some sort of retribution.15 Working time for low wage workers can be rigid, unpredictable, and inhumane – the opposite of what the promise of flextime should hold.

Inflexible work also disproportionately impacts women. Men tend to have more access to flexible employment than women.16 Managers are more likely to grant flexible schedules to high-status men who were using such flexibility to advance their careers.17 Furthermore, retribution against women for using flextime, whether through direct job loss or through indirect impairment to one’s career growth in the firm, may cause women take more non-standard jobs such as part-time work that may allow them to obtain the flexibility they need to accommodate double demands of work and family.18 This effect is only exacerbated by women in low wage
employment. Middle and upper-income women may have better financial resources and greater access to employer-based benefits, such as unpaid job-guaranteed leave from work, than their poorer female counterparts.19

The liability exposure for such gendered-treatment is substantial. One gender discrimination lawsuit, buttressed by the certification of a class action,20 combined material wall bias with other kinds of sex discrimination.21 The jury awarded the plaintiffs over $250 million in damages.22 One plaintiff remarked in her affidavit that a male manager preferred not to hire young women because “first comes love, than comes marriage, then comes flextime and a baby carriage.”23 Female managers can discriminate as well. When a top-performing female saleswoman requested time off to care for her son’s ear infection, “her female supervisor threw a phonebook on the saleswoman’s desk and ordered her to find a pediatrician who was open after hours.”24

This does not mean that fathers and men are immune from the consequences of inflexible work. Fathers frequently report being openly mocked or passed over for promotions because of taking time off for family obligations.25 Caregiving is traditionally perceived as a feminine obligation, and men seeking flextime to parent or care for their children or elderly parents may be perceived as non-masculine and penalized.26 However, the burden of an inflexible work society is disproportionately borne by those who are often least able to accommodate it, low-wage earners who lack bargaining power to resist such working conditions and women who are pressured to sustain a primary caregiver role in the family. The current state of employer-dominated inflexible work is both unjust and unsustainable.

II. CURRENT LEGAL REGIMES INADEQUATELY SAFEGUARD ACCESS TO FLEXIBLE WORK

A variety of employment protections exist against discrimination, harassment, retaliation, and other practices, but little current attention is paid to flexible work. This Part appraises the three most applicable employment laws, the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), and Americans with Disabilities Act (ADA), and, for varying reasons, finds each insufficiently protective of employees’ working time.

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

The FLSA is arguably the statutory authority with the most apparent relevance to flexible working time. The purpose of the FLSA is to ban working conditions that infringe upon a minimum standard of living necessary for personal health and well-being.27 President Franklin D. Roosevelt perceived the FLSA as a centerpiece of the New Deal that would end, among other conditions, “intolerable hours.”28 Implicit in that purpose may also be the intent to ensure a reasonable quality of life outside the workplace.29

However, the FLSA’s statutory language was not primarily directed toward improving work-life balance, but rather the more narrow issues of a just hourly wage and tolerable working conditions. Although FLSA rules interpreting this concept are detailed, the FLSA’s most prominent regulations requires that eligible employees are paid an overtime rate for hours worked over forty hours per week.30 These regulations also require that nonexempt workers are paid no less than an established minimum wage.31
When regulatory agencies responsible for interpreting the FLSA discuss flextime, it is done with little more than a *laissez-faire* approach to working time. The majority of flexible work schedules, including flexible start and end times, core hours with flex hours, and compressed workweeks, are all permissible under the FLSA. According to the Department of Labor, the FLSA does not speak directly to flexible schedules, leaving the use of such schedules to the private agreement between the employer and the employee.

It is this ‘live and let live’ approach that invites the oppressive consequences that so many workers face in their schedule. Employers are able to impose whatever type of working schedule they wish. These schedules can be overly long, unnecessarily burdensome, or simply unjust to the workers that are subjected to them. Employers have no responsibility to concern themselves with the needs of their workforce and the consequences of their scheduling decision on workers’ families and society. If a worker desires even a modest scheduling request for a pressing personal reason, an employer is able to reject the request without any consideration or consequence to itself or anyone else. Roosevelt’s intent for the FLSA to prohibit intolerable hours has not prevented intolerable scheduling practices that exist today.

Furthermore, even if the FLSA were focused on flexible work, it is far too narrow in its current state to be applied effectively to workers that would need it. The FLSA only applies to non-exempt workers, meaning workers who are in executive, administrative, or professional positions are exempt from coverage under the act. A number of selected working groups, even though they would normally be considered laborers, are also exempt from the FLSA’s protections. During the era the FLSA was passed, white collar workers were a small group of elites that were expected to work nine-to-five hours and never burden themselves with overtime. These exemptions are far from technicalities today. As many as 26 million workers, 27% of all workers, are not covered by the FLSA. The percentage of white collar workers has grown substantially over the past fifty years and is only likely to increase the non-exempt percentage in the future. No statute that excuses coverage for so many can sufficiently provide flextime protections for a modern workforce.

Even in the unusual event when the FLSA does implicate regulation of flexible scheduling, courts are still interpreting the FLSA too restrictively. This has occurred most prominently in whether use of portable technologies beyond work hours constitute FLSA-protectable working time. Before the era of advanced technology, working time and personal time remained largely separate. Workers could not easily bring their jobs home with them, as the equipment and material necessary for production remained with the employer. Today, that work-home division is blurring. Both exempt and non-exempt employees are carrying employer-provided smartphones home, and are being required by their employer to access their smartphone for work reasons during personal time. The result is a perverse ‘anti-flextime’ whereby the employer can demand flexibility from the employee whenever it wishes without consequence, or in many cases, compensation. There are virtually no limits to which a worker can be subjected to a supervisor’s instructions.

As a result, non-exempt workers have been forced to file lawsuits against their employers for compensated recovery of their lost personal time. For example, in *Agui v. T-Mobile, Inc.*, employees claimed that they were required to review and respond to communications from employer-issued smartphones. These communications would occur at all hours and without compensation from overtime. Employees sued under the FLSA, claiming that they were entitled to overtime wages for the ten to fifteen hours per week spent dealing with employer emails, texts, and phone calls. The lawsuit grew from a three-worker action to a pleading on
behalf of all similarly situated current and former employees, raising the real possibility of a costly class action. No doubt the employer felt the threat of substantial liability, and entered into a confidential settlement agreement less than one year after the lawsuit’s filing.

Similarly abused employees filed an action in *Rulli v. CB Richard Ellis, Inc.* In this case, employees were given smartphones and other devices and were required to use them beyond normal working hours and without compensation in violation of the FLSA. Responses were required within fifteen minutes of receipt regardless of time of day or location of the employee. According to plaintiff’s counsel, workers were receiving text messages from supervisors while watching a movie or eating dinner at home, and were obliged to respond with no expectation of compensation. Similar to *Aquí*, the employee filed a “collective action” claim, implying that the lawsuit would attempt to represent all employees similarly situated in the firm. The case was believed to have the potential to provide “important guidance” because it was one of the first that focused on the technology-FLSA intersection. Perhaps also sensing potential exposure, the employer settled the claims prior to a published opinion in the case.

When a case finally generated a published opinion on this issue, the results were satisfying, but only on the surface. In *Rutti v. Lojack Corp., Inc.* In *Rutti*, the employee filed a putative class action claiming that time spent commuting to worksites in company vehicles and time spent uploading data about his work to the company after he returned home constituted FLSA-compensable time. The court found that the employee’s commuting time was not compensable even if it was a condition of employment and involved a work vehicle. However, the court did find that certain off-clock activities might be compensable, specifically the requirement to upload transmissions to the employer after the workday is finished. These transmissions appeared to be “part of the regular work of the employees in the ordinary course of business,” and were “necessary to the business and [are] performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business.” The court, though choosing to remand for further factual development, did remark that such transmissions, according to the plaintiff:

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

While this should be encouraging, the court left open a critical gap in protection. The court went out if its way to qualify that “split second absurdities,” or mere “trifles” in time beyond the scheduled working hours, should not be compensable.

This “split second” qualification is the proverbial ‘camel’s nose in the tent’, enabling employers to continue exploiting employees’ personal time. The “split-second absurdities” phrase originates from a Supreme Court decision in 1946. During that industrial era, split seconds were perhaps indeed absurdities. The pace of work and the division of time was substantially less precise. Workers had no access to immediately-responding technology and the Internet as we know it did not exist. The Court could not possibly have anticipated the astonishingly rapid advancements in information technology and speed that society lives with today. Small fractions of time substantially matter, as an email or a data upload that can take mere seconds can transfer hundreds or thousands of gigabytes of data. Technology enables us to
measure that time in increasingly small amounts. Split second absurdities in the context of technology use are no longer absurd. Indeed, they are lethargic in a modern society that speaks comfortably in minute fractions of time.

Yet, the court was comfortable with imposing upwards of ten minutes of working time daily on employees without the need for compensation. This was not a discussion of split seconds, but rather a substantial number of minutes each day. The court noted that most other courts have found such a daily time erosion to be readily *de minimis.* The court reasoned that there was “practical administrative difficulty” with recording such small amounts of time, but such an assertion definitively conflicts with technological reality. Smartphone applications and other devices can easily record the time used and data spent on using applications or completing tasks. It is notable that the court primarily relied on *Lindow v. United States* for its reasoning for *de minimis* time. The *Lindow* case was decided in 1984. There is no need for courts to live in an era, or for employers to be shielded by a view, that incremental periods of time that count cumulate to an hour a week or more are outside the bounds of permissible compensation. Where it is feasible to track working time with precision, the FLSA *de minimis* exception should not be used as a weapon to unnecessarily infringe on employees’ personal time.

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

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

Yet when it comes to the ability of families to use flexible schedules to balance work-life responsibilities, the FMLA has failed to deliver. The FMLA has simply been interpreted too rigidly to be applicable to the pressing need for flexible time. The closest the FMLA comes to flextime is in its language describing permitted employee leave. Regulations interpreting the FMLA do state that “[e]ligible employees may take FMLA leave on an intermittent or reduced schedule basis.” Intermittent leave means separate blocks of time due to a single qualifying reason. Reduced schedule leave means a schedule that reduces the employee’s usual weekly working hours or hours in a work day. Reduced schedule leave can also mean a change in the employee’s schedule for a period of time, such as from full-time to part-time. However, neither the interpretations of the FMLA, nor the statutory language itself, sufficiently embraces flextime as an appropriate family and medical leave. Alternative scheduling like flextime is not treated as a core part of the FMLA’s scope and coverage.

The judiciary has viewed the FMLA in similarly narrow fashion. In *Giles v. Christian Care Centers, Inc.*, Giles requested a flexible schedule because her spouse suffered a back injury. Giles argued that her request for a flexible schedule constituted a legally sufficient request for FMLA leave. The court concluded that her request for a flexible schedule was not a sufficient request for FMLA leave, and thus Giles did not meet the requirements of the FMLA. Giles also argued that the flexible schedule granted to her by her supervisor also constituted leave, and the court also rejected that argument, stating that it constituted neither intermittent leave nor reduced schedule leave under the FMLA.
Similarly, for example, in *Ranade v. BT Americas*, Ranade argued that her employer violated the FMLA when it denied her the twenty hour per week flexible schedule that she preferred. The employer instead required her to work a standard reduced-hours work schedule of equivalent time. The court concluded that the employer was obligated to offer Ranade continuous full-time leave or a mutually agreed reduced schedule. The court stated that the employer’s offer of a reduced fixed schedule was “entirely reasonable” and that Ranade’s flexible schedule request was “haphazard” and not manageable for the employer. Ranade’s FMLA claim was dismissed.

FMLA concepts of permissible leave are insufficient to capture the needs of modern working time in at least three ways. First, intermittent scheduling, taking leave in separate blocks of time due to a single qualifying reason, is a poor fit for flexible work. Families may certainly need substantial blocks of time for single, long-term events, but may of the work-life balance needs that arise demand short term and changing accommodations. A babysitter may cancel at the last minute due to illness. An unexpected appointment with a school demands the parent’s presence in the middle of the day. Elderly parents may need unexpected transportation or personal care. The FMLA’s intermittent scheduling option does little to protect families are continually adapting to short-term and immediate medical, familial, and personal needs.

Second, reduced scheduling is not only similarly unhelpful, it also imposes a substantial penalty. Reduced leave envisions a steady reduction in the usual number of hours per workweek. Such a reduction would be of limited value to time-strapped employees who may need a reduction in hours in one week, but may be fully willing and able to serve the full hours, indeed even extra hours to compensate, in the following week. Reduced leave as currently interpreted under the FMLA does not envisi

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

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

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

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

The plaintiff in Valle-Arce v. Puerto Rico Ports Authority found similar relief. In this case, Valle-Arce requested and received a flexible work schedule as an accommodation for her Chronic Fatigue Syndrome (CFS), which kept Valle-Arce from sleeping more than four hours a night and forced her to suffer with persistent pain and weakness. Years later, a subsequent supervisor questioned her flexible schedule accommodation that was permitted by a previous manager. This supervisor harassed Valle-Arce on a weekly basis about her schedule, served written reprimands for attendance, and denied her other accommodations that would have eased her symptoms. Valle-Arce was ultimately discharged.  

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

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

Although encouraging precedent exists displaying a willing to accept flextime as a reasonable accommodation under the ADA, there are still signs that flextime use may not be receiving the protection it deserves. In Ezikovich v. Commission on Human Rights and Opportunities, Ezikovich requested a “no fixed start to work schedule” to accommodate CFS, the same diagnosis attributed to Valle-Arce. Her employer denied the request and instead offered to accommodate with a modified work schedule that had reduced hours and for a time allowed her to work in an office closer to Ezikovich’s home. Ezikovich sued, claiming that she should have been allowed a no fixed start flexible schedule as an accommodation. The court concluded that the part-time schedule offered by her employer was an effective accommodation and denied Ezikovich’s disability claim.  

Allowing a part-time schedule, as Ezikovich did, to constitute a sufficient accommodation limits the effectiveness of flexible scheduling. Part-time work denies low-income workers the
subsistence compensation they desperately need. Furthermore, part-time work imposes a disproportionate wage penalty that impoverished workers can ill afford. A request for flextime under the ADA should not transform into a banishment into part-time work that for many proves financially unsustainable.

That being said, however, one cannot place upon the ADA the sole burden of defending flexible working time. The ADA has an important, but very specific, “clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities.”\(^{112}\) The mandate of the ADA is not to reinforce work-life balance for all employees or free workers generally from the subjugation of inflexible time. Most flextime requests appear only as a consequence of ADA requests for an accommodation. One cannot cite a statutory regime for stinginess in an area which it was not intended to apply.

As a result, an unusual situation exists where the statute that whose purpose is least directed toward accommodating flexible scheduling, the ADA, is the one that appears to have the greatest receptivity toward flexible work arrangements in the workplace. By contrast, the structure of the FMLA, whose purposes include lessening the burden on working women and balancing the national interest in preserving family integrity, offers little to incorporate flexible scheduling needs.\(^ {113}\) Its terms need to be more elastic to be effective. Similarly, the venerable FLSA would also seem to hold significant potential for flextime work as it is a statute that directly addresses issues of working time. However, the FLSA is simply too outdated to incorporate modern accommodations. The FLSA is also unlikely to be expanded to included millions of professional employees who would benefit from flexible schedules but are currently exempt from coverage under the act. There is a significant need to introduce flextime protections, beyond what current statutory frameworks can offer, and the next section evaluates the latest effort in Congress to bridge the gap.

**III. AN ARGUMENT AGAINST CURRENT EFFORTS OF CONGRESS: THE WORKING FAMILIES FLEXIBILITY ACT**

While efforts have been made in the past to legislate workplace flexibility, the most popular provision currently being considered in Congress is the Working Families Flexibility Act (WFFA). The Working Families Flexibility Act (WFFA) allows employers to pay their employees with time off when they work overtime instead of compensating with time-and-one half pay as required by the FLSA.\(^ {114}\) Some legislators have praised the WFFA as “commonsense legislation will help American workers better balance the needs of family and the workplace.”\(^ {115}\) The WFFA has also received the strong support of employer-interest groups such as the National Federation of Independent Business,\(^ {116}\) and a number of other employer-representative organizations.\(^ {117}\)

The WFFA, however, has encountered substantial resistance from commentators and employee-representative groups. Few employers can afford to give up overtime pay which so many low wage earners rely on maintain subsistence necessities.\(^ {118}\) The enthusiastic response from employers to the WFFA gives credence to the contention that firms will use the WFFA not to facilitate flexible work schedules, but rather to avoid paying overtime and circumvent the protections of the FLSA.\(^ {119}\) The act also gives an additional incentive for employers to impose or retract last minute scheduling changes that can destabilize the already precarious existence of working families. Already vulnerable low-wage workers will be even more at the mercy of the scheduling and compensation whims of their employers.
The details of the dubiously-named\textsuperscript{120} WFFA support the conclusion that the act is primarily designed to enrich the employer rather than deliver genuine workplace flexibility. Supporters of the WFFA highlight the voluntary nature of the compensatory time, noting that it permits employees to get paid overtime on request.\textsuperscript{121} However, this option is a hollow one, as there are no special protections in the WFFA for employees who refuse the denial of paid overtime for compensatory time. The pressure for employees, especially low-wage employees, to take compensatory time instead of overtime will be intense. As the act contemplates that the waiver of mandatory compensatory time would take place by agreement before work begins,\textsuperscript{122} the waiver will be absorbed into the swamp of standard, and in practice non-negotiable, boilerplate language of employment contracts.\textsuperscript{123} Unlike, for example, the ADA, which allows verbal requests for reasonable accommodation,\textsuperscript{124} the WFFA permits only written requests that monetary compensation be provided.\textsuperscript{125} This seemingly simple requirement can be a concern for employees who, out of fear of retaliation, may want to avoid creating a written record of requests that can be used as ammunition later against retention or promotion. Whereas a casual oral request for overtime pay may be requested, granted, and disregarded over time, a formal written demand can remain in an employee’s personnel folder permanently.

Furthermore, the power to choose when compensatory time is taken is unbalanced. Section 7 of the act states that the use of compensatory time “shall be permitted by the employee’s employer to use such time within a reasonable period after making the request.”\textsuperscript{126} The employee receives the compensatory time, but has no ability to determine when such time can be used. That discretion rests entirely with the employer. The employer need only grant the compensatory time within an ambiguous “reasonable period” after making the request. Employee time off without any control of when that time can be used, or whether the employee can choose overtime instead, contradicts the most basic notions of flexible work.

The WFFA also has a hair-trigger escape clause for employers who may find the granting the compensatory time inconvenient. The act gives employers the power to deny the use of compensatory time if it “unduly disrupt[s] the operations of the employer.”\textsuperscript{127} The notion of undue disruption is not defined, but can be interpreted as a substantially lower threshold of inconvenience than the “undue burden” phrase applicable as a defense to an accommodation in the ADA. The courts would be left to decide what threshold of disruption of operations is sufficient for an employer to deny the issuance of compensatory time, and those workers who would most depend on employer’s discretion, low-wage workers, would likely be the ones least able to pursue litigation to protect their interests. Unsurprisingly, the WFFA offers no provision for employees to refuse the employer’s rejection of when compensatory time can be used when it “unduly disrupts” the operation of their families.

There is little support to conclude that the WFFA would sufficiently meet the needs of employees seeking control over their flexible schedules. As one expert remarks, the WFFA “should be called the Employer Flexibility Act, because at every turn here, the employer gets to decide[].”\textsuperscript{128} The next section proposes a series of reforms that make protection for flexible working time a reality.

\textbf{IV. TOWARD MEANINGFUL LEGAL REFORM OF FLEXTIME PROTECTION IN THE WORKPLACE}

Working time is an area that is badly in need of reform, and current Congressional efforts seem little interested in genuinely protecting worker interests. Workers struggle to reconcile
work and family obligations. Employers have little obligation to respond to these concerns. While voluntary initiatives implementing flextime could benefit employees, a broader suite of reforms is necessary to protect the most vulnerable working populations. The following part argues for such reforms.

This part will argue for reforms under the FLSA, FMLA, and the ADA. Not every statutory regime is equally and independently able to incorporate complete protections of working time. Limitations in statutory structure limit the feasibility of sweeping flextime changes. In spite of this, however, this part will contend that each of the three major acts has the potential to substantially relieve employee time burdens through realistic amendments to current statutory language. This part will also introduce a new hybrid flextime regime, based upon a combination of a right to request framework and key elements of the ADA accommodation process. This part argues that such a reform will strike the most effective balance between employee interests in flexible time and employer interests in an efficient organization.

A. The FLSA Working Time Rules Should Better Reflect Modern Workplace Realities

The FLSA is arguably the earliest ancestor of modern working time relationships. The act is well-established, widely utilized, and represents a landmark advancement in workplace protection. Even though attempts are being made to reform the statute, there is little likelihood that the FLSA will be substantially diluted in the near future.

The FLSA’s well-established reputation and long history, however, does not necessarily mean that it is the optimal venue for the reform of flexible working time. Simply put, the FLSA was built for a prior economic age. The FLSA was enacted in 1938, during a period when manufacturing dominated the U.S. economy and shift schedules were largely governed by a fixed “whistle to whistle” schedule. This dated phrase is still used today to explain the definition of “workday.”

Thus, FLSA drafters in the 1930s could not have conceived of the modern emphasis on a service economy that would be significantly less tethered to an on-site factory system. Drafters could also not have predicted the vast increase in female participation in the American workforce, and the associated needs of pregnancy, nursing, and child care that would accompany the influx of a two-parent working household. They could also not have predicted technological innovations that would have enabled twenty-four hour communication, production, and the sharing of large quantities of data.

Most importantly, drafters could not have anticipated the desperate need for flexible work time that so many families have today. Workers have greater demands on their personal time than in decades past. Employees today work longer, travel longer, and have a substantially different of care responsibilities than families in generations past. A modern flextime program would have been almost unheard of in the 1930s workplace. The FLSA’s statutory structure is thus ill-suited for embedding broad regulatory flextime protections. However, this does not necessarily mean that the FLSA is an unusable vehicle for reform.

One of the most important potential FLSA working time reforms available is to reform the *de minimis* exception to exclude precise accounts of working time where it is feasible for the employer to do so. Regulations addressing the *de minimis* exception state that “where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities.”

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Those realities simply do not exist today for a substantial number of employers. Time tethered to an electronic device is neither uncertain nor indefinite. The “industrial realities” are that small blocks of time can be easily tracked. It is interesting to note that the most recent court case cited by the regulation to justify this construction of the de minimis rule is from 1955.\(^{137}\)

The era in which it was technologically difficult to measure fractional working time has long passed. UPS, for example, arms its delivery trucks with a host of sensors that monitor its workers every move.\(^{138}\) These sensors can monitor to the second when an employee opens a door, closes it behind him, buckles her seatbelt, and starts the truck.\(^{139}\) Just one minute of productivity improvement per driver per day increases UPS annual financial results by $14.5 million.\(^{140}\) If today’s technologies can track slivers of time that courts once dismissed as trifles,\(^{141}\) then certainly such technology can be implemented to give employees their full compensation for time worked outside normal hours.

Such technology need not be as complicated as monitoring an entire delivery truck. Employer-provided and personal smartphones can be equipped with time-tracking technology that employees can turn on and off to monitor fractional work outside of normal working hours. Once those factional time periods reach a certain threshold, such as thirty minutes or a full hour, the employee can be compensated for additional time. Supervisors will likely be more careful in avoiding abuse of workers’ personal time if they know that such time will come at the same compensatory cost as working time obligations. Employees will be more aware that when outside work time contact is initiated, it is indeed significant enough to warrant payment of their attention to this problem.

One problem may arise when the employer still deems the cost of the fractional time worth the employees’ attention to various obligations while off work. For the employer, the cost is simply the fractional additional cost of the working time. For the employee, such off shift interruptions come at a substantially greater cost. A substantial benefit of personal time for employees is that it relaxes and rejuvenates employees through separation from work obligations. Constantly being interrupted, even if the employee is paid, can be unpleasant and stressful. Even brief off-shift work tasks interrupt the relaxation and recovery process. Employer requests interrupt meals and disrupt social outings, especially if the employer demands immediate action. The inability of employees to entirely switch off from work during their leisure time is not only frustrating and stressful, but has been associated with a number of health ailments such as fatigue, sleeping problems, and cardiovascular disease.\(^{142}\) Such interruptions to personal time are no mere inconveniences, but can impair workers’ health in no less concrete ways than an unsafe on-site work environment.

Two possible reforms to the FLSA could mitigate this problem. The first option would be to give non-exempt employees the right to refuse work outside of established working hours. Such a right would also protect employees from retaliation should the employer wish to penalize the employee for defending her personal time. This would give employees the opportunity to receive the full uninterrupted leisure and rest period necessary to recover from work and avoid unnecessary health-related stresses. If exceptions were to be made, they would only be allowed through an established business necessity. If a necessity existed, the off-shift obligation could be separately negotiated or command an overtime premium with a minimum payment of fractional time for any interruption. There is no need in a twenty-first century information economy to let employers impose their will round-the-clock to acquire free labor from their workforce. If technology can allow the work to happen, then technology can also track the time for payment.
B. The FMLA Should be Expanded to Encourage Greater Use of Leave

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

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

The most aggressive reform would be amending the FMLA to include an additional category of permissible leave. The FMLA currently permits employees to take three types of unpaid leave: 1) a single block of leave of up to twelve weeks, 2) intermittent leave that can be taken in separate periods due to a single injury, and 3) reduced leave in which an employee is typically made to work on a part-time basis. The FMLA could be amended to incorporate a fourth and distinct class of leave under the FMLA – flexible leave. Flexible leave would expand the concept of intermittent leave to allow for, not only short-time unpaid leave for qualifying reasons, but also for an expanded qualification of reasons not previously incorporated under the act. Flexible leave could include non-emergency adult and child care, such as illness of a child arising from the common cold, which is not covered because it does not constitute a serious medical illness. Flexible leave could also include activities related a child’s education or school-related activities such as attendance to a parent teacher conference, which are also not covered as qualifying reasons for FMLA leave. Another characteristic of flexible leave could be allowing employees flexibility in when they arrive at work, but then requiring completion of a full work day after arrival. A variant would be enabling an employee to work around a core time and modifying the start and end hours of the day, taking leave as needed for qualifying reasons.

While employee control and flexibility over their own working time is obviously a priority, reforms cannot be so aggressive as to substantially jeopardize the efficiency of the firm or deny employers the reliability of a consistent workforce. The most similar type of leave to flexible leave already permissible under the FMLA is intermittent leave. Employees using intermittent leave can be take the full twelve weeks of unpaid medical leave, but in small blocks of time for qualifying events. The leave increment can be as small as the shortest period that a firm’s payroll system can track. Such leave can be spread out by the employee over the entire year.
For employers, such intermittent leave in small increments can be costly and time consuming for employers that are forced to track it. In attendance critical positions such as nurses and pilots, employers may have extraordinary difficulties managing scheduling burdens to fill missing hours. Employers repeatedly cite intermittent leave as a particular regulatory difficulty, with three of four employers surveyed reporting that tracking intermittent and unscheduled leave is their greatest FMLA problem. It is also vulnerable to employee abuse, with another survey finding that abuse of intermittent leave is the top complaint of employers subject to the FMLA. Language from the National Association of Manufacturers, in response to a request by the Department of Labor for information regarding unscheduled intermittent leave, states the problem most forcefully: “Intermittent leave is the point in the FMLA where all the unintended harmful consequences of the law come together to cause an economic nightmare for manufacturers: unchallengeable ailments, unassailable and unannounced absences, and unending burdens with no prospect of a remedy.”

Thus, any incorporation of flexible leave into the FMLA must be circumscribed as to not overburden the operations and responsibilities of the employer. First, what is likely the most significant type of intermittent leave is leave that it is unplanned. An employee that uses intermittent leave due to migraines one to two days a week, for example, is unscheduled and potentially quite disruptive. Flexible leave need not be unplanned, as flexible working time can be most often used for regular and consistent variances such as adjusting child care for two-parent families with changing shift schedules or a periodic and scheduled child school appointment. The cost of allowing unplanned, flexible leave would also appear to amplify further the problems associated intermittent leave. Any amendment should require that any flexible leave request should only be permitted upon sufficient notice to the employer to lessen the burden on firm operations.

Second, because of the potential substantial burden of flexible leave, flexible leave requests should be limited by a showing of a business burden by the employer. While the FMLA requires employer consent when leave is taken after the birth or adoption of a healthy child, there is no established “undue hardship” or “business necessity” defense by which employers can deny FMLA requests because of employer burdens. If flextime leave were to be incorporated into the FMLA, a limitation must be available to the employer, either by a threshold such as an undue hardship or through requiring employer agreement similar to that already existing for leave related to a healthy birth or adoption of a child. If a proposed flexible schedule or leave would substantially impair the employer’s business, the employer would be within its right to deny that leave. While the addition of a new class of flexible leave would substantially aid qualifying employees, the costs of unrestricted use of such leave without limitations may create an unnecessary burden on the employer.

An alternative to a broad amendment redefining a new class of leave is to expand coverage of the current leave practices and coverages already available the FMLA. This coverage could be expanded across three conduits for reform in order to provide sufficient relief to employees seeking flexible working time. This would involve incorporating a greater number of employees and broadening the scope of certain key terms, while keeping the core functions and processes of the FMLA in place.

The first conduit of reform is the threshold of employee coverage. Currently, the FMLA only applies to workers in firms with fifty or more employees. That threshold is too high. Relieving any firm with less than fifty employees from FMLA obligations excludes a massive forty percent of the U.S. workforce from coverage. The companies under this threshold that
are excluded from coverage are the firms least likely to provide work-life options that would give employees needed flexibility. This threshold also disproportionally imperils on women and poor families who are more likely to work for smaller employers that are not required to offer FMLA coverage. With more than half of low-wage workers employed by small businesses, the fifty-employee threshold represents a glaring gap in the effectiveness for whom the FMLA was intended to benefit most.

This threshold did not arise out of a carefully considered analysis of the impact on the flexibility available to vulnerable workers. The first bill proposed in Congress offered no exemption for small businesses. Every firm was obligated to comply with its requirements regardless of size. After each revised bill was introduced, the size exemption grew larger and larger until it reached the very high exemption level of fifty employees. The likely reason was that power politics via pressure from business groups elevated the threshold to its final number. No Congressional study of the impact of this threshold on low-income workers was completed.

The threshold for coverage of the FMLA should be reduced to twenty-five employees. This reform would enable millions of employees to enjoy the benefits of the FMLA, particularly low-income employees, who have been long excluded and could greatly use the access to leave. This amendment should be no great stock to employers. For decades the ADA and Title VII have comfortably required employees with fifteen or more workers to comply with their requirements. Some states have already enacted their own laws with coverage thresholds as low as fifteen employees. There is little reason to believe such an amendment to the FMLA would shock the workplace system.

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

The second conduit of reform is expanding the concept of the meaning of family. The social definition of family has changed rapidly and substantially over the preceding decades. Grandparents and in-laws take on substantially increased parenting responsibilities. There has been a dramatic rise in gay couples and gay families. Even good friends partake in family life as “voluntary kin” that share the burden of medical directives, wills, and other important responsibilities. These non-traditional families and family members experience the same joys, as well as the same family burdens and pressures, as their nuclear predecessors.

The FMLA should be reformed to incorporate a wider range of recognized family members that better reflects how society views family life. In 2008, for example, Congress amended the FMLA to allow twenty-six weeks of unpaid leave for family members who are caring for wounded servicemembers. The definition of family member included not only the traditional roles of son, daughter, parent, or spouse, but also included any “next of kin” as qualifying family members. The FMLA should be further expanded to incorporate such family members as domestic partners, parties to a civil union, grandparents, or family in-laws. Such individuals could benefit from workplace flexibility as robustly as any member of a traditional nuclear family.
The third, and perhaps most important, reform relevant to workplace flexibility is the expansion of what constitutes qualifying FMLA leave. The FMLA currently permits leave for the birth, care, or adoption of a child. It also permits leave to care for a parent, spouse, child, or one’s own serious health condition. These are certainly justified reasons to take leave.

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

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

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

C. Enact a Hybrid Flextime Statute Based Upon a Combination of the Right to Request Framework and Key Components of the ADA Accommodation Process

A promising basis upon which to build an independent flextime statute is an emerging model based upon a right to request flexible work. Originating in the United Kingdom, under right to request legislation, an employee is granted the right to request flexible work arrangements from her employer. Such a request may only be made by qualifying employees who have worked for an employer for a required length of time. Requests may be made for specific reasons related to child care or other listed obligations. Employees may only exercise the right to request on a periodic basis, such as once or twice a year.

Under typical circumstances, a request for a flexible schedule can simply be rejected outright by the employer. There is no obligation for an employer, no matter how pressing the flextime request and no matter how limited the business impact, to take the flextime proposal
seriously. Working time is simply another business decision that remains within the full discretion of the employer.

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

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

Leading right to request legislation in the U.S. incorporates many of these characteristics. Right to request legislation now exists in Vermont, which passed a law that, beginning January 1, 2014, will protect employees who request flexible working arrangements. Employers must consider such requests at least twice per calendar year per employee. Consideration of requests means that the employer must discuss the request with the employee in good faith, propose alternatives if appropriate, and consider whether the request can be granted “in a manner that is not inconsistent with its business operations or its legal or contractual obligations.” The employer is also prohibited from retaliating against the employee for making a flexible schedule request.

In a similar vein, the City and County of San Francisco passed an ordinance, which will also take effect on January 1, 2014, granting of employees the right to request a flexible or predictable working arrangement. A flexible working arrangement can encompass a modified work schedule, part-time employment, job sharing, telecommuting, and changes in start and end times, among others. Employees may make two requests every twelve months. Employers must respond in writing and explain the reason for the denial which states a “bona fide business reason.” Like the Vermont law, the ordinance prohibits retaliation against employees who make the request.

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

Second, the process of communication that is required has inherent and beneficial value. Even if the employer is under no obligation to accept the request, the process is not inherently hollow. Right to request rules establish a collaborative process by which employers and employees can communicate about the request. Employees who are denied the flextime request
may at least feel their voices have been heard and that their employer has taken the time to supply them with a written and reasonable explanation. The dialogue process also limits managerial discretion in that employers must engage in the process even when it is undesirable. However, the dialogue process also respects the managerial discretion of the employer to evaluate such a request in light of workplace demands. The right to request dialogue creates a non-threatening venue by which employer and employee can collaborate to explore a variety of flexible options and, if possible, reach a mutually acceptable agreement.  

Third, the right to request is a vehicle through which to promote flextime generally. When the right to request is exercised by an employee, it places upon the employer a statutory obligation to follow a set a procedures to evaluate and resolve the flextime request. Although the cost of the process is likely low, the process gets the employer in the habit of not reflexively denying flextime requests. Having this required process in place may encourage employers to readily grant more reasonable flextime requests or proactively introduce flextime so that the employer will not need to go through the process for each employee. When employers adopt flextime more regularly, they may discover that introducing flextime into their workplace may improve company operations through such metrics as productivity and worker loyalty.  

Finally, successful right to request programs will encourage further flextime legislation. Once the right to request becomes normalized, employers may realize that granting flextime is not overly burdensome. Just as most accommodations under the ADA are low-cost or cost free, so will most flexible schedules not be overly burdensome to the employer. If such scheduling is widely shown to be of limited cost and burden on firm efficiency, employers may be less aggressive in resisting future flextime related legislation. Such a success with flextime may thus pave the way to more robust flextime work laws in the future.

In addition to enacting a right to request statute, flextime reform could be improved even further by incorporating relevant successful characteristics of the ADA. This hybrid right to request-accommodation model would not only shore up any potential weaknesses in the right to request framework but also increase the incentives of the employer to meaningfully comply with its provisions.

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

The right to request process merely requires a meeting and a written decision from the employer. While requiring employer-employee communication, there is a risk that the employer may simply go through the motions without engaging with the flextime request. The interactive process provision of the ADA, by contrast, is far more robust. The ADA’s Interpretive Guidance on Title I of the Americans with Disabilities Act (Guidance) specifically states that an employer should use a “problem solving approach” during the interactive process. The Guidance establishes specific stages, where by the employer analyzes the job involved, consults with the employee to determine the nature and scope of limitations, identifies potential accommodations, considers the preferences of the employee, and selects an accommodation that is “most appropriate for both the employee and employer.”
The Guidance encourages employer and employee to use a specific step-by-step process when the employer or employee lack sufficient knowledge about the tools available or the limitations involved in the accommodation. This process is no mere standardized procedure, but an individual assessment of both the job at issue and the limitations of the employee. The Guidance provides detailed directions for employers to follow and is deliberately two-way and interactive. This collaborative solution-oriented process could be readily layered into the communication process for the right to request a flexible schedule, and substantially improve it as a result.

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

This attention to courts to the process further incentivize the employer to engage in good faith flexible scheduling dialogue more robustly than a mere discussion and communication embedded in a right to request framework. The specter of liability will lie behind the flexible dialogue process and ensure proper compliance. However, given that the requirement of good faith engagement is relatively easy for the employer to satisfy, the employer will not suffer unnecessary risk of exposure. Incorporating a similar responsibility in flextime requests to that placed on ADA accommodations will result in a more balanced and engaged dialogue that, while encouraging collaborative and productive discussion, will also have the threat of sanction discouraging bad faith disengagement.

In addition to adopting ADA interactive dialogue processes and sanctions, right to request legislation should also incorporate an analogous ADA requirement that an employee show a threshold of harm, known as an “undue hardship,” before denying a request for flexible scheduling. Under the current right to request system, the employer merely has to articulate a business reason for the flextime denial. The employer does not have to specify the specific nature or the extent of the costs or further justify the rationale. The employee cannot challenge the business justification for the denial, only whether the employee followed the correct processes in reaching its decision. This prevents the employee from making any substantive challenges to an employee’s reasoning, and encourages employers to mechanically point to business problems without a real effort to accommodate. This also encourages employers to deny flexible schedule requests for even the most minor of inconveniences.

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

Other ADA-based enhancements to the right to request framework would also benefit employees. One curious requirement of the UK right to request statute is that it limits the number of requests for flexible scheduling an employee can make to once a year. No second request is allowed even if the second request in the period was for a different caregiving responsibility. This limitation seems to accomplish little more than restricting the employee’s options. It also creates substantial for workers, who must decide whether the work-life crisis facing them at the moment is the ‘right one’ to make a request for, lest they find the door shut to further requests for another twelve months. Concerns about employee abuse of the request system can be mitigated by placing the same duty of good faith and interaction on requesting employees that the ADA imposes on both parties. Indeed, if an employee fails under the ADA to meaningfully participate in the interactive process, it may preclude a claim that her employer violated her right to a reasonable accommodation. The same obligation should be placed on the employee who engages in the right to request process. There is thus little need for an arbitrary limitation on requests for flexible scheduling for a given period.

Another unnecessary characteristic of the UK right to request statute is that it perceives the flexible schedule accommodation as a permanent change without any inherent requirement to revert back to the original schedule, or another schedule, at a later time. This appears to defeat the purpose of flexible scheduling in that it prohibits further change to working time when new obligations arise for the employee requiring other flexibility or when the current obligation ends and employees can willingly return to a more traditional schedule. The ADA does not envision accommodations as permanent, and under a right to request regime it does not accomplish much more than restricting future flextime opportunities for employees.

**CONCLUSIONS**

The time has not merely arrived, but indeed is long overdue, for meaningful flextime reform. Employees are under pressure to satisfy work and family obligations. Low income workers are under enormous stress trying to manage their personal lives while at the same time hold on to their jobs that they so desperately need to survive. Some employers have apparently little respect for the needs of employees, and managers have little incentive to act on their behalf.

Unfortunately, the current prevailing legal regimes do not sufficiently protect access to flexible work. The FLSA is too limited and dated to be of much use for most employees. The FLSA was constructed for employees taking substantial blocks of leave, not precise changes to weekly schedules, and as a result has little to offer the flex-seeking employee. The ADA, while holding promise in the encouragement of flexible schedules, has a specific mandate that does not target the broad scope of the American workforce. Employees are left without a fulfilling remedy.

This need not be the current state of affairs. This article proposes a suite of reforms that grant employees access to flexible working time. The first series of reforms argues for amendments to prevailing statutory frameworks. While such frameworks can be interpreted more broadly, and with good effect for flexible workers, the remedies available remain insufficient and incomplete. The second series of reforms argues for the creation and adoption of
a flextime statute based upon a hybrid model of a right to request enhanced by key elements of the ADA. This model strikes a just balance between permitting the employer substantial discretion with which to shape its workforce while also empowering the employee to make flextime requests with a reasonable likelihood of adoption. It also places obligations on both the employer and employee to genuinely engage the process. Employers are also subject to the bite of sanction if they disengage from the process or otherwise abuse it. The result is a regime that achieves substantial goals for employees with a relative minimum inconvenience for the employers they serve.

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

2 Id.
3 See, e.g., Rebecca Korzec, Working on the “Mommy Track”: Motherhood and Women Lawyers, 8 HASTINGS WOMEN’S L.J. 117 (1997).
4 Chuck Halverson, Notes, From Here to Paternity: Why Men are not Taking Paternity Leave Under the Family and Medical Leave Act, 18 WIS. WOMEN’S L.J. 257, 261-65 (2003).
7 Id. at 383.
8 Id. at 399-401.
9 Id. at 399.
10 Id. at 399-400.
12 Id. See also Gregory Acs, A Good Employee or a Good Parent? Challenges Facing Low-Income Working Families, 4 U. ST. THOMAS L.J. 489, 498 (2007) (“[Low wage jobs] simply do not offer them the same level of pay, benefits and flexibility as those held by moderate-income families.”); Stephanie Bornstein, Work, Family, and Discrimination at the Bottom of the Ladder, 19 GEO. J. POVERTY L. & POL’Y 1, 9 (2012) (similar).
13 Runge, supra note 11, at 451-52.
14 Watson & Swanberg, supra note 6, at 400-01.
15 Runge, supra note 11, at 450.
19 Runge, supra note 11, at 472.
22 Id. The average verdict in family responsibilities cases before this one was only $570,000. Id.
23 Id.
24 Id.
25 Id. at 98.
According to the plaintiff’s manager, such activities were “standard business practices.”

(2010).


Steven M. Guiterrez & Joseph Neguse, Emerging Technologies and the FLSA, 39 COLO. L. W. 59 (2010).

The Court emphasized that workers are not “mere chattels or articles of trade.”

592 (1944) (explaining that FLSA protects “the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.”), supersedes on other grounds by statute, 29 U.S.C. § 254 (2006). The Court emphasized that workers are not “mere chattels or articles of trade.” Id. at 597.


56 *Id.* at 1058 (quoting Dunlop v. City Electric, Inc., 527 F.2d 394, 401 (5th Cir. 1976)).

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

58 *Id.* at 1056-57.


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

61 Rutti, 596 F.3d at 1056.

62 *Id.* at 1056-57.

63 See Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984).

64 *Id.*


66 *Id.* § 2614(a).


68 29 C.F.R. § 825.203 (2014). See also 29 C.F.R. § 825.202(a) (“FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances.”).

69 29 C.F.R. § 825.202(a)

70 *Id.*

71 *Id.*


73 Giles, 1997 WL 786256, at *3.

74 *Id.* at *3.

75 *Id.*; See also Chappell v. Bilco Co., 675 F.3d 1110, 1116 (8th Cir. 2012) (“A claim under the FMLA cannot succeed unless the plaintiff can show that he gave his employer adequate and timely notice of his need for leave. Adequate notice requires enough information to put the employer on notice that the employee may need FMLA leave.”) (citations omitted). Such leave may need to be supported by a certification from a health care provider if the employer requests. 29 U.S.C. § 2613(a) (2006).

76 *Id.* at *3 n.11.


78 *Id.* at *2.

79 *Id.*

80 *Id.* (citing 29 C.F.R. § 825.117 (2013) (stating that employees must attempt schedule part-time leave “so as not to disrupt the employer's operations" and allowing employers to “assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's . . . reduced leave schedule”)).

81 *Id.* at *3.

82 *Id.* at *5.

83 29 C.F.R. § 825.202 (2014) (“A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.”).


85 209 F.3d 29 (1st Cir. 2000).

86 *Id.* at 31.

87 *Id.*

88 *Id.* at 32.

89 *Id.*

90 *Id.*

91 *Id.* at 35.
92 Id. at 36.
93 Id. at 38.
94 651 F.3d 190 (1st Cir. 2011).
95 Id. at 193-94.
96 Id. at 194.
97 Id. at 195. Such accommodations would have been a printer in her office, air conditioning, and proximity to the washroom. Id. at 194-95.
98 Id. at 196.
99 Id. at 197.
100 Id.
101 Id.
102 Id. at 200.
103 Id.
104 Id.
105 Id. at 201.
106 Id. at 202.
108 Id. at 496. Before that time, Ezikovich was granted the opportunity to work out of a more convenient office and was also able to report to work when she was able, usually between 11:00am and noon, with the informal consent of her supervisor. Id. at 496 & n.1.
109 Id. at 496. Ezikovich would retain her full-time employee status under this proposed arrangement. Id.
110 Id. at 499.
111 Id. The court elaborated that attendance at work was an essential function of the job and that the inability to attend work on a regular basis does not satisfy such essential functions. Id. at 499 n.5.
114 Working Families Flexibility Act, H.R. 1406, 113th Cong. (2013), available at https://www.govtrack.us/congress/bills/113/hr1406/text. For a more detailed discussion of the act, see Lane C. Powell, Flexible Scheduling and Gender Equality: The Working Families Flexibility Act Under the Fourteenth Amendment, 20 MICH. J. GENDER & L. 359 (2013). It is important to remember that H.R. 1406 is not the first legislation to carry this name, as other bills have been proposed in the past also known as the Working Families Flexibility Act that seek substantially different goals. See, e.g., Rachel Arnow-Richman, Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance, 42 CONN. L. REV. 1081, 1108-1112 (2010) (discussing bill known as the Working Families Flexibility Act which grants, among other rights, the right for employees to request a change in their employment terms without fear of sanction). See also Working Families Flexibility Act, H.R. 1274, 111th Cong. § 3(a) (2009). As this earlier bill remains dormant, and the more recent WFFA remains a live issue, the discussion here will focus on the latter act.
115 Similar praise has been given to the Senate version of the WFFA, the Family Friendly and Workplace Flexibility Act, which was characterized as a “common-sense measure that would help reduce scheduling burdens for workers.” Daniel Wilson, GOP Sens. Float Bill to Let Workers Swap OT for Comp Time, LAW360 (Oct. 31, 2013), http://www.law360.com/articles/485215.

NFIB strongly supports legislation to remove obstacles that prevent employers from providing increased flexibility to their employees. H.R. 1406 simply allows private-sector employers to offer a benefit that is currently enjoyed by employers and employees in the public sector. This legislation would allow employees the choice of taking time-and-a-half compensatory time as payment for overtime. It is important to stress that if an employer chooses to offer compensatory time, the offering is completely voluntary for employees, and at any time employees can change their mind and receive overtime compensation in cash.

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

Id.

117 See Letter from American Hotel & Lodging Association et al., to Hon. John Boehner and Hon. Nancy Pelosi (May 7, 2013), available at http://www.cupahr.org/advocacy/positions/CTC-Letter-of-Support-HR-1406.pdf (“Now, more than ever, employees seek greater control over their time. The Working Families Flexibility Act would give employees more control over their time by giving them the option of paid time off in lieu of overtime payments.”). The letter is supported by 19 business organizations and 72 human resources groups, mainly local branches of the Society of Human Resource Management. Id.

118 Warner, supra note 120.

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


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

124 E.g., Taylor v. Phoenixville School Dist., 184 F.3d 296, 313 (3d Cir. 1999) (“The EEOC's manual makes clear, however, that . . . the notice [for a reasonable accommodation] does not have to be in writing, be made by the employee, or formally invoke the magic words "reasonable accommodation." . . .”); Kravits v. Shineski, 2012 WL 604169, at *7 (W.D. Pa. 2012) (similar)

125 H.R. 1406, § (3)(E).

126 Id., § (7)(B).

127 Id.

128 Huppke, supra note 121 (quoting Judith Lichtman, senior adviser for the National Partnership for Women & Families). Lichtman further states:

[The WFFA] pretends to provide a set of options to employees. But even if they elect to take the comp time instead of wages, when they can take it is fully at the discretion of the employer. You have no ability to take that leave when you need it. The employer can decide.
where women worked in the home, most families had only one wage earner, and nobody went to their kids’ soccer

The making of shoes may be likened to a race. There are two races every working day. The first face begins when the factory whistle blows in the morning and ends with the noon whistle. The second race begins with the whistle after the noon hours and ends with the whistle at night. A contestant in a foot race intends to be on the starting line when the whistle blows, and ready to run. If he is not there he does not start and does not win.


29 C.F.R. § 790.6.

See generally Ann Bookman & Delia Kimbrel, Families and Elder Care in the Twenty-First Century, 21 FUTURE CHIL 117 (2011), available at http://futureofchildren.org/futureofchildren/publications/docs/21_02_06.pdf.  Fortunately, however, the value of fractional work assessed as not de minimis decades ago in the regulation can still be used today. The regulation states that “holding that working time amounting to $1 of additional compensation a week is ‘not a trivial matter to a workingman’ and was not de minimis...[t]o disregard workweeks for which less than a dollar is due will produce capricious and unfair results.” 29 C.F.R. § 745.87 (2014) (citing Glenn L. Martin Nebraska Co. v. Culkin, 197 F. 2d 981, 987 (8th Cir.), cert. denied, 344 U.S. 866 (1952) and Addison v. Huron Stevedoring Corp., 204 F.2d 88, 95 (2d Cir.), cert. denied, 346 U.S. 877 (1953)). One dollar of additional working time a week is equivalent to $8.73 today. See Inflation Calculator, http://www.dollartimes.com/calculators/inflation.htm (last visited May 28, 2014). With the federal minimum wage currently being $7.25 per hour, $8.73 represents approximately 1.2 hours of lost time per week. The cases cited by the regulation conclude such value is not de minimis, and this indeed should remain so today.


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


As Representative Judy Biggert stated, the FLSA “has been frozen for more than sixty years, locked in a time where women worked in the home, most families had only one wage earner, and nobody went to their kids’ soccer games.” 149 CONG. REC. H4207 (daily ed. May 19, 2003).
See Natasha Bhushan, Note, *Work-Family Policy in the United States*, 21 CORNELL J.L. & PUB. POL’Y 677, 687 (2012). Furthermore, research conducted since the passage of the FMLA reveals that parental leave decreases turnover and increases employee loyalty. *Id.*


Furthermore, research conducted since the passage of the FMLA reveals that parental leave decreases turnover and increases employee loyalty. *Id.*

29 C.F.R. § 825.113 (2014).

See Hoffman, supra note 4, at 274.


O’Leary, supra note 161, at 43.

Id. at 44.

Id. at 43-45.


Id.


Id.

29 C.F.R. § 825.113(d) (2014).


Id. at 70-71.

Id. at 70.

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


Id. at 9-10.

Id.

Id.


Keter & Jarrett, supra note 185, at 11.

Id.

Id.


Id. at 9-10.

Id.

Id.

Id.

Id.

Id. at 11.

Id. § 309(a).

Id. § 309(a)-(b). “Inconsistent with business operations” includes burden of additional costs on the employer, a negative effects on morale, consumer demand, recruitment or other impacts. Id. § 309(b)(3).

Id. § 309(f).


Id.

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

Id.

Id. at 3.

Id.


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


Id.

Id.

Id.

E.g., Taylor v. Phoenixville School District 184 F.3d 296, 312 (3d. Cir 1999) (quoting Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996)).

Id.

Id.

Id.

Id.


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

221 29 C.F.R. § 1630.2(p) app. (2014).

222 *Id.*


225 *Id.*

226 *See, e.g.*, Hoppe v. Lewis University, 692 F.3d 833, 840 (7th Cir. 2012) (“[A]n employee who fails to uphold her end of the bargain . . . cannot impose liability on the employer for its failure to provide a reasonable accommodation.”); Steffes v. Stepan Co., 144 F.3d 1070, 1072 (7th Cir. 1998) (similar).

227 *See, e.g.*, Taylor v. Principal Financial Group, 93 F.3d 155, 165 (5th Cir. 1996) (“[O]nce an accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employee and employer.”) (citing 29 C.F.R. § 1630.9 app. (1995)); Seaman v. CSPH, Inc., 179 F.3d 297, 301 (5th Cir. 1999) (“[A]n employee cannot remain silent and expect his employer to bear the burden of identifying the need for and suggesting appropriate accommodation.”)

228 Keter & Jarrett, *supra* note 185, at 11 (“A request for flexible working is normally a permanent one; there is no automatic right to revert back to the previous pattern of working, unless this is agreed.”).