

## WHY DON'T MORE EMPLOYERS ADOPT FLEXIBLE WORKING TIME?

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### I. INTRODUCTION

Flexible working time, also known as flextime, is the incorporation of one or more of a variety of arrangements that modify the hours and location of work.<sup>1</sup> If the vast numbers of academic and popular sources praising flextime are believed, flextime is widely popular. Flextime has been praised as a necessity for the modern workplace.<sup>2</sup> Private enterprise, government agencies,

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<sup>1</sup> See U.S. DEP'T OF LAB., WORKPLACE FLEXIBILITY TOOLKIT, <http://www.dol.gov/odep/workplaceflexibility/> (last visited Sept. 3, 2015) ("Essentially, flexibility enables both individual and business needs to be met through making changes to the time (when), location (where), and manner (how) in which an employee works."); see also Vicki Schultz, *Feminism and Workplace Flexibility*, 42 CONN. L. REV. 1203, 1213–14, 1213 n.28 (2010) (describing various definitions of workplace flexibility).

<sup>2</sup> E. Jeffrey Hill et al., *Defining and Conceptualizing Workplace Flexibility*, 11 COMMUNITY, WORK & FAM. 149, 149 (2008); Ali Dastmalchian & Paul Blyton, *Workplace Flexibility and the*

and U.S. Senate testimony have all hailed the benefits of a flexible workplace at one time or the other.<sup>3</sup> Flextime systems have been credited with better retention of talent, improved customer satisfaction, improved morale, and higher profits.<sup>4</sup> Workplace flexibility is perceived as a solution for workers trying to balance work and family obligations.<sup>5</sup>

In related work, I recommend legal reforms to better enable employees to access flexible practices, especially for women and low-wage workers, in order to better preserve their work-life balance.<sup>6</sup> In this Article, I focus primarily on the perspective of employers. In spite of the clamor, many employers retain their fixed-schedule practices.<sup>7</sup> According to one source, only 20% of employers offer more than one approach to implement workplace flexibility.<sup>8</sup> Another finds that 67% of employers surveyed do not let most of their employees vary their start or quit times.<sup>9</sup> Still, others find that less than one-third of full time workers surveyed have flexible work arrangements, with less-skilled workers having less flexibility than other groups.<sup>10</sup>

Employees aren't experiencing the flexibility either. Only 15% of workers surveyed and only 8% of hourly wage workers surveyed felt they were able to freely determine their work schedule.<sup>11</sup> Twenty-eight percent of full-time and 16% of part-time workers regarded their overtime work as mandatory.

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*Changing Nature of Work: An Introduction*, 18 CAN. J. ADMIN. SCI. 1, 1 (2001) (“[F]lexibility is increasingly regarded as a ‘must have’ in all functional areas of contemporary organizations.”).

<sup>3</sup> Hill et al., *supra* note 2, at 149–50.

<sup>4</sup> Sloan Ctr. on Aging & Work at Bos. Coll., *Why Employers Need Workplace Flexibility*, FOCUS ON WORKPLACE FLEXIBILITY, [http://workplaceflexibility.bc.edu/need/need\\_employers](http://workplaceflexibility.bc.edu/need/need_employers) (last visited Sept. 3, 2015).

<sup>5</sup> Hill et al., *supra* note 2, at 150.

<sup>6</sup> Robert C. Bird, *Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform*, 37 BERKELEY J. EMP. & LAB. L. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2537997](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537997).

<sup>7</sup> Mary Louise Fellows & Lily Kahng, *Costly Mistakes: Undertaxed Business Owners and Overtaxed Workers*, 81 GEO. WASH. L. REV. 329, 382 (2013).

<sup>8</sup> Stephen Sweet, Marcie Pitt-Catsouphes, Elyssa Besen & Lonnie Golden, *Explaining Organizational Variation in Flexible Work Arrangements: Why the Pattern and Scale of Availability Matter*, 17 COMMUNITY, WORK & FAM. 115, 134 (2014). The authors concluded that “[t]he reality is that most workers in the USA have constrained choices in respect to options to reconfigure how, when, where, or how much work is to be performed.” *Id.*; Thomas M. Beers, *Flexible Schedules and Shift Work: Replacing the ‘9-to-5’ Workday?*, 123 MONTHLY LAB. REV. 33, 33 (2000) (reporting data from 1990s showing that less than 10% of employers offered flextime as part of a formal employee benefit program).

<sup>9</sup> GEORGETOWN UNIV. LAW CTR., FLEXIBLE WORK ARRANGEMENTS: SELECTED CASE STUDIES 1 (2010), [http://workplaceflexibility2010.org/images/uploads/FWA\\_CaseStudies.pdf](http://workplaceflexibility2010.org/images/uploads/FWA_CaseStudies.pdf).

<sup>10</sup> COUNCIL OF ECON. ADVISERS, *infra* note 17, at 1, 23. *But see* Baltes et al., *infra* note 71, at 496 (citing research finding that 66% of surveyed firms offer flexible work schedules).

<sup>11</sup> Lonnie Golden, *The Effects of Working Time on Productivity and Firm Performance: A Research Synthesis Paper*, CONDITIONS OF WORK AND EMPLOYMENT SERIES NO. 33, 3 (2012).

Twenty-seven percent of salaried workers and as many as 41% of hourly workers believe they were never able to adjust their start and end work times.<sup>12</sup> Forty-five percent of U.S. workers perceive no ability to influence their work schedules at all.<sup>13</sup> The hype of flextime, and its substantial promise, is simply not matching the workplace reality.

Scholars have openly wondered, given substantial evidence of positive impact for both employer and employee, why isn't employer adoption of flexible scheduling more widespread? One of the leading researchers on flextime remarks that, "a key question to try to grasp theoretically is why so many employers do *not* adopt, implement or consider flexible work arrangements?"<sup>14</sup> Others inquire, "[d]espite . . . reservations against highly flexible time schedules, one may raise the question why arrangements with moderate flexibility are adopted only by a minority of firms—given that the overall productivity effect of flexible work hour schedules seem to be positive."<sup>15</sup>

The purpose of this Article is to answer this question and to examine why more employers do not adopt widely-accessible flextime programs. The purpose of this Article is also to show why it is in many employers' short-term and long-term interests to do so. Part II of this Article reviews the history and development of working time and flexible scheduling. This Part shows the relatively humane working time arrangements of today have not always been in existence. Rather, they are the result of over a century of struggle by labor unions and political allies to establish the 5-day, 40-hour workweek, and by extension flextime, as established practices in the workplace. Part III articulates a substantial business case for flexible working time. This Part shows that, while not uniformly positive, the research examining flexible practices generally reveals that firms benefit through a variety of direct and indirect metrics when meaningful flextime programs are adopted.

The next three parts address what employers must do to take advantage of this worthwhile practice. Part IV examines the role of information asymmetries that deter flextime adoption, and articulates six barriers that must be overcome to introduce an optimally successful flextime program. Part V focuses on implementation, and highlights a critical reason why flextime programs fail, which is the employer retaining primary or sole control over flextime. Employees must have substantial control over their working time, or

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<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 3 (citing INTERNATIONAL SOCIAL SURVEY PROGRAMME: WORK ORIENTATION III (2005), <http://zocat.gesis.org/webview/index.jsp?object=http://zocat.gesis.org/obj/fStudy/ZA4350>).

<sup>14</sup> Golden, *supra* note 11, at 3.

<sup>15</sup> Elke Wolf & Miriam Belbo, *Does Work Time Flexibility Work? An Empirical Assessment of the Efficiency Effects for German Firms* 26 (Ctr. For European Econ. Research, Discussion Paper No. 04-47, 2004).

the benefits to flextime can disappear. Part VI shows how firms must manage their legal and ethical obligations to flextime. Although legal protection for flexible work is generally limited, the perception of flextime misuse or abuse may be perceived as a great injustice that can backfire on employees through costly litigation. Part VII explores how, even if employers still remain uninterested in voluntary flexible schedules, a growing number of legislative initiatives are on the horizon that will mandate flextime or flextime-like practices. If employers do not proactively engage flextime, they risk being forced into flexible arrangements through regulatory action. This Article concludes that it is in the employer's interest to adopt flextime, and done so thoughtfully and with participation of employees, can result in a net gain for everyone concerned.

## II. THE HISTORY AND DEVELOPMENT OF WORKING TIME

The concept of flexible working time appears simple enough to define, that of any period in which a worker is working for an employer or at the employer's disposal.<sup>16</sup> Flextime can incorporate a wide variety of scheduling practices, such as shifting hours earlier and later, revolving hours around a core time of work, transition periods, modification of starting and quitting times, and flexible break arrangements.<sup>17</sup> Flexibility may also arise in place of work, such as selecting one of multiple worksite locations, off-site work, and telecommuting.<sup>18</sup> Flextime also impacts the number of hours worked, such as shifts from full-time to part-time work, taking leave to improve job skills, job sharing, and the ability to enter and leave the workforce for an extended period to care for a loved one or other personal need.<sup>19</sup> Flextime is virtually limitless in the variants of scheduling, location, and assignment that can be crafted between an employer and its employees.

The notion of working time is a social construction arising from evolving economic necessity and changes in what is perceived to be humane hours of work. The notion of working time today, first established in the 1940s, can be viewed from a variety of perspectives. The most traditional and narrow perception of working time is that of physical presence. The presence definition focuses on time required by the employer for the employee to be at a particular

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<sup>16</sup> Lisa Rodgers, *The Notion of Working Time*, 38 INDUS. L.J. 80, 81 (2009).

<sup>17</sup> COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, WORK-LIFE BALANCE AND THE ECON. OF WORKPLACE FLEXIBILITY 4–5 (Mar. 2010), <http://www.whitehouse.gov/files/documents/100331-cea-economics-workplace-flexibility.pdf>; SOC'Y OF HUMAN RES. MGMT., WORKPLACE FLEXIBILITY IN THE 21<sup>ST</sup> CENTURY 8 (2009), [http://www.shrm.org/research/surveyfindings/articles/documents/09-0464\\_workplace\\_flexibility\\_survey\\_report\\_inside\\_finalonline.pdf](http://www.shrm.org/research/surveyfindings/articles/documents/09-0464_workplace_flexibility_survey_report_inside_finalonline.pdf).

<sup>18</sup> COUNCIL OF ECON. ADVISERS, *supra* note 17, at 9–10.

<sup>19</sup> *Id.* at 10–12.

location or on the employee's premises.<sup>20</sup> Physical presence as work invokes the expectations and conduct of historical labor. Both manufacturing and agrarian work have traditionally required a physical presence at the job site. Crops cannot be planted and harvested without on-site physical labor. Production cannot be completed without a workforce physically present at an assembly line. Such a definition of working time would have been sufficient for most pre-modern societies.

Working time has also been viewed through the lens of exertion, that of engaging in some activity that is required by the employer over a certain period. This view of working time includes any time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."<sup>21</sup> This definition focuses on the act of work rather than its location and also incorporates that the employer benefits in some way from the worker's actions. This expands working time from mere attendance at a factory or farm to some activity engaged in that is pursued for the benefit of the employer and at the employer's request independent of location or concurrence in time between the activity and the benefit received.

Working time can also mean not only exertion or presence, but the mere availability to serve one's employer for a particular period of time. As the Supreme Court has remarked, "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity."<sup>22</sup> This implies that any time spent monitoring employer interests, even though that monitoring may not necessitate concrete worker action, also falls within the orbit of working time.

Working time as it is understood today, an eight-hour daytime work day over a five-day period with two full days of rest, is a social construction that took centuries to evolve. During the colonial period, work arrangements through apprenticeships could last for years at a time, and apprentices were

<sup>20</sup> Anderson v. Mount Clements Pottery Co., 328 U.S. 680, 690–91 (1946).

<sup>21</sup> Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 13, 321 U.S. 590, 598 (1944), *superseded by statute*, 29 U.S.C. § 254 (2012). In *Tennessee Coal*, the Court ruled that miners were entitled to compensation for time spent before each shift making the compulsory and hazardous trip to the employer's underground iron mines. *Id.* at 599–600. That was later narrowed somewhat by the Portal-to-Portal Act of 1947, which declared that traveling to and from work does not constitute compensable time under the Fair Labor Standards Act (FLSA). See Portal-to-Portal Act of 1947, Pub. L. No. 80–49, § 1, 61 Stat. 84, 84; *see also* Martin v. City of Richmond, 504 F. Supp. 2d 766, 771–73 (N.D. Cal. 2007) (explaining the evolution of compensable working time).

<sup>22</sup> Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944) ("Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.").

“bound body and soul” to their masters.<sup>23</sup> In these relationships, every moment of the worker’s time was subject to the discretion of the employer. Living time and working time were blended together.

Initial efforts to control work time were sought by journeymen at the end of the U.S. colonial period, who sought to limit their workday to between 12 and 14 hours.<sup>24</sup> Although employers resisted the change, by the early 1800s artisans, craftsman, and other skilled workers formed labor unions and political parties.<sup>25</sup> These parties sought a reduction to a ten or even eight hour work day as part of a struggle against the “discipline of time” and emerging values of commercialism.<sup>26</sup>

After the Civil War, attitudes toward working time in the United States changed. The struggle for abolishment of slavery generated a heightened awareness of work contracts for personal services or long-term apprenticeships.<sup>27</sup> Contracts for wages were viewed differently than other agreements because they were based on an individual’s personal labor.<sup>28</sup> Such labor was distinct from oneself, and the forced performance of that labor, whether through contract or otherwise, was analogous to wage slavery.<sup>29</sup>

During the late eighteenth century the battle continued for more humane work hours. Craft workers obtained the first eight-hour day in the construction industry in the 1890s.<sup>30</sup> Over the next 30 years, a number of unionized groups, such as garment workers, railroad workers, and steel workers, also successfully obtained the eight-hour work day.<sup>31</sup> Sporadic gains

<sup>23</sup> *History of Apprenticeship*, WASH. STATE DEP’T. OF LABOR & INDUS., <http://www.ini.wa.gov/TradesLicensing/Apprenticeship/About/History/> (last visited Sept. 16, 2015).

<sup>24</sup> Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 10 (2001).

<sup>25</sup> HERBERT APPLEBAUM, *THE AMERICAN WORK ETHIC AND THE CHANGING WORK FORCE* 83–87 (1998); DALE YODER, *LABOR ECONOMICS AND LABOR PROBLEMS* 282 (2d ed. 1939).

<sup>26</sup> APPLEBAUM, *supra* note 25, at 83–87.

<sup>27</sup> Miller, *supra* note 24, at 11–12.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Don Hellriegel, *The Four-Day Workweek: A Review and Assessment*, 20 MICH. ST. U. BUS. TOPICS 39, 40 (1972).

<sup>31</sup> *Id.* Samuel Gompers, founder of the American Federation of Labor and an important figure in American labor history, declared at the time:

We want eight hours, we are determined to have eight hours, we shall try to aid those who are in a condition by May 1, 1890 to obtain eight hours . . . . The end of the labor movement, the end of the agitation for the reduction of the hours of labor, will not end in 1890; so long as there is one person seeking employment and cannot obtain it, so long will there be work for our organization.

Richard L. Rowan, *The Influence of Collective Bargaining on Hours*, in *HOURS OF WORK* 17, 22 (Clyde E. Dankert, Floyd C. Mann & Herbert R. Northrup eds., 1965).

were achieved in various industries in the early 20th century until 1938, when the landmark Fair Labor Standards Act (FLSA) was enacted.<sup>32</sup> The FLSA profoundly changed the American workplace by creating a minimum wage, imposing limits on the use of child labor, and, most importantly for working time, requiring employers to pay an overtime rate for work exceeding 40 hours a week.<sup>33</sup> The FLSA represented one of the most important advancements to the protection of employee working time in the past century and the 40-hour work week remains the standard for U.S. employment today.<sup>34</sup>

The first American organization to use modern flextime was Hewlett Packard, which adopted flextime in one of its U.S. facilities in 1972 after using it in its German division.<sup>35</sup> Between 1974 and 1978, the number of employees with flexible working schedules doubled from 4% to 8%.<sup>36</sup> A number of organizations during the 1970s and 1980s that studied flexible work arrangements advocated for their use in U.S. organizations.<sup>37</sup> Three trends further accelerated the interest in flexible working time. Mothers went to work in increasing numbers, fathers demonstrated an increased interest in familial roles, and single parents emerged as a substantial part of the workforce.<sup>38</sup> Employees were now highly motivated to find ways to balance the conflicting challenges of work and family obligations.<sup>39</sup>

During the 1980s, flextime matured from an efficiency enhancing process to an important issue of work-life balance, including gender equality.<sup>40</sup> Flextime was implemented to show commitment to equal employment opportunity for women by offering daycare services and flexible hours for women with small children.<sup>41</sup> In 1989, AT&T introduced a flextime policy that allowed employees to take two hours off at a time for personal needs.<sup>42</sup> When IBM expanded its flextime program in 1988 as part of a work-family package, its Vice President of Personnel reflected that “[its] workforce mirror[ed]

<sup>32</sup> Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

<sup>33</sup> Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 535–36 (2001).

<sup>34</sup> *Id.* at 535–38.

<sup>35</sup> CHRISTINE AVERY & DIANE ZABEL, *THE FLEXIBLE WORKPLACE: A SOURCEBOOK OF INFORMATION RESEARCH* 5 (2001). By 1977, the company had applied flextime to 22,000 workers. FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 177 (2009).

<sup>36</sup> James O’Toole, *Thank God It’s Monday*, 4 WILSON Q. 126, 135 (1980).

<sup>37</sup> AVERY & ZABEL, *supra* note 35, at 6–7.

<sup>38</sup> Robert Drago & Douglas Hyatt, *The Effect of Work-Family Policies on Employees and Employers*, 42 INDUS. REL. 139, 139 (2003).

<sup>39</sup> *Id.*

<sup>40</sup> DOBBIN, *supra* note 35, at 179.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

changes in the national employment demographics, with more working women, dual-career couples, [and] single parents” participating in the workforce.<sup>43</sup>

Academic interest in work-life issues increased as well, resulting in an “explosion of research” into flextime and related issues.<sup>44</sup> By the 1990s, large numbers of human resource practitioners were engaged in understanding whether work-family programs that employees now demanded could operate profitably.<sup>45</sup> From this examination of work-family programs from the organizational perspective, the business case for flexibility began to emerge. In a relatively short time, flextime had grown from an untested experiment to a popular workplace concept.

### III. A BUSINESS CASE FOR FLEXIBLE WORKING TIME

When First Tennessee Bank (FTB) learned of an increasing number of customer complaints, the 8,000 employee regional provider of financial services knew it had a problem.<sup>46</sup> Customers wanted steady relationships with bank employees, and customers were being increasingly reintroduced to a whole new group of individuals who handled their money.<sup>47</sup> An investigation found that employees were leaving because FTB lacked workplace flexibility—rules were unnecessarily rigid, absentee policies were harsh, and leave time rules remained a relic from the 1950s.<sup>48</sup> A “culture of closet fathers” emerged, whereby men confessed to lying about meeting a client so that they could attend their children’s events.<sup>49</sup> One father confessed fear of losing his job if he disclosed that he was taking his young daughter to leukemia therapy sessions.<sup>50</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> Drago & Hyatt, *supra* note 38, at 139. In spite of this increased interest, research on the organizational impact of work-life practices may not be as effective as it should be because the various research programs studying the issue may be poorly integrated. T. Alexandra Beauregard & Lesley C. Henry, *Making the Link Between Work-Life Balance Practices and Organizational Performance*, 19 HUM. RES. MGMT. REV. 9, 9 (2009). This may be in part because such practices touch upon so many different disciplines, sociology, psychology, management, occupational health, and law, to name a few, and the resultant research may be insufficiently cross-pollenating between disparate fields of study.

<sup>45</sup> Drago & Hyatt, *supra* note 38, at 139.

<sup>46</sup> Gillian Flynn, *Making a Business Case for Balance*, WORKFORCE, Mar. 1997, at 68, 69–74.

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

<sup>48</sup> *Id.* at 70.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* Complaints were not limited to men. One female employee lamented having to leave her sick child at home and calling to check in every 15 minutes throughout the day. *Id.* Another admitted dissolving aspirin in a baby bottle so day care would accept the child and the parent could work. *Id.* Others lied about illness so that they could take care of children. *Id.* at 71.



Firm executives responded decisively. The chairman empowered employees to design their own workplace flexibility policies as long as they continued to serve the customer.<sup>51</sup> Through employee workgroups supported by management, departments implemented various flexible schedules, such as working longer days earlier in the month in exchange for shorter days later in the month.<sup>52</sup> Other employees used permitted flexibility to work at home a few days a week, switch to a part-time schedule, or shift hours to satisfy family appointments and events.<sup>53</sup> One executive switched from an 8 a.m. to 5 p.m. to a 9 a.m. to 4 p.m. schedule for family reasons.<sup>54</sup>

The results for FTB were dramatic. FTB's work-life program, known as Family Matters, reported a 96% employee satisfaction rate.<sup>55</sup> The bank saved \$3 million in turnover costs, increased productivity, and improved customer retention to a point that it was substantially above the industry average.<sup>56</sup> One department managed to slice its account reconciliation duties in half due to flexible scheduling.<sup>57</sup> Customers now ranked FTB the best bank in its markets.<sup>58</sup> According to the bank's Human Resources department, making flexible workplace programs succeed is simply about being on "the cutting edge of common sense."<sup>59</sup>

Flexible scheduling programs can also be financially rewarding, as FTB's experience is no exception.<sup>60</sup> For example, one study examined the impact of work-life programs, a bundle of initiatives that included flexible

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

<sup>52</sup> *Id.*

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

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 73.

<sup>56</sup> *Id.* at 72.

<sup>57</sup> *Id.* at 71.

<sup>58</sup> *Id.* at 74.

<sup>59</sup> *Id.* Common sense, however, might not always be sufficient. For example, it took a startling decline in employee retention and customer satisfaction for executives at FTB to realize that decades-old habits needed to change. Flynn, *supra* note 46, at 69–70. At Kraft Foods, management responded with its own flexible program only after receiving disappointing survey results from its hourly workers and manufacturing plants about work-life integration issues. LEON C. LITCHFIELD, JENNIFER E. SWANBERG & CATHERINE M. SIGWORTH, INCREASING THE VISIBILITY OF THE INVISIBLE WORKFORCE: MODEL PROGRAMS AND POLICIES FOR HOURLY AND LOWER WAGE EMPLOYEES 65 (Apr. 2004), <https://www.bc.edu/content/dam/files/centers/cwf/pdf/LowWageStudy.pdf>. At the H.E. Butt Grocery Company, an independently owned food retailer, senior managers acted after they realized that employees were using their own sick leave to care for family members and "essentially had to lie to take care of their family." *Id.* at 62. Workplace flexibility programs can arise solely from the impetus of management, but no less often they are triggered by difficult conditions reported by employees.

<sup>60</sup> See, e.g., GEORGETOWN UNIV. LAW CTR., *supra* note 9 (summarizing other success stories); Litchfield, Swanberg & Sigworth, *supra* note 59 (same).

work schedules, on the productivity of a sample of Fortune 500 firms across 30 industries.<sup>61</sup> Applying rankings on the Family Friendly Index<sup>62</sup> to productivity metrics, the authors found that a 10% increase in the index would result in a 2% to 3% increase in productivity for the firm.<sup>63</sup> Although evidence tying flextime schedules to productivity may not always be uniform, there is little evidence that employees on flextime are less productive than their fixed-schedule counterparts.<sup>64</sup>

Studies on market reactions to work-life balance programs indicate a positive reaction to their introduction. A review of Wall Street Journal announcements found a significant and positive relationship between stock price and the announcement of a work-family initiative.<sup>65</sup> Another study found a similarly positive reaction from the market, especially when the firm was pioneering work-life policy rather than a follower firm adopting the same policy after others.<sup>66</sup>

This is not to say, however, that all flextime research produces uniformly positive results for all involved. Flexible schedules that permitted work outside the office increase firm performance, but that may not be so for other flexible scheduling practices.<sup>67</sup> A survey of human resources executives in 658 organizations found that firms employing a higher percentage of women and professionals had a stronger relationship between work-life benefits and

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<sup>61</sup> Thomas J. Clifton & Edward Shepard, *Work and Family Programs and Productivity*, 25 INT'L J. MANPOWER 714, 714 (2004).

<sup>62</sup> The Family Friendly Index was developed by the Family and Work Institute to survey the work and family policies and benefits of 188 Fortune 500 enterprises. *Id.* at 718–19.

<sup>63</sup> *Id.* at 725.

<sup>64</sup> See Golden, *supra* note 11, at 3 (citing Song Yang & Lu Zheng, *The Paradox of De-Coupling: A Study of Flexible Work Program and Workers' Productivity*, 40 SOC. SCI. RES. 299, 302 (2011)) (“Most importantly, there is virtually no research finding that employees working on flexitime have lower productivity than those on traditional fixed work schedules.”).

<sup>65</sup> Michelle M. Arthur, *Share Price Reactions to Work-Family Initiatives: An Institutional Perspective*, 46 ACAD. MGMT. J. 497, 503 (2003) (“The average share price reaction to the announcement of a work-family initiative over a three-day window is .39 percent. The average share price reaction occurring after legitimization of work-family initiatives was slightly higher at .48 percent.”). The average value of such an introduction as measured by the share price was \$60 million per firm. *Id.* at 504. In related work, firms that were named the “best company for working mothers” witnessed unexpected cumulative abnormal return (CAR) of 4.84% on average of the three period event window. John M. Hannon & George T. Milkovich, *The Effect of Human Resource Reputation Signals on Share Prices: An Event Study*, 35 HUM. RES. MGMT. 405, 417 (1996).

<sup>66</sup> Michelle M. Arthur & Alison Cook, *Taking Stock of Work-Family Initiatives: How Announcements of “Family-Friendly” Human Resource Decisions Affect Shareholder Value*, 57 INDUS. & LAB. REL. REV. 599, 610 (2004).

<sup>67</sup> Eleni T. Starvou, *Flexible Work Bundles and Organizational Competitiveness: A Cross-National Study of the European Work Context*, 26 J. ORG. BEHAV. 923, 936–40 (2005).

productivity.<sup>68</sup> For less-skilled workers in male-dominated jobs, productivity benefits from work-life programs were negligible.<sup>69</sup> Though evidence exists supporting direct productivity gains from flextime, a clear impact on the organizational bottom line, and the conditions in which it most effectively arises, needs further refinement.<sup>70</sup>

Other research focuses on the indirect benefit of flexible scheduling. Flexible scheduling arrangements allow workers to better balance their work-life obligations such as child care, illness, household tasks, and assisting elderly relatives. The reduced pressure from non-work issues, in turn, enables individuals to become more effective employees. A meta-analysis of research found that flextime positively impacted job satisfaction, absenteeism, and satisfaction with one's work schedule.<sup>71</sup> However, the beneficial effects are not permanent, and may decline with time.<sup>72</sup>

Workplace flexibility programs also encourage employees to like their jobs better. A survey of 6,445 employees found a positive link between functional job flexibility characteristics, such as job rotation, work autonomy, voluntary teamwork initiatives, and overall job satisfaction.<sup>73</sup> Reviews of the literature report similarly positive effects of flextime on overall job satisfaction.<sup>74</sup> Job satisfaction, in turn, provides a link to efficiency and productivity metrics. Employees that are more satisfied with their jobs tend to be more productive, thereby increasing firm profitability.<sup>75</sup> Job satisfaction is

<sup>68</sup> Alison M. Konrad & Robert Mangel, *The Impact of Work-Life Programs on Firm Productivity*, 21 STRAT. MGMT. J. 1225, 1235 (2000).

<sup>69</sup> *Id.*

<sup>70</sup> Byron Y. Lee & Sanford E. DeVoe, *Flextime and Profitability*, 51 INDUS. REL. 298, 298 (2012) (citing COUNCIL OF ECON. ADVISERS, *supra* note 17, at 25).

<sup>71</sup> Boris B. Baltes et al., *Flexible and Compressed Workweek Schedules: A Meta-Analysis of Their Effects on Work-Related Criteria*, 84 J. APPLIED PSYCH. 496, 508 (1999).

<sup>72</sup> *Id.* at 509.

<sup>73</sup> Federica Origo & Laura Pagani, *Workplace Flexibility and Job Satisfaction: Some Evidence from Europe*, 29 INT'L J. MANPOWER 539, 554 (2008). Quantitative flexibility practices, defined as jobs consisting of temporary work, part time work or flexible schedules did not report a positive link with job satisfaction. *Id.* at 554. This may be attributable to such scheduling not being voluntary or otherwise generating uncertainty for available sources of income. *See id.* at 541, 547.

<sup>74</sup> *See* Jennifer L. Glass & Ashley Finley, *Coverage and Effectiveness of Family-Responsive Workplace Policies*, 12 HUM. RESOURCE MGMT. REV. 313, 325 (2002) ("Overall, flexible work schedules have demonstrated significant positive effects across studies on . . . job satisfaction."); *see also* Kathleen E. Christensen & Graham L. Staines, *Flextime: A Viable Solution to Work/Family Conflict?*, 11 J. FAM. ISSUES 455 (1990); Jennifer L. Glass & Sarah Beth Estes, *The Family Responsive Workplace*, 23 ANN. REV. SOC. 289, 304 (1997) (citing Linda Thiede Thomas & Daniel C. Ganster, *Impact of Family-Supportive Work Variables on Work-Family Conflict and Strain: A Control Perspective*, 80 J. APPLIED PSYCH. 6 (1995)).

<sup>75</sup> Origo & Pagani, *supra* note 73, at 541 (citing Andrew J. Oswald, *Happiness and Economic Performance*, 107 ECON. J. 1815 (1997)).

also strongly and inversely associated with an employee's intention to leave an organization.<sup>76</sup> Turnover is a persistent and frustrating problem for firms, which costs an estimated \$14,000 per employee.<sup>77</sup> These costs arise from searching and recruiting, lost productivity and business from the position vacancy, and the costs of training the replacement.<sup>78</sup>

Workplace flexibility also enhances employee well-being, which also benefits the firm. Flextime is associated with reduced work pressure and work-life conflict.<sup>79</sup> Such schedules are also associated with reduced stress and burnout,<sup>80</sup> as well as measurable reductions in turnover.<sup>81</sup> Workplace flexibility is also positively associated with healthful behaviors such as increased hours of sleep, stress management, and self-assessed healthy lifestyles.<sup>82</sup> Healthy behaviors encouraged by flextime can reduce stress, absences, and other work related issues, thereby reducing medical costs and in turn improving productivity.<sup>83</sup>

Flexible schedules also do not appear to increase net firm costs. A survey of over 1,000 U.S. firms found that 36% of firms reported that their flexible programs were cost neutral and as many as 46% believed that their firms generated a positive return on their investment by introducing such programs.<sup>84</sup> In a global survey of 17,000 senior business people in 80 countries,

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<sup>76</sup> See, e.g., Elizabeth Medina, *Job Satisfaction and Employee Turnover Intention: What Does Organizational Culture Have to Do with It?* 3 (Fall 2012) (unpublished M.A. thesis, Columbia University), <http://hdl.handle.net/10022/AC:P:19055>; see also Chan M. Hellman, *Job Satisfaction and Intent to Leave*, 137 J. SOC. PSYCH. 677, 684 (1997) (conducting a meta-analysis and concluding that "the relationship between job satisfaction and intent to leave is significantly different from zero and consistently negative for studies conducted in the United States. The more dissatisfied employees become, the more likely they are to consider other employment opportunities.").

<sup>77</sup> Matthew O'Connell & Mei-Chuan Kung, *The Cost of Employee Turnover*, 49 INDUS. MGMT. 14, 14 (2007).

<sup>78</sup> *Id.* at 15.

<sup>79</sup> Helen Russell, Philip J. O'Connell & Frances McGinnity, *The Impact of Flexible Working Arrangements on Work-Life Conflict and Work Pressure in Ireland* 14 (Econ. & Soc. Res. Institute, Working Paper No. 189, 2007), <http://hdl.handle.net/10419/68001>.

<sup>80</sup> Joseph G. Grzywacz, Dawn S. Carlson & Sandee Shulkin, *Schedule Flexibility and Stress: Linking Formal Flexible Arrangements and Perceived Flexibility to Employee Health*, 11 COMMUNITY WORK & FAM. 199, 199 (2008).

<sup>81</sup> Reagan Baughman, Daniela DiNardi & Douglas Holtz-Eakin, *Productivity and Wage Effects of "Family Friendly" Fringe Benefits*, 24 INT'L J. MANPOWER 247, 247 (2003).

<sup>82</sup> Joseph G. Grzywacz, Patrick R. Casey & Fiona A. Jones, *The Effects of Workplace Flexibility on Health Behaviors: A Cross-Sectional and Longitudinal Analysis*, 49 J. OCCUPATIONAL & ENVTL. MED. 1302, 1306 (2007).

<sup>83</sup> *Id.* at 1308.

<sup>84</sup> Golden, *supra* note 11, at 13–14.

60% of respondents reported that flexible work was more cost efficient than fixed working schedules.<sup>85</sup>

Perhaps most intriguing about flextime is that it has the potential to generate a productivity surplus that can be shared between employers and employees. In theory, the cost of workplace flexibility for an employer should be at or near zero.<sup>86</sup> Wages and benefits are in theory merely trade-offs in compensation.<sup>87</sup> Workplace conditions such as employee-preferred flexibility in working time are therefore economically equivalent to other mandated employment benefits such as health insurance, sick leave, bonuses, or protections from discharge. In a competitive labor market, employers can provide these benefits, but costs associated with those benefits will be borne by the employee. Wages should therefore decline under these conditions to compensate for the cost of the flexible working time benefit provided.

Practice does not necessarily match with the theory. A broad empirical consensus on the impact of workplace flexibility on wages remains unclear.<sup>88</sup> However, when employee-desired flexible working time schedules are implemented in practice, wages have been found to either increase or remain unchanged. One study found no wage change for men, but a wage increase for women, associated with use of flextime.<sup>89</sup> Another study found that while professional women received increase wages under a flexible working time arrangement, wages for men did not change.<sup>90</sup> Preferences for working time

<sup>85</sup> REGUS GLOBAL GROUP, FLEXIBLE WORKING GOES GLOBAL 2 (Mar. 2011), [http://www.regus.cn/images/Regus%20Whitepaper%20Flexible%20Working%20150311\\_tcm307-39644.pdf](http://www.regus.cn/images/Regus%20Whitepaper%20Flexible%20Working%20150311_tcm307-39644.pdf).

<sup>86</sup> This is based on the Coase principle, which explains that if property rights are clearly defined and can be transferred without transaction cost, then distribution of property rights shifts, but does not fundamentally change, economic efficiency. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

<sup>87</sup> See generally Stephen A. Woodbury, *Substitution Between Wage and Nonwage Benefits*, 73 AM. ECON. REV. 166 (1983); Sherin Rosen, *Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition*, 82 J. POL. ECON. 34 (1974).

<sup>88</sup> Katie L. Winder, *Flexible Scheduling and the Gender Wage Gap*, 9 B.E. J. ECON. ANALYSIS & POL'Y 1, 6 (2009) (“[I]t seems that we are far from consensus on either the sign, magnitude, or cause of the relationship between flexibility and wages.”); see also Elaine McCrate, *Flexible Hours, Workplace Authority, and Compensating Wage Differentials in the US*, 11 FEMINIST ECON. 11, 13–14 (2005) (reporting earlier studies showing mixed results).

<sup>89</sup> Bonnie Sue Gariety & Sherill Shaffer, *Wage Differentials Associated with Flextime*, 124 MONTHLY LAB. REV. 68, 68 (2001).

<sup>90</sup> Nancy Johnson & Keith Provan, *The Relationship Between Work/Family Benefit and Earnings: A Test of Competing Predictions*, 24 J. SOCIO-ECON. 571, 580 (1995). The authors did find a negative wage effect associated with non-professional women. *Id.* The negative wage effect may be in part because flextime schedules represent an opportunity for exploitation of vulnerable worker groups by the employer. See Judith Warner, *When ‘Flex Time’ Means Ripping Off Workers*, TIME (May 3, 2013), <http://ideas.time.com/2013/05/03/when-flex-time-means-ripping-off-workers/> (“For low-wage workers, however, flexibility all too often means being at

flexibility may also vary according to employee characteristics.<sup>91</sup> Women, employees with children under school age, and older workers may place a higher value on flexible working time than other workers.<sup>92</sup>

One reason for the observed wage effects may be because flextime generates a productivity surplus that is shared between the employer and employee. This gift-exchange effect, as termed by George Akerlof, posits that some firms may indeed pay their employees more than the market-clearing wage would demand.<sup>93</sup> This seems counterintuitive, as firms should not pay any more than they need to satisfy their labor requirements.<sup>94</sup> In return, however,

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the beck and call of employers. These workers can be—and often are—sent home on a moment’s notice (and without pay) when business is slow. They are told to cancel long-scheduled personal days if business picks up, and are sometimes threatened with immediate firing if they can’t stay late at work for last-minute overtime because they need to get home to their families.”).

<sup>91</sup> Two authors present a simple example of how heterogeneous preferences for flexible working time might manifest:

Imagine two employees: one is a chess player during his leisure time and the other likes to windsurf. Windsurfing depends on the weather and the windsurfer therefore places more value on flexible working time vis-à-vis the chess player . . . [T]he windsurfer is more willing to trade-off wage earnings for flex-time compared to the chess player.

Thus, hedonic compensation theory tells us that willingness to pay for fringe benefits and job amenities varies with employee type, and that firms can try to make the workers it desires self-sort as employees to the firm by choosing appropriate wage-benefit combinations.

Tor Eriksson & Nicolai Kristensen, *Wages or Fringes? Some Evidence on Trade-offs and Sorting* 6 (Inst. for the Study of Labor, Discussion Paper No. 5309, Nov. 2010), <http://ftp.iza.org/dp5309.pdf>.

<sup>92</sup> *Id.* at 18.

<sup>93</sup> George Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q. J. ECON. 543, 543 (1982).

<sup>94</sup> George Akerlof, *Gift Exchange and Efficiency-Wage Theory: Four Views*, 74 AM. ECON. REV. 79, 79 (1984) (“A view that any buyer should willingly pay more than necessary to any seller seems highly counterintuitive in the paradigm of standard economics, which is that of supply and demand.”). Akerlof explains how such a gift-exchange might manifest:

Why should there be any portion of labor that is given as a gift by the firm or of treatment of the worker by the firm that can be considered a gift? The answer to this question is at once trivial and profound. Persons who work for an institution (a firm in this case) tend to develop sentiment for their co-workers and for that institution; to a great extent they anthropomorphize these institutions (e.g., “the friendly bank”). For the same reasons that persons (brothers, for example) share gifts as showing sentiment for each other, it is natural that persons have utility for making gifts to institutions for which they have sentiment.

Akerlof, *supra* note 93, at 550.

workers are expected to supply greater effort.<sup>95</sup> Instead of price, the relationship and the exchange is based at least in part on workplace norms. Norms in a workplace are often prevalent and complex, and may be able to capture the actual terms of an employment relationship better than any written contract.<sup>96</sup> Applied to flextime, employers invest in employees by introducing flexible scheduling that employees prefer. Employees, in turn, reward the employer for introducing that flextime by being more productive and reducing costs of labor such as absenteeism and turnover. Employers then in turn reward the employee with higher wages that arise from the financial gains that flextime provides. The result is that flextime should not impose costs, but rather create value that benefits the employer and its employees.

#### IV. FRICTIONS IMPEDING THE ADOPTION OF FLEXIBLE WORKING TIME

Given the potential that flexible scheduling holds, one would expect that its adoption would be quite common. Yet, evidence of the broad adoption of successful flextime programs remains far from certain. The question remains, why do employers avoid flexible scheduling, in spite of its likely benefits. For some companies, the adoption of flextime is simply common sense.<sup>97</sup> However, for other firms it may require a real change in thinking.<sup>98</sup> The key for employers, then, is to overcome these frictions in information.

Employers must overcome a number of informational and attitudinal barriers that impede the adoption of successful flexible programs. First, employers should not simply reflexively mimic the workplace practices of other firms. Institutional theory predicts that firms will follow one another as practices in the industry become established and obtain their own inherent

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<sup>95</sup> Akerlof, *supra* note 93, at 543–44. This concept is fundamentally different than a pure market exchange whereby the maximum price that an employer would be willing to pay for labor would be the minimum price by which it can be obtained. *See id.* at 567–68.

<sup>96</sup> *See, e.g.*, Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 149 (2005) (“[E]mployment norms capture the complete terms of employment better than legal contracts ever can.”); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (describing how employers promote norms and signal adherence to them); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 94–95 (2000) (noting key importance of workplace norms).

<sup>97</sup> *See supra* note 59 and accompanying text.

<sup>98</sup> Audrey Adelson, *Reasons to Implement a Flexible Work Environment*, EMORY: WORKLIFE RES. CTR. (Aug. 8, 2013), <http://www.worklife.emory.edu/worklife/workplaceflexibility/news/ReasonstoImplementaFlexibleWorkEnvironment.html> (“Making a case for workplace flexibility is common sense to some, but for others it can be a real shift in thinking about how, where and when work is done.”).

value simply because they have existed over time.<sup>99</sup> Firms may find it easier to copy other organizations than innovate because such innovations may be painful or disruptive.<sup>100</sup> Established practices may also have their own social legitimacy and, through that legitimacy, exert a pressure to conform.<sup>101</sup> For example, while the nine-to-five, five-day work week may have a variety of advantages, one of the reasons that it is so well established is simply because of its longevity.<sup>102</sup> Important firm behaviors such as the initiation of merger activity and the adoption of organizational form have been credited, in part, to imitative conduct.<sup>103</sup> The imitation impulse may even be so strong that it explains the likelihood of a layoff better than economic measures such as profitability.<sup>104</sup> Imitation can be a strong force keeping flexible working time schedules off the corporate agenda. This need for imitation, which may arise consciously or exist simply because of inertia, must be overcome. Firms must not retain fixed-schedule practices simply because of inertia or because rival firms have rigid scheduling.

A second barrier may be the pressures exerted by investors through capital markets. Such markets may not be particularly sympathetic to, or interested in, flexible work arrangements.<sup>105</sup> Investors may perceive the organizations they own through a distant lens of stock price and quarterly earnings. The firm's physical plant, let alone its employees, is almost never seen regularly by anonymous and distant financial interests. Executives taking a company public have expressed concern about this effect. In meetings with top executives at a large software firm, executives confided that its generous employment benefits would be at risk when the firm went public because the investment community considered such expenditures to be "a waste of

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<sup>99</sup> Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 148 (1983).

<sup>100</sup> *Id.* at 155.

<sup>101</sup> Jeffrey Pfeffer, *Human Resources from an Organizational Behavior Perspective: Some Paradoxes Explained*, 21 J. ECON. PERSP. 115, 126 (2007).

<sup>102</sup> The five-day work week was first popularized with its adoption by Henry Ford in 1927 and was subsequently reinforced by Depression-era government legislation. Hellriegel, *supra* note 30, at 40.

<sup>103</sup> Lawton R. Burns & Douglas R. Wholey, *Adoption and Abandonment of Matrix Management Programs: Effects of Organizational Characteristics and Interorganizational Networks*, 36 ACAD. MGMT. J. 106, 106 (1993); Pamela R. Haunschild, *How Much Is That Company Worth? Interorganizational Relationships, Uncertainty, and Acquisition Premiums*, 39 ADMIN. SCI. Q. 391, 391 (1994); Pamela R. Haunschild, *Interorganizational Imitation: The Impact of Interlocks on Corporate Acquisition Activity*, 38 ADMIN. SCI. Q. 564, 564 (1993).

<sup>104</sup> Art Budros, *The New Capitalism and Organizational Rationality: The Adoption of Downsizing Programs, 1979-1994*, 76 SOC. FORCES 229, 247 (1997).

<sup>105</sup> Pfeffer, *supra* note 101, at 127.



money.”<sup>106</sup> This was believed to be true even though the firm benefited from turnover one-quarter that of its rivals, saving the firm millions in costs.<sup>107</sup> The very idea of workplace flexibility to quantitatively-driven and short-term-oriented capital markets may seem little more than a costly employee entitlement. Managers may have to educate a skeptical market about the benefits of flexible working time.

Third, employers should rethink the costs and benefits of flextime by heeding the readily available information in support of adopting flextime. The administrative costs of flexible time schedules, and the short-term restructuring that may need to take place, can be highly visible to a firm’s leadership. Flextime may require the attention of an already overburdened human resources staff. There is also a learning curve that must be overcome by managers. Supervisors may complain about the short-term inconvenience that flextime may impose. By contrast, the potential benefits from flexible time schedules, such as increased productivity and reduced turnover, take longer to manifest and require significant data mining to perceive.<sup>108</sup> The result is that, while the costs will be highly salient, the benefits will not be, resulting in a reluctance to undertake any initiative even if it would add value over time.

Fourth, employers must better interact with employees and their representatives to ascertain their needs and expectations for flextime. Unions traditionally held this representative role. A study of 897 unionized workers across eight establishments found that when unions effectively support schedule needs, individual access to flextime, compressed schedules, and gradual return to work, options increase.<sup>109</sup> This effect has been found globally as well as in the United States.<sup>110</sup> However, unions, the traditional defender of employees, have lost considerable influence over the past 50 years.<sup>111</sup> Unions have been credited with reducing the standard workweek from six to five days,<sup>112</sup> reducing daily work hours,<sup>113</sup> and promoting family-friendly policies.<sup>114</sup> The decline of union leadership may result in less pressure on

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 128.

<sup>109</sup> Peter Berg et al., *Work-Life Flexibility Policies: Do Unions Affect Employee Access and Use?*, 67 *INDUS. & LAB. REL. REV.* 111, 133 (2014).

<sup>110</sup> Peter Berg et al., *Contesting Time: International Comparisons of Employee Control of Working Time*, 57 *INDUS. & LAB. REL. REV.* 347, 347 (2004).

<sup>111</sup> See generally Benjamin I. Sachs, *The Unbundled Union: Politics without Collective Bargaining*, 123 *YALE L.J.* 148, 176–77 (2013).

<sup>112</sup> Robert C. Bird, *The Four-Day Work Week: Old Lessons, New Questions*, 42 *CONN. L. REV.* 1059, 1064 (2010).

<sup>113</sup> *Id.*

<sup>114</sup> John W. Budd & Karen Mumford, *Trade Unions and Family-Friendly Policies in Britain*, 57 *INDUS. & LAB. REL. REV.* 204, 204 (2004).

management to listen to workers. What once arose from union pressure must now arise from proactive management leadership.

Fifth, managers must change their cynical assumptions about employee behavior. Some managers assume that employees are inherently “effort adverse,” meaning that employees will exploit any changes in working time to minimize their effort given to their job.<sup>115</sup> This viewpoint is a manifestation of Theory X, which is a management theory that assumes employees will try to avoid work whenever possible.<sup>116</sup> Arising from this theory is the belief that management must introduce substantial incentive and punitive controls in order to extract productivity from its workers.<sup>117</sup> Strict and constant supervision, anathema to the notion of flextime, is necessary to avoid shirking.<sup>118</sup> Theory Y, by contrast, assumes that management must have confidence in human capacities and provide the tools to employees to empower them to succeed.<sup>119</sup>

Managers who follow Theory X may be less likely to make long-term or intangible investments in their employees. They may believe that such investments, such as flextime, will encourage workers to avoid work and neutralize productivity rewards.<sup>120</sup> Such an attitude, however, causes these prophecies to become self-fulfilling as workers feel underappreciated by their managers, thereby seeing little need to do more than the minimum for their employer.<sup>121</sup>

Finally, and perhaps most fundamentally, employers must get employees to trust them. There is a widespread belief that supervisors view workers more as commodities than whole persons worth long-term investment. Distrust of management by employees, which may have been in part created by employer indifference, is “pervasive.”<sup>122</sup> One study found that over half of all employees disbelieve information they receive from senior management.<sup>123</sup> Waves of layoffs and downsizing have increased the perception of the employee as an interchangeable unit of production.<sup>124</sup> Broken promises regarding pensions and health insurance have further eroded employee mistrust. Poor treatment of a workforce can not only erode morale, but create mistrust in

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<sup>115</sup> Pfeffer, *supra* note 101, at 129.

<sup>116</sup> Gregory S. McNeal, *Organizational Theory and Counterterrorism Prosecutions: A Preliminary Inquiry*, 21 REGENT U. L. REV. 307, 318–19 (2008). *See generally* DOUGLAS MCGREGOR, *THE HUMAN SIDE OF ENTERPRISE* (1960) (introducing Theory X).

<sup>117</sup> McNeal, *supra* note 116, at 318–19.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 319. Pfeffer, *supra* note 101, at 128.

<sup>120</sup> Pfeffer, *supra* note 101, at 128.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 116.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

the very employers that are responsible for implementing the trust-eroding policies. Executives make decisions based upon their assumptions about people and organizations.<sup>125</sup> If the assumption exists that employees are replaceable and that firms have little responsibility for their broader welfare, then there would be little motivation to build a flextime environment for employees.

This lack of trust can cause employees to resist utilizing flexible working time schedules even if it would be directly beneficial to them. One of the main reasons is that, even though a formal policy sanctioning flexible schedules may be available, employees may believe that requesting flextime can damage their career. A study of four government agencies revealed through interviews that, although formally available, managers perceived flextime as a real threat and have made their feelings clear to employees.<sup>126</sup> An employee reported that “the theory is that [flexible scheduling is] there, the reality of it is that it really depends on your manager.”<sup>127</sup>

Employees, thus, perceive flextime requests as a substantial risk. Asking the wrong manager could result in a rebuke. Under such conditions it makes little sense for employees to even ask at all. Even managers themselves may feel the pressure to not use flextime. One managerial-level employee who requested purchased leave time was told by her superior, “You’re a manager and paid to manage, not to take holidays.”<sup>128</sup> Managers were expected to “give blood, work all the hours, days and nights, run around and look traumatized and things like that.”<sup>129</sup> One executive director flat out refused to let managers take flextime, reasoning that “[i]magine if someone was out on the ocean sailing their boat and we needed to contact them.”<sup>130</sup>

When lower managers and employees approve or utilize flextime, they may do so only by “keep[ing] it a secret from higher up.”<sup>131</sup> Direct supervisors may support flextime requests, whereas management at the regional level may regularly deny them.<sup>132</sup> The result was low- and middle-level managers who were supportive of flextime felt reluctant to grant it without clear support from senior management.<sup>133</sup> Senior management, in turn, would declare their commitment to work-life balance but would do little to convert their rhetoric

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<sup>125</sup> *Id.* at 128.

<sup>126</sup> Patricia Todd & Jennifer Binns, *Work-Life Balance: Is It Now a Problem for Management?*, 20 GENDER WORK & ORG. 219, 226 (2013).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 227.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 226.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 229.

into practice.<sup>134</sup> Employees would have little reason to rely on employer promises that flextime can be used openly and without retaliation.<sup>135</sup>

Even when management is not directly discouraging flextime, a widespread perception exists that requesting it is a poor career choice.<sup>136</sup> Forty percent of employees and 60% of female employees believed that using flextime or otherwise taking time off for family reasons would negatively affect future career opportunities.<sup>137</sup> Another survey reported 25% of respondents believed their careers would be negatively affected if they took advantage of work-family policies.<sup>138</sup> This result is, even if the employer has not explicitly discouraged flextime, managers will need to take affirmative steps to build trust. Employees will need to trust employers to believe that flextime is a genuine work option and its use does not carry with it the scarlet letter of lack of commitment to one's future in the organization. It is imperative that employers build that trust before introducing a flextime initiative.

#### V. SUBSTANTIAL CONTROL OF FLEXTIME MUST REMAIN WITH THE EMPLOYEE

Not only must attitudes change amongst relevant stakeholders, flextime programs must be implemented properly for employers to benefit. Unfortunately, not all flexibility is good flexibility. Positive effects of flextime can disappear when too much flexibility is introduced into the work schedule.<sup>139</sup> Productivity gains can be offset by the extra control needed to track the hours worked by employees.<sup>140</sup> Inconsistent employee presence at work during set hours can inhibit communication between employees as well as the formation of cooperative teams.<sup>141</sup> If tasks are highly interdependent, performance can suffer as delays arise from schedule conflict and the limited

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Employees may also believe that by requesting flextime they are letting down their co-workers who need to complete important tasks. This may be especially true when workers act in teams, and the absence of a single member at a critical moment can impede overall goals. As one employee offered, "you feel guilty about taking holidays because you know you are leaving a lot of work for the rest of the people in your team." *Id.* at 228.

<sup>136</sup> See Lisa Leslie et al., *Flexible Work Practices: A Source of Career Premiums or Penalties?*, 55 ACAD. MGMT. J. 1407, 1407 (2012) (finding under certain circumstances that utilization of flexible work practices can result in career penalties).

<sup>137</sup> CYNTHIA L. NEGREY, *WORK TIME: CONFLICT, CONTROL, AND CHANGE* 116 (2012).

<sup>138</sup> Susan C. Eaton, *If You Can Use Them: Flexibility Policies, Organizational Commitment, and Perceived Performance*, 42 INDUS. REL. 145, 155 (2003).

<sup>139</sup> Baltes et al., *supra* note 71, at 508.

<sup>140</sup> *Id.* (citing Sally A. Coltrin & Barbara D. Barendse, *Is Your Organization a Good Candidate for Flextime?*, 60 PERSONNEL J. 712 (1981)).

<sup>141</sup> *Id.* at 509.

opportunity for management supervision.<sup>142</sup> Flexibility can also increase electricity, heating, and air conditioning costs as the workplace must remain open for longer hours to accommodate early and late schedules.<sup>143</sup> The firm's industry may be poorly suited to non-fixed scheduling, management may be indifferent to the task, or poor tracking of its use may impair productivity.

Out of the various pitfalls, one characteristic appears to most influence the success of flexible scheduling, and that is employee control. Employee control means the ability of individual workers to alter their work schedule, through increasing or decreasing hours, within the guidelines of a flexible scheduling program.<sup>144</sup> Employee control also means the ability of workers to make decisions according to their non-work needs and preferences, such as vacations, health matters, or other personal obligations.<sup>145</sup>

Employee control also means participation in the design of the flextime program itself. In developing FTB's successful work-life program, the chairman videotaped himself burning the attendance policy and gave his employees the discretion to figure out their own attendance policies.<sup>146</sup> Human resources "pulled itself completely" out of the development process, leaving employee workgroups to design policies in cooperation with their managers.<sup>147</sup> Involving employees in the design and management of the flextime programs enshrines a commitment to the program's goal, reinforces ownership of the flextime process, and helps improve results for the enterprise.<sup>148</sup>

The substantial impact of employee control can be observed most acutely in studies where that control is taken away. In one survey of workers with limited control over their hours, 44% of workers who worked more hours than they wish experience high levels of feeling overworked at their job.<sup>149</sup> Overworked employees report making more mistakes at work.<sup>150</sup> They also feel

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

<sup>143</sup> See generally Sally A. Coltrin & Barbara D. Barendse, *Is Your Organization a Good Candidate for Flextime?*, 60 PERSONNEL J. 712 (1981).

<sup>144</sup> Berg et al., *supra* note 110, at 331–32.

<sup>145</sup> DGJ Beckers et al., *Worktime Control: Theoretical Conceptualization, Current Empirical Knowledge, and Research Agenda*, 38 SCANDINAVIAN J. WORK. ENV'T & HEALTH 291, 291 (2012).

<sup>146</sup> Flynn, *supra* note 46, at 70.

<sup>147</sup> *Id.*

<sup>148</sup> WFD CONSULTING, INNOVATIVE WORKPLACE FLEXIBILITY OPTIONS FOR HOURLY WORKERS 11–12, [http://www.wfd.com/PDFS/Innovative\\_Workplace\\_Flexibility\\_Options\\_for\\_Hourly\\_Workers.pdf](http://www.wfd.com/PDFS/Innovative_Workplace_Flexibility_Options_for_Hourly_Workers.pdf).

<sup>149</sup> ELLEN GALINSKY, STACY S. KIM & JAMES T. BOND, FEELING OVERWORKED: WHEN WORK BECOMES TOO MUCH 7 (2001), [http://familiesandwork.org/downloads/feelingoverworked\\_summ.pdf](http://familiesandwork.org/downloads/feelingoverworked_summ.pdf).

<sup>150</sup> *Id.* at 11.

angry toward their employers for expecting too much.<sup>151</sup> Employees subject to controlling overwork are also more likely to seek employment elsewhere.<sup>152</sup> Employees also feel personal pressure at home and find family relationships impaired, sleep lost, higher levels of stress, and lower ability to cope with everyday life events.<sup>153</sup>

Other empirical work reinforces these findings.<sup>154</sup> In a survey of approximately 2,900 full-time employees, respondents reported that lack of schedule control had a substantial negative impact on a number of family and health outcomes, including lack of work-life balance, burnout, distress, job dissatisfaction, minor physical problems, and general health.<sup>155</sup> As the authors stated, “control over scheduling matters a great deal. Of the eight family and health outcomes examined in this article, control over scheduling had highly significant ( $p=.001$ ) positive effects on six. Moreover, as suggested in the job and personal control literature, control matters for all workers in the labor force.”<sup>156</sup> These effects were felt regardless of whether workers were performing standard or non-standard shifts, and did not vary systematically by gender or family status.<sup>157</sup> As the authors rightly concluded “[j]ust as workers in general benefit from control over how they do their work, regardless of what work they do, so they also benefit from control over when they work, regardless of the actual clock times they work.”<sup>158</sup>

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> For a useful review of current thinking on work scheduling control, including key empirical results, see Beckers et al., *supra* note 145.

<sup>155</sup> Rudy Fenwick & Mark Tausig, *Scheduling Stress: Family and Health Outcomes of Shift Work and Schedule Control*, 44 AM. BEHAV. SCI. 1179, 1188 (2001); see also Tomohide Kubo et al., *Effects on Employees of Controlling Work Hours and Working Schedules* 63 OCCUPATIONAL MED. 148, 150–51 (2013) (finding that “a combination of high personal control over work-time and low variability of working times was associated with desirable effects on self-reported sleep quality, fatigue recovery and work–life balance”). For a cross-national comparison of the degree of workers’ control over the hours and timing of their work, see Berg et al., *supra* note 110; see also Karen S. Lyness et al., *It’s All About Control: Worker Control over Schedule and Hours in Cross-National Context*, 77 AM. SOC. REV. 1023, 1023 (2012).

<sup>156</sup> Fenwick & Tausig, *supra* note 155, at 1194.

<sup>157</sup> Lyness, *supra* note 155, at 22. However, women may be particularly vulnerable to the lack of control over working time. As one study found:

We generally found across countries that hours excess (overwork) is linked more strongly for women than men . . . suggesting that lack of control over work hours has greater negative consequences for women, both in terms of impact of work on their lives outside of work and their attitudes about their jobs and organizations.

*Id.* See generally Schultz, *supra* note 1 (discussing feminism and workplace flexibility).

<sup>158</sup> Fenwick & Tausig, *supra* note 155, at 1194.

Perhaps the most problematic action that an employer can take is to institute a 'flextime' program as an efficiency enhancing measure that manipulates work schedules entirely according to the needs of the firm. Such a program is known charitably as organization-centered flexibility, which uses changes in working time to increase outputs of the firm through the manipulation of its labor.<sup>159</sup> Organization-centered flexibility is generally solely under the administration and control of management, invites no participation from employees, and gives limited consideration to worker well-being.<sup>160</sup> Firms that redistribute labor from part-time to full-time at whim, institute arduous shiftwork schedules,<sup>161</sup> or increase or reduce working hours without warning generally typify this practice.

Organization-centered flexibility may be useful for keeping decision options open that require substantial labor, or for generating opportunities in new markets that compel variable scheduling. However, this is not the kind of workplace flexibility, or flextime, contemplated by the majority of researchers who study the practice.<sup>162</sup> Such a practice is not only potentially deceptive to employers who might misinterpret its intention, but it also has a dubious track record of success. Employees subjected to organization-centered flexible scheduling reported experiencing increased time pressure, mental strain, and occupational risk.<sup>163</sup> Organization-centered flexible scheduling can also increase employee turnover and negatively impact a firm's bottom line.<sup>164</sup> Organization-centered flexible scheduling is not really flextime at all, but rather a variable scheduling practice that can substantially burden employees.

While in some cases, firm-oriented programs can deliver positive efficiency outcomes to firms,<sup>165</sup> in many others, substantial productivity gains remain unachieved.<sup>166</sup> At best, firms will witness little change in their workforce from the firm-oriented program. At worst, workers will be subjected to overwork, stress, injuries, and reduced productivity. Shifts that are

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<sup>159</sup> Hill et al., *supra* note 2, at 150–51.

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

<sup>161</sup> See Robert C. Bird & Niki Mirtorabi, *Shiftwork and the Law*, 27 BERK. J. EMPL. & LAB. L. 383, 384 (2006) (discussing the negative impacts of shift schedules).

<sup>162</sup> See Ian Combe & Gordon E. Greenley, *Capabilities for Strategic Flexibility: A Cognitive Content Framework*, 38 EURO. J. MARKETING 1456, 1457 (2004); see also Dastmalchian & Blyton, *supra* note 2, at 1.

<sup>163</sup> Philippe Askenazy & Eve Caroli, *Innovative Work Practices, Information Technologies, and Working Conditions: Evidence for France*, 49 INDUS. REL. 544, 561 (2010).

<sup>164</sup> Byoung Hoon-Lee & Jong-Sung Kim, *Is Family-friendly Management Good for Firms? The Diffusion and Performance of Family-friendly Workplaces in South Korea*, 52 J. INDUS. REL. 459, 472–73 (2010); Byron Y. Lee & Sanford E. DeVoe, *Flextime and Profitability*, 51 INDUS. REL. 298, 312 (2012).

<sup>165</sup> Golden, *supra* note 11, at 13 (citing Wolf & Belbo, *supra* note 15).

<sup>166</sup> See *supra* note 164.

unpredictable, onerous, or are fully at the discretion of the employer are neither employee-friendly nor optimally productive. While the potential for employer and employee benefit is substantial, genuine employee control over flexible scheduling can make the difference between gains and losses for both employers and employees.

## VI. EMPLOYERS CAN AVOID FLEXTIME DISPUTES

Flexible workplace programs can be perceived as a considerable legal risk.<sup>167</sup> Compared with the legal exposure associated with traditional employment practices, however, such as hiring, firing, and promotion, the legal risks arising from flextime are relatively low. The most obvious source of regulation of flextime would be the Fair Labor Standards Act (FLSA).<sup>168</sup> The most prominent features of the FLSA established a minimum wage, restricted child labor, and required employers to pay an overtime rate for work surpassing 40 hours in a given week.<sup>169</sup> Flextime would be a natural outgrowth of the FLSA, but drafters in the 1930s could not have possibly predicted the modern service economy and family life that makes flextime so demanding.<sup>170</sup> 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 the two-working-parent household.<sup>171</sup> As a result, the FLSA today does not address flexible schedules, and the

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<sup>167</sup> See, e.g., Gillian Flynn, *The Legalities of Flextime*, WORKFORCE (Oct. 7, 2001), <http://www.workforce.com/articles/the-legalities-of-flextime>.

<sup>168</sup> Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19 (2012)).

<sup>169</sup> *Id.*; see also Jennifer Clemons, *FLSA Retaliation: A Continuum of Employee Protection*, 53 BAYLOR L. REV. 535, 535–36 (2001).

<sup>170</sup> Enacted in 1938, the FLSA served a manufacturing-dominated economy and shift schedules tied to a set “whistle to whistle” schedule. See, e.g., 29 C.F.R. § 790.6 (2015). As one article describing a shoe factory in the early twentieth century highlights:

The making of shoes may be likened to a race. There are two races every working day. The first race 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.

*The Foreman Who Never Starts*, 136 SHOE AND LEATHER REP. 73, 74 (1919).

<sup>171</sup> See Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119, 151 (2012) (“The history of the FLSA demonstrates that entangled within the regulation of labor was a vision of who should work in the market, and of the nature of family. Looking closely at this entangled history, it becomes evident that labor legislation did much more than regulate hours and wages. It regulated family.”).



Department of Labor leaves such scheduling to private employment agreements.<sup>172</sup>

Other laws provide similarly scant protection. The Family and Medical Leave Act (FMLA)<sup>173</sup> is not flexible enough to account for flextime programs. The closest protection that the FMLA provides is for intermittent leave, which is intended for separate blocks of time that modify the otherwise fixed work day.<sup>174</sup> The FMLA is not intended for flexible scheduling, and courts have rejected plaintiffs' attempts to argue that a request for a flexible schedule constitutes a request for FMLA leave.<sup>175</sup> Similarly, although a flexible schedule is not an inherently unreasonable accommodation pursuant to the Americans with Disabilities Act (ADA),<sup>176</sup> only employees with a qualified disability can avail themselves of the statute. Flextime is only protected to the extent it functions as a reasonable accommodation for the employee to perform the essential functions of their job. From the perspective of the employer, flextime does not present extraordinary direct legal exposure.<sup>177</sup>

However, employers are vulnerable to indirect legal exposure arising from employees' strongly negative reaction to perceived mistreatment under flextime programs. Employees do not judge employer-employee fairness simply by what the law permits the employer to do. Instead, employees commonly carry with them a personal sense about right and wrong. If employees feel they have been treated unfairly, it is also likely that they will conclude the treatment is illegal, and act accordingly. Workers have already been found to hold inflated expectations of employment protections at work, with one survey reporting that a substantial majority of respondents believed they had protection from discharge more akin to just cause than employment at will.<sup>178</sup>

These inflated perceptions create what is known as an employee's psychological contract with her employer. A psychological contract is an employee's perception of mutual obligations that an employer and an employee

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<sup>172</sup> *Flexible Schedules*, U.S. DEP'T OF LAB., <http://www.dol.gov/compliance/topics/wages-other-flex.htm> (last visited Sept. 16, 2015).

<sup>173</sup> Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§2601–2655 (2012)).

<sup>174</sup> See 29 C.F.R. § 825.202(a) (2015).

<sup>175</sup> See *Giles v. Christian Care Ctrs., Inc.* 1997 WL 786256 (N.D. Tex. Dec. 11, 1997).

<sup>176</sup> 42 U.S.C. § 12111(9)(B) (2012).

<sup>177</sup> See Bird, *supra* note 6 (manuscript at 24). From the perspective of the some employees, policymakers, or academics, the lack of legal protection for flextime could be seen as woefully insufficient to protect employees from abusive practices.

<sup>178</sup> See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 136 (1997).

have with one another.<sup>179</sup> Psychological contracts are not legal obligations, but rather an employee-held set of beliefs that an employer will act a certain way based upon past practices and promises.<sup>180</sup> Psychological contracts are not merely worker fantasy, however, as they are often grounded on statements made by the employer and a well-developed sense of fairness and justice that an employee possesses. Psychological contracts may also be a source of improved productivity, as employees maintain elevated production and fewer complaints when informally expected norms of fair pay and treatment are followed by management.<sup>181</sup>

When flextime initiatives are irrationally or unfairly implemented, employees experience a violation of their psychological contract with their employer.<sup>182</sup> When employees feel unjustly treated, their likelihood of retaliation against the firm increases through negative statements, sabotage, and litigation.<sup>183</sup> When managers respond directly to requests for work-life balance, as they did at a public-sector agency that had a work-life policy, with the dismissive, “[o]h no, we don’t do that crap. We don’t have time,”<sup>184</sup> employees who badly need the flexibility can feel great frustration.

Employees who experience a breach of their psychological contract will often act in response to the breach. Some employees may quietly respond by lowering their productivity in ways that management cannot easily perceive. Other employees may consider their own interests over the needs of the firm when making business decisions. Still others may seek employment elsewhere to find a more favorable work climate.

The most public and costly response is to file a lawsuit against the employer for perceived legal violations arising from unjust treatment related to flextime. The employee may feel the need to validate that their belief was the correct one, extract retribution for unjust treatment, or lead a cause for public attention focusing on unfair employment practices. To the extent these wind their way through the judicial system, these disputes are no less costly than any

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<sup>179</sup> Jill Kickul & Scott W. Lester, *Broken Promises: Equity Sensitivity as a Moderator Between Psychological Contract Breach and Employee Attitudes and Behavior*, 16 J. BUS. & PSYCHOL. 191, 192 (2001).

<sup>180</sup> Psychological contracts also tend to be future-focused and more oriented toward the organization as a whole rather than individual managers. See Elizabeth Wolfe Morrison & Sandra L. Robinson, *When Employees Feel Betrayed: A Model of How Psychological Contract Violation Develops*, 22 ACAD. MGMT. REV. 226, 228 (1997).

<sup>181</sup> Bird, *supra* note 96, at 166.

<sup>182</sup> *Id.* at 213–14; see, e.g., Denise M. Rousseau, *Psychological and Implied Contracts in Organizations*, 2 EMP. RESP. & RTS. J. 121, 128–29 (1989).

<sup>183</sup> Larry A. DiMatteo, Robert C. Bird & Jason Colquitt, *Justice, Employment, and the Psychological Contract*, 90 OR. L. REV. 449, 512–13 (2011).

<sup>184</sup> Morrison & Robinson, *supra* note 180, at 228.

meritorious lawsuit. Furthermore, there is always the chance the employee will win by advancing a novel legal theory or facing a sympathetic jury.

The following sections examine cases where employees believed they were wronged due to flextime disagreements and filed legal claims against their employer. These cases are notable not simply for the flextime precedent they create, but for understanding how important it is that employers who implement flextime programs do so in a manner that is objective, transparent, and harmonious with the attitudes and sense of justice of the employees that will use them.

*A. Employer Inattention Leads to Employee Reaction: Kellar v. Summit Seating, Inc.*<sup>185</sup>

Flexible scheduling frequently means variable shift times, and giving the discretion to the employee of when to start and end work can be the basis of liability. As a general rule, the employer cannot simply accept the benefits of employee work without compensation.<sup>186</sup> The employer has an obligation to control the workplace to ensure that employees do not perform work when it does not want such work completed.<sup>187</sup> In *Kellar*, Susan Kellar regularly arrived at the employer's factory between 15 and 45 minutes before the start of her 5 a.m. shift.<sup>188</sup> According to Kellar, she would unlock doors, turn on lights, turn on the compressor, and punch in on her time clock.<sup>189</sup> Kellar would then prepare coffee for the rest of Summit's employees, review schedules, and distribute fabric and materials to her subordinate's workstations so that they could start work immediately without waiting for fabric.<sup>190</sup> After a brief break, Kellar would spend the remaining time preparing models for production, cleaning the work area, and checking patterns.<sup>191</sup> Although no one told her this was necessary, Kellar did so because it would have been "a hassle" to get her subordinates up and running by the 5 a.m. start time.<sup>192</sup>

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<sup>185</sup> 664 F.3d 169 (7th Cir. 2011).

<sup>186</sup> See, e.g., 29 C.F.R. § 785.13 (2011) ("[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them.").

<sup>187</sup> *Id.* ("The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so."); see also *Brennan v. Qwest Commc'ns Int'l, Inc.*, 727 F. Supp. 2d 751, 755–61 (D. Minn. 2010).

<sup>188</sup> *Kellar*, 664 F.3d at 172.

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

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 173.

The court found that Kellar's work was not *de minimis* and thus potentially qualified for FLSA compensable working time.<sup>193</sup> However, Kellar did not inform her superiors about her early arrival and also did not report paycheck errors or request additional overtime pay at the time.<sup>194</sup> The court found that Kellar's employer did not have actual or constructive knowledge of her pre-shift contributions, and was thus not liable for paying compensation under the FLSA.<sup>195</sup> Kellar did clock in early, but Summit managers had no reason to suspect that Kellar was acting differently than prevalent employee practice, which was to clock in early and socialize until shifts commenced.<sup>196</sup>

The *Kellar* case appears to be a close call for the employer. Courts often find that a question of fact exists regarding employer's knowledge of employee work in similar cases, thus opening the gates for trial.<sup>197</sup> The court affirmed the trial court's granting of summary judgment,<sup>198</sup> even though Kellar had clocked in consistently at the earlier time. If there was a modicum of notice to her supervisors, who in this apparently small firm were also owners of the corporation, Kellar may have survived summary judgment. The *Kellar* case shows how employers can remain vulnerable to unintended flexible scheduling and that monitoring is necessary to ensure that work performed is necessarily work desired by the employer.

What is most interesting about *Kellar* is the implicit narrative about the management of flextime and how inattentive employer conduct to flex practices can trigger unnecessary and costly litigation. Employees do not generally perceive work as only an anonymous wage for labor exchange, but also as a commitment to one's employer and an expression of personal pride.<sup>199</sup> Assuming Kellar's perspective is the accurate one, she was a highly committed employee who voluntarily arrived early to ensure the production would run smoothly at the beginning of the shift. Kellar went above and beyond what her managers wanted without asking and thought of the productivity of her workers over her own personal interests of only doing what was expected.<sup>200</sup> Kellar

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<sup>193</sup> *Id.* at 177.

<sup>194</sup> *Id.* at 173.

<sup>195</sup> *Id.* at 177.

<sup>196</sup> *Id.* at 177–78.

<sup>197</sup> Ogletree, Deakins, Nash, Smoak & Stewart, P.C., *Seventh Circuit Holds Employer Not Liable Under FLSA for Employee's Off-the-Clock Work*, INDIANA EAUTHORITY (Dec. 21, 2011), <http://old.ogletreedeakins.com/publications/2011-12-21/seventh-circuit-holds-employer-not-liable-under-flsa-employee's-clock-work>.

<sup>198</sup> *Kellar*, 664 F.3d at 178.

<sup>199</sup> See generally Bird, *supra* note 96 (defining employment as a relational contract forged by the behavior of the parties and arguing that the “maintenance of relational contract is essential for any successful organization”).

<sup>200</sup> *Kellar*, 664 F.3d at 172–73.

never complained and never demanded extra compensation.<sup>201</sup> Kellar displayed the classic expression of organizational citizenship, acting in a way that transcended her specific role obligations without a formal reward from the firm.<sup>202</sup> Organizational citizenship is a valuable personnel trait that is tied to higher productivity and loyalty<sup>203</sup> and all the more surprisingly present in a lower-wage manufacturing environment that might discourage this trait from appearing.

The married owner-managers of the firm, Ray and Sue Fink, were inattentive to their early shift workplace practices. The Finks arrived at the factory between 7 a.m. and 8 a.m., not bothering to arrive any earlier to interact with arriving employees and apparently not inquiring into early shift work practices, even though the Finks met with Kellar weekly to discuss production.<sup>204</sup> The Finks knew that Kellar was a good employee, promoting her from Cutter's Helper to Sewing Department Manager in 2004,<sup>205</sup> but apparently did not inquire or nurture further Kellar's work habits or work schedule. The flexible schedule did not arise through a formal program, but rather organically through the dedication of a hard-working employee and the complicit inattention of her owner-managers. Under this narrative, the Finks mismanaged their employee and their working time practices and wound up litigating against a once highly-productive and committed employee.

There is, however, a counter-narrative to the *Kellar* case. Mamie Spice, Kellar's co-worker and sister, stated that Kellar "never performed any work at all."<sup>206</sup> According to Spice, the sisters would instead arrive early and drink coffee until the start of their shifts.<sup>207</sup> Indeed, many fellow employees clocked in early and socialized until their shifts began.<sup>208</sup> Kellar also stated that she arrived early, among other reasons, to receive deliveries prior to the shift's start at 5 a.m.<sup>209</sup> However, deliveries at Summit never arrived before 5 a.m..<sup>210</sup> From this perspective, Kellar was not a high-commitment employee but simply "came in early because it was convenient for her and she engaged in activities

<sup>201</sup> *Id.* at 173.

<sup>202</sup> See Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1196 n.59 (2010).

<sup>203</sup> *Id.* at 1196.

<sup>204</sup> *Kellar*, 664 F.3d at 173.

<sup>205</sup> Brief of Plaintiff at 10, *Kellar*, 664 F.3d 169 (7th Cir. 2011) (No. 11-1221), 2011 WL 2529574, at \*10.

<sup>206</sup> *Kellar*, 664 F.3d at 173.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Kellar v. Summit Seating, Inc.*, No. 3:09-cv-00464-CAN, slip op. at 6 (N.D. Ind. Jan. 12, 2011).

<sup>210</sup> *Id.*

primarily for her own benefit.”<sup>211</sup> Under this alternate interpretation, Kellar’s lawsuit is a grab for pay for which she was not entitled.

Even under this view, the employers share some blame for their own predicament. The owners should not have allowed this false perception of acceptable flexible scheduling to occur. Their inattention to scheduling, perhaps because it was inconvenient to show up so early, created a latent expectation that early arrivals and clocking in constituted compensable time. Working time must be monitored to avoid such expectations, even when created by managers, so that when such expectations are not met it does not result in a feeling of betrayal that can create the motivation to sue the employer.

In most cases, exactly what provoked the employee’s sense of injustice sufficiently enough to take legal action remains unclear. In the *Kellar* case, a tantalizingly brief mention about the commencement of Kellar’s lawsuit may offer insight. Kellar left Summit in February 2009.<sup>212</sup> She did not challenge her employer’s compensation practices during her employment or immediately after she left, as one might expect. Instead, the lawsuit was commenced shortly after Kellar was forced to pay back \$5,888 in employment benefits to Summit that she received from her unemployment compensation.<sup>213</sup> The perceived injustice of being forced to remit unemployment compensation to Summit may have triggered the retaliatory animus to sue. That animus to sue would likely not have been animated, all the way to the United States Court of Appeals for the Seventh Circuit in fact, if Ray and Sue Fink had proactively and properly managed their employees’ working time schedule.

*B. The Flexitime Crusade: Daley v. Aetna Life & Casualty Co.*<sup>214</sup>

When a flexitime program is perceived to be hypocritically or inconsistently implemented, the consequences can be more than just unrealized productivity gains. Employees may perceive the opportunity to use flexitime as a precious commodity. If the chance to use flexitime is only available in theory, and the company hypocritically publicizes a family friendly workplace, that can cause significant frustration and erosion of employee morale. If the perceived grievance is bad enough, they may file a legal action to assert their perceived rights to a just workplace or to retaliate against an unfair employer. Perhaps no case better highlights the protracted litigation that can arise from a disagreement over flexitime than *Daley*.

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<sup>211</sup> *Id.* at 7. The court granted summary judgment for the employer, noting that “[s]ummary judgment ‘is the put up or shut up moment in a lawsuit.’” *Id.* at 7 (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)).

<sup>212</sup> *Id.* at 3.

<sup>213</sup> *Id.*

<sup>214</sup> 734 A.2d 112 (Conn. 1999).

Virginia Daley was an interior designer, responsible for coordinating design development for Aetna's field offices nationwide.<sup>215</sup> During a six-week maternity leave period, Daley requested an alternative schedule enabling her to work from home one day per week, which was denied.<sup>216</sup> Aetna cited "the effects of [an] ongoing reorganization process, including increased workload, the decreased staff, the team-oriented environment, the need to train staff members with new procedures, and the changing needs of the department's customers" as its rationale.<sup>217</sup>

During this time period, other designers were being laid off for economic reasons, and Daley was being cited repeatedly for performance problems.<sup>218</sup> Aetna cited her inability to get key projects completed in a timely fashion, and Daley sent her supervisor a letter in which she pledged to "get very serious about producing the quantity and quality of work that is required."<sup>219</sup> Even after further discussions and pledges to improve performance, Daley continued to produce substandard work.<sup>220</sup> Meanwhile, Daley continued to request an alternative work schedule, which was denied.<sup>221</sup> Daley said that management's unwillingness to accommodate her request to work at home was inconsistent with "meeting what the company said about its family flexibility program."<sup>222</sup>

During her last months of employment, Daley's frustration with the lack of flexible scheduling available to her continued to grow. Three months before her discharge, Aetna published an article describing an Aetna Chairperson's receipt of a "Good Guy" award by a national women's organization in recognition of his support for model family and medical leave programs.<sup>223</sup> Daley responded with an interoffice memorandum to Aetna's Chairperson expressing her dissatisfaction with Aetna's flexible work arrangements.<sup>224</sup> The memo described her own frustrations in trying to obtain a flexible schedule and her disappointment with Aetna's "failure to implement its

<sup>215</sup> *Id.* at 116.

<sup>216</sup> *Id.* at 117.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 117–18.

<sup>219</sup> *Id.* at 117.

<sup>220</sup> *Id.* at 117–18.

<sup>221</sup> *Id.* at 118.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* The organization that granted the award was the National Women's Political Caucus. *Id.* At the time, Aetna was also consistently listed on *Working Mother* magazine's annual list of best companies for working mothers and has been ranked as one of the four most family-friendly enterprises by the Families and Work Institute. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 91–92 (2001).

<sup>224</sup> *Daley*, 734 A.2d at 118.

heavily promoted flexible scheduling policies” and recounted the experiences of five unidentified co-workers who were denied alternative schedules, two of whom left the firm as a result.<sup>225</sup> The memo stated that managers should have the flexibility to fashion flexible schedules that would allow employees to balance family and professional obligations and that employee relations departments should be given the authority to ensure that Aetna adheres to its flexible scheduling policies.<sup>226</sup> After repeated discussions between Daley and management about her deficient performance over a 15-month period, Daley was eventually fired for substandard work.<sup>227</sup>

Daley presented three claims based upon her dissatisfaction with her firm’s flexible work arrangements. First, Daley argued that her flexible scheduling memorandum addressed a matter of public concern.<sup>228</sup> Second, Daley sued for negligent misrepresentation, claiming that “Aetna negligently represented to [her] that it was committed to helping its employees balance the

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* Relevant portions of Daley’s memo are below:

I have worked for Aetna for seven years and have heard about Aetna’s “family flexibility” almost since I arrived here. I had a child in the summer of 1991 confident in the knowledge that I worked for a company that would work with me to find the best balance between raising a family and continuing a career with Aetna.

. . . .

I told [an Aetna representative] that from my perspective, there was no flexible policy at Aetna. She empathized with my situation but told me that for every person like me that she heard of, she knew of one that did have an alternative work arrangement so, that to her, the policy was working. Successfully implementing a heavily promoted program 50% of time certainly does not seem like not [sic] award winning performance to me. I know of two people in my department alone, that have left the company in the last six months because they could not secure a flexible working arrangement and three others that have requested similar situations and have been turned down. That’s a 17% success rate, which is a failure by any measure.

Realistic options for Aetna employees to meet their family obligations without sacrificing their careers are generally not available today. To continue to represent to Aetna employees and the national media that these options are available [sic] is unconscionable. Aetna is a company who’s [sic] business is keeping promises. If Aenta [sic] cannot keep its promises to its employees, how can Aetna expect to earn the trust of the general public?

Department managers must be given the flexibility to appropriately staff to meet both the demands of workload and employee’s family obligations. Human Resources, Family Services and Employee Relations must be empowered to ensure that Aetna’s family flexible policies are adhered to. This direction has to come from the top; it has to come from a real “good guy.”

Exhibit 1a of Plaintiff, Daley v. Aetna Life & Casualty Co., 734 A.2d 112 (Conn. 1999) (No. 16083).

<sup>227</sup> Daley, 734 A.2d at 118.

<sup>228</sup> *Id.* at 120.



demands of work and family and that it would support its employees in balancing their commitments by means of work and family programs including work-at-home options, part-time hours and flextime.<sup>229</sup> Third, Daley argued that her discharge was in violation of an important public policy that employers should provide flexible work schedules for working parents.<sup>230</sup> Such public policy, she further claimed, prohibited employers from discriminating against employees who pursue flexible working arrangements.<sup>231</sup> The trial court rejected these claims, and the appellate court affirmed the trial court's judgment in favor of Aetna.<sup>232</sup>

The case raises lessons related to the psychological implications of flexible scheduling and how mismanaging a flexible schedule can create legal costs even when no rule has been violated. There is more to Daley's lawsuit than self-interested assertion of legal rights, a pragmatic attempt to reach a settlement with Aetna, or a leveraging tool to obtain reinstatement. Rather, Daley pursued this case with a vigor—as someone who found herself in an employment dispute and attempted to transform it into a *cause célèbre* for the rights of employees, especially working mothers, who need flexible scheduling and work-family balance.

Daley's pleadings imply that she was fighting this lawsuit, in part, as a matter of principle. The lawsuit was pursued no doubt at substantial cost, either to her or her attorney working on a contingency fee basis. The case was also time consuming, taking over five years to litigate and navigate through trial to the Connecticut Supreme Court.<sup>233</sup> With limited direct precedent favoring her arguments, Daley's lawsuit was not an easy one to win. Daley's attorney, for example, ably tried to bootstrap a public policy argument for flextime based upon the sanctity of the parent-child relationship and the importance of promoting employment opportunities for women.<sup>234</sup> Daley's attorney also argued at length that her speech was constitutionally protected and a matter of

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<sup>229</sup> *Id.* at 127.

<sup>230</sup> *Id.* at 130.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 136.

<sup>233</sup> *Id.* at 118–19. Daley told author Ann Crittenden that the losses over the five years following her termination from Aetna cost her hundreds of thousands of dollars in lost income and employer contributions to her retirement plan. CRITTENDEN, *supra* note 223, at 93. Daley's financial losses were likely far less than she claims, however, as her position at Aetna was tenuous given her poor performance and Aetna's recent downsizing of her department. *See Daley*, 734 A.2d at 117–19.

<sup>234</sup> *See* Brief for Appellant at 22–27, *Daley v. Aetna Life & Casualty Co.*, 734 A.2d 112 (Conn. 1999) (No. 16083), 1998 WL 35173676, at \*22–27. For example, Daley's attorney argued that maternity leave policies “directly affect” one of the basic civil rights of man. *Id.* at \*24 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

social concern.<sup>235</sup> Daley's public policy, negligent misrepresentation, and retaliation claims based on the denial of flexible scheduling appear to be attempts to further expand, perhaps even as a landmark case, employment protections into the realm of flexible work.

In addition, her lawsuit attempted to throw the proverbial book at Aetna. In addition to flexible scheduling related claims, Daley's claims included defamation, negligent representation on behalf of Daley's son, loss of mother-child consortium on behalf of Daley's son, loss of family consortium by Daley's husband, and loss of mother-child consortium.<sup>236</sup> These claims were unsuccessful, and the court found at least one to be "border[ing] on the frivolous."<sup>237</sup>

It would be unsurprising to learn that Daley fully understood that these arguments had a limited chance of success. However, such consortium-related charges do send a message through the courts that denial of flexible scheduling to employees has definite impacts on one's spouse and children.<sup>238</sup> This case was not just a lawsuit, but a costly and time-consuming effort to get Aetna, and by extension the broader society at large, to realize the penalty that parents face in the workplace when employers deny them genuine opportunities for flexible scheduling.

Daley's efforts, even though unsuccessful, may have distressed employers. From a purely legal perspective, Daley's unsuccessful lawsuit generated some judicial influence. A search of citing references on Westlaw reveals 735 citations from primary and secondary sources.<sup>239</sup> Most of the judicial references, however, are from the state in which *Daley* was decided. There has not been a nationwide judicial movement toward legal protection of requests for flexible working time. Daley's loss in the courts may have cemented the notion that a denial of flexible scheduling may be neither a matter of public concern nor a well-established public policy. However, the case is, of

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<sup>235</sup> *Id.* at \*11–20.

<sup>236</sup> *Daley*, 734 A.2d at 118–19.

<sup>237</sup> *Id.* at 136. The court criticized Daley's claim for negligent employment practices under CONN. GEN. STAT. § 31-49, which obligates an employer to "exercise reasonable care to provide for his servant a reasonably safe place in which to work." CONN. GEN. STAT. § 31-49 (2015). The court found that Daley offered "no evidence that the conditions under which she labored . . . were physically hazardous." *Daley*, 734 A.2d at 136.

<sup>238</sup> According to one author, "loss of consortium is often invoked in employment discrimination cases." Lance McMillian, *Adultery as Tort*, 90 N.C. L. REV. 1987, 2021 n.122 (2012). Apparently, loss of consortium cases related to spousal injury potentially invoke a series of personal and embarrassing questions about the couple's sex life. *Id.* at 2012–22. It is possible that Daley had to undergo such uncomfortable scrutiny when subjected to deposition.

<sup>239</sup> Citing References to *Daley v. Aetna Life & Casualty Co.*, 734 A.2d 112 (Conn. 1999), WESTLAWNEXT, [https://a.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\(search "734 A.2d 112" in the search bar; then follow the "Citing References" hyperlink\)\)](https://a.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default(search%20%22734%20A.2d%20112%22%20in%20the%20search%20bar%3B%20then%20follow%20the%20%22Citing%20References%22%20hyperlink))).

course, binding only in a single state, and the issue arguably remains unresolved elsewhere.

It is not surprising then that when a dozen large employers met to discuss work-family issues, the hottest topic was not social security or other large government entitlements, but rather the fears of creating work-family programs.<sup>240</sup> The belief among the employers was that flexible scheduling and other work-family programs would be “taken for granted and even viewed as undeniable rights.”<sup>241</sup> Firms saw value in flexible scheduling but also expressed concern about inflating employee expectations such that they would feel entitled to accommodations that would be neither legally required nor feasible in the workplace.<sup>242</sup>

When a *Wall Street Journal* article explored this issue, it used the then still-pending *Daley* case as the archetype of how much wrongful discharge protections could potentially expand. Calling the lawsuit “far-fetched,” it noted that the case exposed a “fault line in nearly all work-family policies”—employers handle flexible scheduling requests on a case-by-case basis with little tracking of their requests and use.<sup>243</sup> The fault line that *Daley* exposed, according to the article, would cause employers to tighten their once relaxed procedures for handling flexible schedules.<sup>244</sup> Employers may even need a “flexibility audit” to see how flexibility is used by the enterprise.<sup>245</sup>

Too much should not be made of *Kellar* and *Daley*, however, and one should not draw unnecessarily broad conclusions. Yet, the cases raise the possibility that mishandled flexible schedules can trigger feelings of violation, which may prompt employees to take legal action against the enterprise. Whether an employer likes it or not, implementing a flextime program may create psychological contracts with its employees who expect such a flextime program to be utilized fairly and without penalty by employees who need it.

## VII. LOOKING AHEAD: THE TREND TOWARD MANDATORY WORKPLACE FLEXIBILITY

There are substantial incentives for employers to adopt flextime programs. Flextime has the potential to generate performance benefits for the enterprise. Employees who use flextime are less likely to leave for a

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<sup>240</sup> Sue Shellenbarger, *Work & Family: How Accommodating Workers' Lives Can Be a Business Liability*, WALL ST. J., Jan. 4, 1995, at B1.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*; see also *Tracking Is Key for Flexible Employee Work Schedules*, AVITUS GROUP BLOG (Nov. 7, 2012, 8:30 AM), <http://info.avitusgroup.com/blog/bid/240352/Tracking-is-Key-for-Flexible-Employee-Work-Schedules>.

<sup>244</sup> Shellenbarger, *supra* note 240, at B1.

<sup>245</sup> *Id.*

competitor. Flextime can alleviate work stress and burnout, which in turn can reduce the incidence of absences, lateness, and work-related medical costs. Soon, however, employers may not have a choice. There is an emerging trend toward mandating flexible work options for employees. If employers do not more aggressively incorporate flextime practices, it may cause the demand for mandated reforms to accelerate. The following Part highlights the current legislative trend toward a mandated flexible workplace.

Before discussing current legal trends, it bears noting why flextime has become such an important public issue. Flextime is not just a productivity or efficiency issue for firms, but rather a badly needed practice whose presence or absence can have a profound impact on employees' work and personal lives. Low-wage workers are especially vulnerable without mandated flextime protections. Such workers, who are highly dependent on consistent wages for survival, are subjected to overtime and shift cancellations with little or no warning.<sup>246</sup> Personal commitments can be negatively impacted, such as rescheduling of medical appointments, school pick-up schedules, and babysitting.<sup>247</sup> Three-quarters of low-wage workers simply have no access to paid sick leave, and 40% of low wage workers have no access to paid personal, vacation, or sick days.<sup>248</sup>

Flexible working time can also disproportionately impact women.<sup>249</sup> Men may refuse to utilize flextime because they believe it will damage their careers.<sup>250</sup> Women, by contrast, will more likely utilize flextime either to satisfy caregiver needs or because women's unequal wages for similar jobs held by men makes it cheaper for women to cut back on work than their spouses or partners.<sup>251</sup> Retribution 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

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<sup>246</sup> Liz Watson & Jennifer E. Swanberg, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation*, 3 AM. U. LAB. & EMP. L.F. 380, 399–401 (2013).

<sup>247</sup> *Id.* at 399.

<sup>248</sup> Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL'Y 445, 451 (2012).

<sup>249</sup> Men tend to have access to more flexible employment than women. Michael Selmi & Sonia Weil, *Can All Women Be Pharmacists?: A Critique of Hanna Rosin's The End of Men*, 93 B.U. L. REV. 851, 864 (2013) (citing Press Release, Bureau of Labor Statistics, Workers on Flexible and Shift Schedules in May 2004 (July 1, 2005), <http://www.bls.gov/news.release/pdf/flex.pdf>).

<sup>250</sup> Rosemary Owens, *Engendering Flexibility in a World of Precarious Work*, in PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY 329, 339 (Judy Fudge & Rosemary Owens eds., 2006).

<sup>251</sup> *Id.* at 339–40; *see also* Schultz, *supra* note 1, at 1215.

them to obtain the flexibility they need to accommodate double demands of work and family.<sup>252</sup>

The pressure for flextime legislation is not just an academic exhortation. Rather, it is a response to a substantial need from a large percentage of the American workforce. This need has resulted in a number of legal reforms, or proposed legal reforms, across local, state, and federal government entities.

At the federal level, bills have been introduced that seek to alleviate the harshest effects of flextime working time. For example, The Healthy Families Act would establish a national standard for paid sick days, enabling workers to earn up to seven job-protected sick days each year.<sup>253</sup> Accrued sick time would be earned at the rate of 1 hour for every 30 hours worked,<sup>254</sup> enabling new employees to not have to wait an extended period to avail themselves of leave. According to supporters, the Healthy Families Act would provide economic security, decrease health care costs, and reduce contagion of infections.<sup>255</sup> Others argue for job-guaranteed, paid leave legislation that would require employers to provide two weeks of paid leave each year to all full-time and part-time employees that have worked for that employer for a minimum of 60 days.<sup>256</sup>

Other federal legislation proposes flexible work reforms but appears to give priority to employer discretion over employee protection. The Working Families Flexibility Act (WFFA) permits employers to compensate their workers with time off when employees work overtime, instead of the more typical method of compensation of time-and-one-half pay as the FLSA requires.<sup>257</sup> Some legislators have praised the WFFA as “commonsense

<sup>252</sup> Owens, *supra* note 250, at 329–30. Cf. NEGREY, *supra* note 137, at 122 (noting the presence of a male-defined workplace culture and an “overtime culture” that would discourage use of leave under the FMLA).

<sup>253</sup> *Fact Sheet: The Healthy Families Act*, NAT’L PARTNERSHIP FOR WOMEN & FAMS. (Feb. 2015), <http://www.nationalpartnership.org/research-library/work-family/psd/the-healthy-families-act-fact-sheet.pdf>.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 2. Employers, however, have objected to the Act’s provisions as rigid and unnecessary. NEGREY, *supra* note 137, at 124.

<sup>256</sup> Runge, *supra* note 248, at 477.

<sup>257</sup> Working Families Flexibility Act, H.R. 1406, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/house-bill/1406/text> (last visited Sept. 6, 2015); see also Lane C. Powell, *Flexible Scheduling and Gender Equality: The Working Families Flexibility Act Under the Fourteenth Amendment*, 20 MICH. J. GENDER & L. 359 (2013) (arguing that “the WFFA should be reframed to target ‘work-life’ balance, rather than specifically ‘work-family’ balance”). There is another act, also known as the Working Families Flexibility Act, which would grant employees the right to request a change in terms without fear of retribution. See Working Families Flexibility Act, H.R. 1274, 111th Cong. § 3(a) (2009), <https://www.congress.gov/bill/111th-congress/house-bill/1274/text> (last visited Sept. 6, 2015);

legislation” that helps employees with work-life balance.<sup>258</sup> Substantial criticism, however, characterizes the WFFA as a measure that primarily benefits employers, offers little to employees, and will be mainly used to circumvent the requirement to pay overtime under the FLSA.<sup>259</sup>

State innovations may also impose flextime-like protections. The Domestic Workers Bill of Rights was passed in New York in 2010, providing a wide range of protections including entitlement to overtime, three days paid time off after one year of employment, and one day of rest per week.<sup>260</sup> Domestic workers are perhaps the prototypical example of workers that are vulnerable to flexible schedules because they are low wage and easily at the beck and call of their employer every day of the week.<sup>261</sup>

In Maine, the only state with such a law, a statutory cap on mandatory overtime prohibits employees from imposing more than 80 hours of overtime work in any two-week period.<sup>262</sup> Other states have limited such overtime but only for certain categories of employees, such as nurses.<sup>263</sup> Substantial mandatory overtime can disrupt child care, impose ‘tag team’ parental scheduling, and create constant familial stress by having to rapidly adjust the changing work time needs of the employer. Maine may not be alone in passing this reform for all qualified employees, as nearly 20 states have at some point introduced legislation to curb the practice.<sup>264</sup>

In 2011, Connecticut became the first state to enact a law requiring paid sick leave for service workers.<sup>265</sup> The leave accrues as 1 hour of sick leave

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*see also* Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1108–12 (2010).

<sup>258</sup> 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, 8:35 AM), <http://www.law360.com/articles/485215>.

<sup>259</sup> *See* Warner, *supra* note 90.

<sup>260</sup> Runge, *supra* note 248, at 475 (citing N.Y. LAB. LAW §§ 161, 170 (LexisNexis 2010)).

<sup>261</sup> *Id.*

<sup>262</sup> ME. REV. STAT. ANN. tit. 26, § 603 (2008); *see also* Watson & Swanberg, *supra* note 246, at 435.

<sup>263</sup> Watson & Swanberg, *supra* note 246, at 434–35 (citing statutes from California, Minnesota, Oregon, West Virginia, Connecticut, Illinois, Maryland, New Jersey, and Washington).

<sup>264</sup> *Id.* at 435.

<sup>265</sup> CONN. GEN. STAT. § 31-57r to 57w (2015). The classification of what constitutes a “service worker” is listed in detail at CONN. GEN. STAT. § 31-57r(7) and includes such diverse jobs as fast food preparation, cashiers, home health aides, and retail sales people. The law has generated debate over its costs to employers and benefits to employees. *See, e.g.*, Dan Haar, *Paid Sick Leave Brings Different Views of Same Numbers*, HARTFORD COURANT (Jan. 9, 2014), [http://articles.courant.com/2014-01-09/business/hc-haar-paid-sick-leave-reports-20140109\\_1\\_11-](http://articles.courant.com/2014-01-09/business/hc-haar-paid-sick-leave-reports-20140109_1_11-)

for every 40 hours worked.<sup>266</sup> The number of days, however, cannot exceed five days per calendar year.<sup>267</sup> This requirement does not apply to every organization, however, and only imposes paid leave on employers with 50 employees or more.<sup>268</sup> While a number of cities have also required paid sick leave,<sup>269</sup> and still others have been specifically banned from doing so by their state legislatures,<sup>270</sup> other states may be poised to follow Connecticut and require paid sick time.<sup>271</sup>

A study of Connecticut's paid sick leave law, arguably the most costly of the aforementioned reforms because it mandates paid time, reveals that most employers experienced modest or no impact on business operations.<sup>272</sup> Data about costs came from self-reporting from employers, who would likely not be reluctant to report substantial cost increases if they had occurred from the law. Furthermore, arguably expected negative impacts did not occur. Virtually no firms reported reducing wages as a result of the law, almost 90% did not reduce working hours, 96% did not reduce operating hours, and 85% did not raise prices.<sup>273</sup> As one grocery manager reported, "[t]he impact has been less than anticipated. . . . It does not even hit the radar screen."<sup>274</sup> Although initial resistance existed, by mid-2013 more than 75% of employers responding to the survey either somewhat or strongly supported the new law.<sup>275</sup>

Most relevant to flexible working time is legislation passed in Vermont. Since 2014, Vermont law protects employees who request flexible

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percent-higher-costs-paid-sick-leave. Not all believe that the law has imposed substantial costs on organizations. *See, e.g.,* Bryce Covert, *No, Connecticut's History-Making Paid Sick Leave Law Did Not Hurt Business*, THINKPROGRESS (Mar. 6, 2014, 12:06 PM), <http://thinkprogress.org/economy/2014/03/06/3370261/connecticut-paid-sick-leave/> (citing a survey reporting that two-thirds of employers reported that the law led to either no change in costs or cost increases of less than 2%).

<sup>266</sup> CONN. GEN. STAT. § 31-57s(a) (2015).

<sup>267</sup> *Id.*

<sup>268</sup> CONN. GEN. STAT. § 31-57r(4) (2015).

<sup>269</sup> *Should Laws Mandate Paid Sick Leave? Most Americans Say Yes, Survey Suggests*, LAWYER'S PC, Apr. 1, 2014, at 10 (noting that Seattle and Portland, Oregon, have approved such measures).

<sup>270</sup> *Id.* ("Kansas, Tennessee, Mississippi, Louisiana and Arizona have banned cities from requiring private employers to provide mandatory sick leave.").

<sup>271</sup> NEGREY, *supra* note 137, at 124.

<sup>272</sup> Eileen Applebaum et al., *Good for Business? Connecticut's Paid Sick Leave Law*, CTR. FOR ECON. & POLICY RESEARCH 1, 3 (Mar. 2014), <http://www.cepr.net/documents/good-for-buisness-2014-02-21.pdf>.

<sup>273</sup> *Id.* at 13.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 17.

working arrangements.<sup>276</sup> An employer must consider such a request from an employee at least two times per calendar year.<sup>277</sup> Consideration cannot be perfunctory, but rather must involve a good faith engagement with the employee, discussion of alternatives, and deliberation on whether it can be granted to avoid impairment of business operations.<sup>278</sup> The law also protects an employee from retaliation for requesting a flexible schedule.<sup>279</sup>

At the local level, the City and County of San Francisco permit employees the right to request flexible or predictable work,<sup>280</sup> including telecommuting, part-time employment, and a modified work schedule.<sup>281</sup> Like the Vermont law, the ordinance permits 2 requests in a 12-month period.<sup>282</sup> If a request is denied, an employer must give a legitimate business reason and explain this reason in writing.<sup>283</sup> Employers cannot retaliate against employees who request flexible or predictable working arrangements.<sup>284</sup>

Both the Vermont law and San Francisco ordinance may be based upon European models, such as the Flexible Working Regulations in the United Kingdom, under which employees have the right to request a change in the number of hours, times, or days in their work schedules.<sup>285</sup> As innovations in working time have more frequently come from Europe rather than the United States, it is likely that further regulation of flextime will also originate from European legislation.

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<sup>276</sup> VT. STAT. ANN. tit. 21, § 309 (2015).

<sup>277</sup> *Id.* § 309(a).

<sup>278</sup> *Id.* § 309(b). “Inconsistent with business operations” includes the burden of additional costs on the employer, a negative effect on employee morale, a detrimental effect on the ability to meet consumer demand, an ability to recruit staff, and other impacts. *Id.* § 309(b)(3).

<sup>279</sup> *Id.* § 309(f).

<sup>280</sup> Thomas E. Geidt, *New San Francisco Ordinance Grants Protected Status to “Caregivers” and Allows Them to Require Flexible Work Arrangements: Will Its Provisions Spread to Other Jurisdictions?*, PAUL HASTINGS LLP: STAYCURRENT (Nov. 2013), <http://www.paulhastings.com/docs/default-source/PDFs/stay-current-new-san-francisco-ordinance-grants-protected-status-to-caregivers.pdf>.

<sup>281</sup> *Id.* at 2.

<sup>282</sup> *Id.* Employees who experience a major life event, such as childbirth, may make a third request in that year period. *Id.*

<sup>283</sup> *Id.* at 3.

<sup>284</sup> *Id.*

<sup>285</sup> Michelle A. Travis, *What a Difference a Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week*, 42 CONN. L. REV. 1223, 1247 (2010) (citing Employment Rights Act, 1996, c. 18, § 80F(1) (U.K.) (as amended by the Employment Act, 2002, c. 22, § 47 (U.K.))). See generally DEIRDRE McCANN, *REGULATING FLEXIBLE WORK* (2008) (providing an in-depth examination of flexible work in the United Kingdom).



## VIII. CONCLUSION

Flextime has the potential to change the character of the modern workplace. Employers can benefit from flextime increased productivity, reduced absenteeism, greater talent retention, and stronger employee loyalty. Employees gain by being better able to care for their families, exert greater control over their jobs, and pursue personal interests. One should be careful not to overstate the evidence, as flextime studies do not always report positive results. However, the evidence supporting the introduction of flextime appears to be significant.

Even with such evidence, many organizations adopt flextime on an ad hoc basis or do not adopt flextime schedules as a matter of company policy. This paper contends that a variety of informational and attitudinal barriers are at work that prevent wider adoption of flexible working time. The benefits of flextime are not sufficiently widely known. Flextime gains may be less visible than flextime costs. Capital markets do not respond to flextime initiatives. Managers may fear employee shirking. These and other factors contribute to the lack of adoption and need to be overcome.

Firms also need to overcome poor flextime implementation. If enough employees view the system as unfair, it can produce reactions that can be costly for the enterprise. The challenge for employers may be even more cultural than it is legal, by ensuring that employees participate in flexible workplace design and also ensuring that flexible scheduling is administered evenhandedly across the workforce. Perception can be as important as reality, and even if current flextime legal protections are relatively limited, employees may perceive their treatment as unfair and take retaliatory action.

Flextime is neither a panacea for employees nor an instant revenue gain for employers. Both employers and employees have obligations to make flextime work successfully. That being said, employers have substantial control over when and how flexible work arrangements are introduced in the workplace. Many employers are leaving substantial value uncaptured when failing to consider flexible scheduling as a workplace option. Proposed legislative reforms are on the horizon, and incorporating flexible work practices now can help anticipate future changes arising from regulatory form. With careful planning and implementation, flextime can be a net benefit for both employers and employees in the organization.