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## A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility

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## A POST-PANDEMIC ANTIDISCRIMINATION APPROACH TO WORKPLACE FLEXIBILITY

Michelle A. Travis\*

### ABSTRACT

Before the COVID-19 pandemic, the judiciary largely accepted the “full-time face-time norm” resulting in the systematic exclusion of persons with disabilities, women, and other members of protected groups from certain jobs. Claims involving aspects of the full-time face time norm include accommodation requests for telecommuting, flextime, part-time, and other flexible working arrangements. This Article examines pre-pandemic case law under the ADA and Title VII of the Civil Rights Act. COVID-19 has brought dramatic workplace changes, requiring judges to re-examine their previous restrictive rulings on workplace flexibility. During the pandemic, companies around the world went from prohibiting remote work to requiring it. This Article encourages judges, using the lessons learned during the COVID-19 pandemic, to re-examine the defining features of “work” and empower antidiscrimination law to more meaningfully expand equal employment opportunities.

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## INTRODUCTION

Fifteen years ago, I coined the phrase, “full-time face-time norm,” to describe the essentialized workplace that has pervaded federal antidiscrimination case law.<sup>1</sup> This norm refers to the judicial presumption that work itself is defined by very long hours, rigid schedules, and uninterrupted, in-person performance at a centralized workspace.<sup>2</sup> This bundle of default organizational structures systematically excludes members of certain employee groups, including individuals with disabilities and women who perform the bulk of caregiving responsibilities.<sup>3</sup>

Antidiscrimination law has the potential to address these inequalities by demanding workplace restructuring to empower individuals to perform their jobs. When I identified the judicial embrace of the full-time face-time norm, however, I revealed how this potential was being undercut.<sup>4</sup> I challenged judges’ refusal to parse out the malleable ways of organizing work performance from the actual tasks that comprise a job.<sup>5</sup> I lamented judges’ inability—or simply refusal—to envision alternative ways of structuring work performance.<sup>6</sup> And I explained how that refusal placed exclusionary workplace structures beyond the reach of antidiscrimination law.<sup>7</sup> By incorrectly assuming that jobs are defined in part by the organizational structures making up the full-time face-time norm, judges have undermined the transformative potential of antidiscrimination law to expand workplace accessibility.

The dramatic workplace changes in the wake of the global pandemic should force courts to revisit these restrictive rulings. With fifty-seven percent of U.S. employers now offering their employees flextime or remote work options as a result of Coronavirus Disease 2019 (COVID-19),<sup>8</sup> it is no longer tenable for courts to define work as something done only at a

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1. See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6, 10 (2005).

2. See *id.*

3. See *id.* at 6, 20.

4. See generally *id.*

5. See *id.* at 21–46.

6. See *id.*

7. See *id.*

8. See Megan Brenan, *U.S. Workers Discovering Affinity for Remote Work*, GALLUP (Apr. 3, 2020), <https://news.gallup.com/poll/306695/workers-discovering-affinity-remote-work.aspx> [<https://perma.cc/JK5F-XFJH>].

specified time and place. Our new working reality offers an opportunity—and an obligation—to reassess antidiscrimination law’s approach to workplace flexibility.

Part I analyzes pre-pandemic case law interpreting both the Americans with Disabilities Act of 1990 (ADA)<sup>9</sup> and Title VII of the Civil Rights Act of 1964 (Title VII).<sup>10</sup> This part reveals how judges’ acceptance of the full-time face-time norm enabled courts to reject employee requests for workplace flexibility as a form of antidiscrimination protection. Part II explains how the massive workplace changes from COVID-19 undermine these prior decisions. By demonstrating the malleability of when, where, and how work is performed, the pandemic necessitates a re-examination of prior judicial assumptions about the defining features of “work,” which would enable antidiscrimination law to more meaningfully expand equal employment opportunities.

#### I. HOW THE PRE-PANDEMIC ESSENTIALIZED WORKPLACE UNDERMINED EMPLOYMENT DISCRIMINATION LAW

The ADA and Title VII sought not only to end biased decision-making on the basis of protected statuses, but also to restructure workplaces to increase access for those excluded by conventional workplace design. This reconstructionist vision is evident in the ADA’s accommodation mandate, which requires employers to modify workplaces to enable individuals with disabilities to perform their jobs.<sup>11</sup> This vision is also incorporated into Title VII’s disparate impact theory, which requires employers to remove “artificial, arbitrary, and unnecessary barriers” to the success of disempowered groups.<sup>12</sup>

Both the ADA’s accommodation mandate and Title VII’s disparate impact theory have the potential to redesign workplace structures that exclude individuals with disabilities and women with caregiving

9. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12117 (2019)).

10. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2012)).

11. See 42 U.S.C. § 12112(b)(5).

12. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971). When Congress amended Title VII in 1991 to codify the disparate impact theory, Congress directed courts to interpret the statute in accord with *Griggs*. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991) (codified at 42 U.S.C. § 1981 note).

responsibilities. Specifically, these statutes have the potential to create more accessible workplaces by requiring employers to provide telecommuting, part-time or flextime options, job-sharing, and temporary leaves. In our pre-pandemic world, however, judges routinely refused to contemplate these alternative structures as viable forms of “work.”<sup>13</sup> Although this refusal infiltrated judicial interpretations through different doctrinal paths in ADA and Title VII cases, both contexts illustrate a misplaced reliance on workplace essentialism.

#### A. Mistaking “Essential Job Functions” Under the ADA

To state an ADA claim, an employee must demonstrate that he or she is a “qualified individual with a disability,” who can perform a job’s “essential functions,” either “with or without a reasonable accommodation.”<sup>14</sup> Upon that showing, an employer may refuse an accommodation only by proving that it would pose an “undue hardship,” which requires evidence of “significant difficulty or expense.”<sup>15</sup>

How a court defines a job’s “essential functions” is thus a critical step in setting the boundaries of ADA protection. A job modification is only considered an accommodation if it *enables performance of* essential job functions. In contrast, if an employee seeks the *removal of* an essential job function, that is not considered an accommodation.<sup>16</sup> The inability to perform an essential job function instead renders the employee disqualified and outside of the ADA’s protected class.<sup>17</sup> In that case, the employer may refuse the requested modification without showing any hardship, as the ADA’s obligations simply do not apply.

Essential functions are supposed to be limited to the core tasks that define a job’s existence.<sup>18</sup> These core tasks must be distinguished from the malleable ways in which an employer organizes when, where, and how the actual functions are performed. While employees may not seek the removal of core tasks, the discretionary organization of task performance is an

13. See Travis, *supra* note 1, at 21–46; see also Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 5–6, 70–78 (2014) [hereinafter Porter, *Backlash*].

14. 42 U.S.C. §§ 12111(8), 12112(a).

15. *Id.* §§ 12111(10), 12112(b)(5)(A).

16. See 29 C.F.R. § 1630.2(o).

17. See *id.*

18. See 29 C.F.R. § 1630.2(n)(1)–(2).

entirely appropriate subject for accommodation requests.<sup>19</sup> Unfortunately, in pre-pandemic cases, judges routinely failed to recognize this distinction in claims involving aspects of the full-time face time norm—i.e., claims involving accommodation requests for telecommuting, flextime, part-time, job-sharing, temporary leaves, and other flexible work arrangements.<sup>20</sup> In these cases, courts incorrectly treated employers’ full-time face-time demands as *essential job functions*, rather than correctly viewing them as preferences about how the actual job tasks get performed.<sup>21</sup> In a pre-pandemic world, judges refused to imagine anything other than conventional workplace design, thereby equating full-time face-time with the definition of “work” itself.<sup>22</sup>

By treating aspects of the full-time face-time norm as essential job functions, judges have shielded employers’ exclusionary workplaces from legal review. This is because the essential function determination is part of an employee’s *prima facie* case. An employee who is unable to meet full-time face-time demands is deemed “unqualified,” so the case never reaches the employer’s undue hardship defense. As a result, employers may refuse requests for workplace flexibility without showing any difficulty or expense—and often when there is significant evidence indicating that the modification would cause no hardship at all.

The Seventh Circuit’s dismissal of an employee’s accommodation claim in *Vande Zande v. Wisconsin Department of Administration*<sup>23</sup> is a typical example of this pre-pandemic approach to workplace flexibility. In *Vande Zande*, an employee requested telecommuting to accommodate her

19. See Travis, *supra* note 1, at 46–67; see also 42 U.S.C. § 12111(9)(B); 29 C.F.R. §§ 1630.2(o)(2)(ii) & 1630.4(a)(iv) (2019). The statute, regulations, and agency guidance reveal this distinction by listing job restructuring as an appropriate accommodation, including adopting part-time and modified work schedules, adjusting start and stop times, permitting remote work, and granting unpaid leave. See *infra* notes 102–112 and accompanying text.

20. See Travis, *supra* note 1, at 21–36; see also CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY & MEDICAL LEAVE ACT: RIGHTS ON LEAVE 75, 123 (Cambridge Univ. Press 2010) (noting the judicial trend to deny accommodations that modify “institutionalized time standards”); Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345, 362 (2003) (explaining how “courts have accepted the existing structure of work as a baseline in delineating the extent of accommodation required under the ADA”); Porter, *Backlash*, *supra* note 13, at 5–6, 70–78 (explaining that “most judges . . . hold that the structural norms are essential functions”).

21. See Travis, *supra* note 1, at 21–36; see also Porter, *Backlash*, *supra* note 13, at 5–6, 70–78.

22. See Travis, *supra* note 1, at 21–36.

23. 44 F.3d 538 (7th Cir. 1995).

partial paralysis and pressure ulcers.<sup>24</sup> Instead of properly assessing whether telecommuting would enable the employee to perform the core tasks of her program assistant position—including “preparing public information materials, planning meetings, interpreting regulations, typing, mailing, filing, and copying”—the court incorrectly treated full-time, onsite presence as itself an essential job function.<sup>25</sup>

Without any evidentiary basis, the court presumed that “team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee’s performance.”<sup>26</sup> The employer was not required to demonstrate any such difficulty or cost—a burden that the employer likely could not have met—because the case never made it to the undue hardship defense. The employee’s inability to meet the so-called “essential function” of onsite presence rendered her disqualified and unprotected by the ADA.

The district court ruling in *Wojciechowski v. Emergency Technical Services Corp.*<sup>27</sup> is another example of this flawed, pre-pandemic reasoning. In *Wojciechowski*, an employee asked to work from home to accommodate her cancer treatment.<sup>28</sup> The court refused to assess whether telecommuting would enable the employee to perform the core tasks of her sales representative position, which seemed technologically portable.<sup>29</sup> Instead, the court held that the employee “was not a qualified individual as she was unable to perform an essential function of her position, being present at the office on a full-time basis.”<sup>30</sup> The court did not require the employer to demonstrate any burden from permitting the employee to work from home—an unlikely showing in what appeared to be a location-independent job.<sup>31</sup> Instead, the court simply assumed that “productivity inevitably would be greatly reduced” by telecommuting.<sup>32</sup> As a result, the employee was excluded from ADA protection, and the employer’s onsite work requirement was shielded from antidiscrimination review.

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24.*Id.* at 543–44.

25.*Id.* at 543–45.

26.*Id.* at 544–45.

27.No. 95 C 3076, 1997 WL 164004 (N.D. Ill. March 27, 1997).

28.*Id.* at \*1.

29.*Id.* at \*2–3.

30.*Id.* at \*2.

31.*Id.* at \*2–4.

32.*Id.* at \*3 (quoting *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 545 (7th Cir. 1995)).

Neither *Vande Zande* nor *Wojciechowski* are unusual cases. Numerous courts have used similar reasoning to reject employees' accommodation requests to telecommute in jobs that appeared to be remote-compatible.<sup>33</sup> These cases are also not unique to telecommuting requests. Courts have made the same error in cases challenging the array of organizational structures that make up the full-time face-time norm. For example, courts have dismissed accommodation requests for part-time and job-sharing arrangements by characterizing a full-time schedule as an essential job function.<sup>34</sup> Courts have dismissed accommodation requests for forty-hour workweeks by characterizing unlimited overtime as an essential job function.<sup>35</sup> Courts have dismissed accommodation requests for flexible

33. See, e.g., *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2014) (en banc) (affirming dismissal of resale buyer's claim requesting telecommuting to accommodate irritable bowel syndrome); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114 (10th Cir. 2004) (affirming dismissal of service coordinator's claim requesting telecommuting to accommodate PTSD); *Rauen v. U.S. Tobacco Mfg. Ltd. P'ship*, 319 F.3d 891 (7th Cir. 2003) (affirming dismissal of software engineer's claim requesting telecommuting to accommodate cancer); *Spielman v. Blue Cross & Blue Shield of Kan.*, 33 Fed. Appx. 439 (10th Cir. 2002) (affirming dismissal of nurse consultant's claim requesting telecommuting to accommodate scleroderma); *Kvorjak v. Maine*, 259 F.3d 48 (1st Cir. 2001) (affirming dismissal of adjuster's claim requesting telecommuting to accommodate partial paralysis); *Unrein v. PHC-Fort Morgan, Inc.*, No. 17-cv-02846-REB-SKC, 2020 WL 2465719 (D. Colo. May 13, 2020) (ruling for employer after bench trial on dietician's claim requesting telecommuting to accommodate a vision disorder); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555 (N.D. Ga. 1995) (dismissing sales agent's claim requesting telecommuting to accommodate multiple chemical sensitivity), *aff'd*, 86 F.3d 1171 (11th Cir. 1996).

34. See, e.g., *White v. Standard Ins. Co.*, No. 12-1287, 2013 WL 3242297 (6th Cir. June 28, 2013) (affirming dismissal of customer service agent's claim requesting a part-time schedule to accommodate a back injury); *Lamb v. Qualex, Inc.*, 33 Fed. Appx. 49 (4th Cir. 2002) (affirming dismissal of account development specialist's claim requesting a part-time schedule to accommodate depression); *DeVito v. Chi. Park Dist.*, 270 F.3d 532 (7th Cir. 2001) (affirming judgment for employer on office receptionist's claim requesting a part-time schedule to accommodate a back injury); *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043 (8th Cir. 1999) (reversing jury verdict against employer on data entry clerk's claim requesting a part-time schedule to accommodate cubital tunnel syndrome); *Terrell v. USAir*, 132 F.3d 621 (11th Cir. 1998) (affirming dismissal of reservations agent's claim requesting a job-share to accommodate carpal tunnel syndrome); *Caroselli v. Allstate Ins. Co.*, 15 Am. Disabilities Cas. (BNA) 596 (N.D. Ill. 2004) (dismissing manager's claim requesting a part-time schedule to accommodate fibromyalgia); *Querry v. Messar*, 14 F. Supp. 2d 437 (S.D.N.Y. 1998) (dismissing police officer's claim requesting 4-hour shifts to accommodate a back condition); *Burnett v. W. Res., Inc.*, 929 F. Supp. 1349 (D. Kan. 1996) (dismissing meter reader's claim requesting 4-hour shifts to accommodate a knee injury).

35. See, e.g., *Davis v. Fla. Power & Light Co.*, 205 F.3d 1301 (11th Cir. 2000) (affirming dismissal of electrician's claim requesting a 40-hour workweek with voluntary overtime to accommodate a back injury); *Chavira v. Crown, Cork & Seal USA, Inc.*, No. CIV. 13-1734, 2015 WL 4920094 (D. Minn. Aug. 18, 2015) (dismissing employee's claim requesting 8-hour shifts and no overtime to accommodate various medical conditions); *Simmerman v. Hardee's Food Sys., Inc.*, No. CIV. A. 94-9606, 1996 WL 131948 (E.D. Pa. Mar. 22, 1996) (dismissing manager's claim requesting a 40-hour workweek to accommodate depression); *Sanders v. FirstEnergy Corp.*, 813 N.E.2d 932 (Ohio Ct. App. 2004) (affirming dismissal of power plant attendant's claim requesting a 40-hour workweek to accommodate

hours, shift changes, and variable start/stop times by characterizing hour requirements and shift assignments as essential job functions.<sup>36</sup> And courts have dismissed accommodation requests for temporary unpaid leaves by characterizing uninterrupted presence as an essential function of nearly every job.<sup>37</sup>

In all these cases, courts failed to task employers with proving that workplace flexibility would be disruptive, burdensome, or costly. Instead, judges assumed that the conventional workplace design was optimal, thereby using the full-time face-time norm not merely as a descriptive device, but as a normative conclusion. This act of workplace essentialism is encapsulated in the oft-repeated mantra, “attendance is an essential

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sleep apnea).

36. *See, e.g.*, *Kallail v. Alliant Energy Corp. Servs., Inc.*, 691 F.3d 925 (8th Cir. 2012) (affirming dismissal of resource coordinator’s claim requesting regular 8-hour day shifts to accommodate surgery recovery); *Earl v. Mervyn’s, Inc.*, 207 F.3d 1361 (11th Cir. 2000) (affirming dismissal of store coordinator’s claim requesting variable start/stop times to accommodate obsessive compulsive disorder); *Laurin v. Providence Hosp.*, 150 F.3d 52 (1st Cir. 1998) (affirming dismissal of nurse’s claim requesting a nonrotating shift to accommodate a seizure disorder); *Faur v. Chi., Cent. & Pac. R.R. Co.*, No. 17-CV-2040-LRR, 2018 WL 4656405 (N.D. Iowa Sept. 26, 2018) (dismissing conductor’s claim requesting regular day shifts and no overtime to accommodate sleep disorders); *Popeck v. Rawlings Co. LLC*, NO. 3:16-CV-00138-GNS-DW, 2018 WL 2074198 (W.D. Ky. May 3, 2018) (dismissing auditor’s claim requesting flexible hours to accommodate irritable bowel syndrome); *Azzam v. Baptist Healthcare Affiliates, Inc.*, 855 F. Supp. 2d 653 (W.D. Ky. 2012) (dismissing nurse’s claim requesting five-hour workdays to accommodate stroke recovery); *Tucker v. Mo. Dept. of Soc. Servs.*, No. 2:11-CV-04134-NK1, 2012 WL 6115604 (W.D. Mo. Dec. 10, 2012) (dismissing youth specialist’s claim requesting day shifts to accommodate migraines); *Salmon v. Dade County Sch. Bd.*, 4 F. Supp. 2d 1157 (S.D. Fla. 1998) (dismissing guidance counselor’s claim requesting flexible start-time to accommodate a back injury).

37. *See, e.g.*, *Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384 (6th Cir. 2017) (affirming dismissal of customer service representative’s request for extended leave or flexible scheduling and additional breaks to accommodate depression and anxiety attacks); *Basden v. Prof’l Transp., Inc.*, 714 F.3d 1034 (7th Cir. 2013) (affirming dismissal of dispatcher’s request for 30-day unpaid leave to accommodate multiple sclerosis); *Pickens v. Soo Line R.R., Co.*, 264 F.3d 773 (8th Cir. 2001) (affirming dismissal of railroad conductor’s request for temporary leaves to accommodate a back injury); *EEOC v. Yellow Freight System, Inc.*, 253 F.3d 943 (7th Cir. 2001) (en banc) (affirming dismissal of dockworker’s request for short-term absences to accommodate HIV/AIDS and cancer); *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675 (8th Cir. 2001) (affirming dismissal of receiving clerk’s request for brief, unscheduled, unpaid leaves to accommodate irritable bowel syndrome); *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997) (affirming dismissal of computer consultant’s request for leave to accommodate a back injury); *Brangman v. AstraZeneca, LP*, 952 F. Supp. 2d 710 (E.D. Pa. 2013) (dismissing training director’s request for leave to accommodate a medical condition); *Fuentes v. Krypton Sols., LLC*, No. 4:11CV581, 2013 WL 1391113 (E.D. Tex. Apr. 4, 2013) (dismissing quality control worker’s request for periodic leaves to accommodate diabetes); *Brown v. Honda of Am.*, No. 2:10-CV-459, 2012 WL 4061795 (S.D. Ohio Sept. 14, 2012) (dismissing factory worker’s request for periodic leaves to accommodate depression, anxiety, and migraines); *Kennedy v. Applause, Inc.*, CV 94-5344 SVW (GHKx), 1994 WL 740765 (C.D. Cal. Dec. 6, 1994) (dismissing sales representative’s request for leave to accommodate chronic fatigue syndrome), *aff’d*, 90 F.3d 1477 (9th Cir. 1996).

function,” which is scattered throughout pre-pandemic opinions.<sup>38</sup> Of course, some jobs really are location- or time-dependent and therefore incompatible with remote working or flextime arrangements.<sup>39</sup> Yet by presuming that full-time face-time is an essential function of virtually every job, courts have precluded inquiry as to which jobs are amenable to workplace flexibility and which are not. If COVID-19 has revealed anything, it’s that many more jobs are compatible with remote and flexible work arrangements than previously assumed.

Although the majority of pre-pandemic cases have adopted the same erroneous assumptions, a few courts have properly allowed ADA workplace flexibility requests to survive summary judgment, thus forcing employers to prove that modifying full-time face-time requirements would pose an undue hardship to defend accommodation denials.<sup>40</sup> By and large, however, courts have continued their essentialist approach to workplace flexibility. This continued even after the ADA Amendments Act of 2008 (ADAAA),

38. See Travis, *supra* note 1, at 31; see also Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1236-38 (9th Cir. 2012); *Hypes v. First Commerce Corp.*, 134 F.3d 721, 726-27 (5th Cir.1998).

39. For examples of location- and time-dependent jobs, see *infra* note 120 and accompanying text.  
40. See, e.g., *Humphrey v. Mem’l Hosps. Ass’n.*, 239 F.3d 1128 (9th Cir. 2001) (reversing dismissal of medical transcriptionist’s claim requesting telecommuting to accommodate obsessive compulsive disorder); *Cehrs v. Ne. Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775 (6th Cir. 1998) (reversing dismissal of nurse’s claim requesting temporary leave to accommodate psoriasis); *Langon v. Dep’t of Health & Human Servs.*, 959 F.2d 1053 (D.C. Cir. 1992) (reversing dismissal of computer programmer’s claim requesting telecommuting to accommodate multiple sclerosis); *Kesecker v. Marin Cmty. Coll. Dist.*, No. C-11-4048 JSC, 2012 WL 6738759 (N.D. Cal. Dec. 31, 2012) (denying employer summary judgment on police officer’s claim requesting leave to accommodate anxiety); *Fleck v. Wilmac Corp.*, No. 10-05562, 2012 WL 1033472 (E.D. Pa. Mar. 27, 2012) (denying employer summary judgment on physical therapist’s claim requesting a part-time schedule to accommodate an ankle injury); *Peirano v. Momentive Specialty Chems., Inc.*, No. 2:11-CV-00281, 2012 WL 4959429 (S.D. Ohio Oct. 17, 2012) (denying employer summary judgment on customer representative’s claim requesting a flexible start-time to accommodate colitis); *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. 2010) (denying employer summary judgment on technician’s claim requesting a 40-hour workweek to accommodate carcinoma); see also *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595(6th Cir. 2018) (upholding jury verdict that employer violated ADA by denying telecommuting to accommodate employee’s pregnancy); *Criado v. IBM Corp.*, 145 F.3d 437 (1st Cir.1998) (affirming jury verdict that employer violated ADA by denying temporary leave to accommodate employee’s depression); *Norris v. Allied-Sysco Food Servs., Inc.*, 948 F. Supp. 1418 (N.D. Cal. 1996) (affirming jury verdict that employer violated ADA by denying part-time or remote work to accommodate employee’s back injury).

Even in cases denying employers’ summary judgment, not all courts have adopted correct reasoning. Some courts continue to improperly view full-time face-time requirements as potential “essential functions” and merely treat the question as a fact issue or shift the burden to the employer to prove the function’s essential nature, rather than viewing the requirements as *non-functions* and moving directly to the undue hardship defense. See Travis, *supra* note 1, at 54–58.

which Congress enacted in response to judicial narrowing of the ADA's protected class.<sup>41</sup> Unfortunately, while the ADAAA eliminated cramped judicial interpretations of "disability," Congress did not address improper judicial interpretations of "essential job functions." As a result, courts' denial of accommodation requests challenging full-time face-time requirements have arguably increased since the ADAAA, as more cases are passing the disability threshold and failing at the "qualifications" stage. This disturbing pattern has aptly been dubbed "the new ADA backlash."<sup>42</sup>

### *B. Ignoring "Particular Employment Practices" Under Title VII*

Although Title VII does not contain a broad accommodation mandate like the ADA,<sup>43</sup> Title VII still has potential to redesign exclusionary workplace structures. This potential is housed in Title VII's disparate impact theory, which requires employers to remove "artificial, arbitrary, and unnecessary barriers" for members of protected groups.<sup>44</sup> Because women still perform the bulk of caregiving responsibilities, full-time face-time requirements can disproportionately burden women's employment opportunities, rendering conventional organizational structures ripe for disparate impact review.<sup>45</sup>

To state a disparate impact claim, a plaintiff must identify a "particular employment practice"<sup>46</sup> that is applied neutrally to women and men, and show that the practice has a "sufficiently substantial" disparity in its effects on women.<sup>47</sup> For example, a woman with caregiving responsibilities could show that policies requiring onsite work, rigid hours, unlimited overtime, or an uninterrupted work-life make it significantly more difficult for women to get raises or promotions. The burden would then shift to the employer to

41. Pub. L. No. 110-325, 122 Stat. 3553.

42. See Porter, *Backlash*, *supra* note 13, at 70–78.

43. Title VII only contains a narrow accommodation mandate for religion. See 42 U.S.C. § 2000e(j).

44. See *Griggs*, 401 U.S. at 431–32; see also *supra* text accompanying note 12.

45. See Travis, *supra* note 1, at 77–91; see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1227 (1989) (noting that "Herculean time commitments, frequent travel, and stringent limits on absenteeism" often disadvantage women who are primary caregivers).

46. 42 U.S.C. § 2000e-2(k).

47. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988) (setting standards for raising "an inference of causation" in disparate impact claims).

assert an affirmative defense by proving that the practice is “job related” and “consistent with business necessity.”<sup>48</sup> If the employer meets that burden, the employee can still succeed by demonstrating that a less discriminatory alternative practice serves the employer’s business needs.<sup>49</sup>

Although this model is less explicit than the ADA regarding workplace redesign, the remedy in a disparate impact claim may have greater transformative potential.<sup>50</sup> If an employee succeeds in a disparate impact case, a court may require an employer to eliminate the exclusionary practice for *all* workers<sup>51</sup> rather than just modifying an existing practice for an individual employee as in an ADA accommodation case. For example, if a woman proves that a practice prohibiting telecommuting disparately impacts women with caregiving responsibilities, a court could require the employer to eliminate the policy, which would open telecommuting options for the entire workforce. The same analysis could apply to require employers to allow part-time or flextime options, job-sharing, or temporary leaves.

However, similar to the ADA context, many pre-pandemic courts embraced workplace essentialism to undermine Title VII’s transformative potential. In both contexts, judges placed exclusionary workplace structures beyond the reach of antidiscrimination review. While judges accomplished this result under the ADA by improperly defining full-time face-time requirements as “essential job functions,” judges accomplished the same thing under Title VII by improperly interpreting “particular employment practices.”

Instead of viewing full-time face-time requirements as malleable choices about when, where, and how actual job tasks get performed—i.e., as workplace *practices*—pre-pandemic courts often treated full-time face-time requirements as defining features of work itself.<sup>52</sup> This characterization bars employees from identifying policies regarding working time and

48. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

49. *Id.* §§ 2000e-2(k)(1)(A)(ii), 2000e-2(k)(1)(C).

50. *See* Travis, *supra* note 1, at 38.

51. *See Griggs*, 401 U.S. at 431 (holding that “[i]f an employment practice which operates to exclude [protected class members] cannot be shown to be related to job performance, the practice is prohibited”); *see also* Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1238 (2003) (“The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody . . .”).

52. *See* Travis, *supra* note 1, at 36–46.

location as “particular employment practices,” leaving no cognizable target for a disparate impact claim.<sup>53</sup> This allows courts to dismiss claims challenging the gendered impacts of policies barring telecommuting, setting rigid start/stop times, demanding unlimited overtime, or prohibiting temporary leaves, without considering whether the policies have any business justification (or whether omitting the policies would cause any cost or disruption). Without an identifiable “particular employment practice,” a plaintiff fails to state a *prima facie* case, ending the inquiry before reaching the employer’s business necessity defense.

The Seventh Circuit’s opinion in *Dormeyer v. Comerica Bank-Illinois*<sup>54</sup> is a typical example. In *Dormeyer*, a bank teller alleged that the employer’s rigid, onsite hour requirements disparately impacted pregnant women who may be unable to work traditional hours at a central office due to morning sickness or other complications.<sup>55</sup> Instead of characterizing the bank’s working-time rules as “practices” that are subject to disparate impact review, the court viewed them as “the work for which she had been hired.”<sup>56</sup> Treating full-time face-time demands as “legitimate requirements” of the job left the employee without a “particular employment practice” against which to lodge her disparate impact claim, resulting in summary dismissal.<sup>57</sup> Because the case never reached the business necessity defense, the bank never had to demonstrate that its requirements served any business need or would pose any difficulty to change. The court also eliminated the employee’s opportunity to demonstrate an alternative practice that would

53. *Id.*; see also Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 617 (2010) (noting courts’ refusal to recognize particular employment practices as one “obstacle” to pregnancy-based disparate impact claims); Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for “Real” Workers*, 39 STETSON L. REV. 777, 809 (2010) [hereinafter Porter, *Synergistic Solutions*] (explaining how courts’ refusal to treat working time norms as “practices” has blocked women’s caregiving-based disparate impact claims). See generally L. Camille Hébert, *Disparate Impact and Pregnancy: Title VII’s Other Accommodation Requirement*, 24 AM. U. J. GENDER SOC. POL’Y & L. 107 (2015) (describing judicial barriers to disparate impact claims seeking pregnancy accommodation).

54. 223 F.3d 579 (7th Cir. 2000).

55. See *id.* at 583–84. The disparate impact theory may be less necessary for pregnancy-based claims after the Supreme Court’s decision in *Young v. UPS, Inc.*, 575 U.S. 206 (2015), holding that employer policies that accommodate a large portion of non-pregnant workers but fail to accommodate a large portion of pregnant workers may violate Title VII’s disparate treatment theory. The reasoning in *Dormeyer*, however, can still bar disparate impact claims by women challenging full-time face-time requirements based on their disproportionate caregiving responsibilities.

56. See *Dormeyer*, 223 F.3d at 584.

57. *Id.* at 583–84.

have a less disparate impact on women.

Other courts have adopted similar reasoning to dismiss disparate impact challenges to a range of full-time face-time requirements. This is often accomplished by describing inadequate options for remote work, flextime, or temporary leaves as the *lack* of a practice, which defines away the disparate impact target. For example, in *Wallace v. Pyro Mining Co.*, an employee alleged that the employer’s inadequate leave policy disparately impacted women after she was fired for requesting a temporary leave when unable to wean her child from breastfeeding.<sup>58</sup> The court characterized the claim as challenging the *absence* of a leave policy for breastfeeding—rather than challenging the *existence* of a practice with exclusions that affect women more negatively than men.<sup>59</sup> That meant that the employee had failed to identify a particular employment practice to challenge, which resulted in dismissal of the employee’s claim.<sup>60</sup>

The court in *Stout v. Baxter Healthcare Corp.* similarly dismissed an employee’s claim that a policy requiring not more than three absences during a probation period disparately impacted women, after the employee was fired for missing work due to a miscarriage.<sup>61</sup> By characterizing the employee’s target as the *lack* of a pregnancy leave policy—rather than the *existence* of an inadequate leave policy with gendered exclusions—the court defined away any cognizable practice subject to disparate impact review.<sup>62</sup> Once again, workplace essentialism was at play as the court deemed full-time face-time norms to be “legitimate requirements of the job.”<sup>63</sup>

This sleight of hand enables employers to retain exclusionary workplace structures without ever defending their use. The *lack* or *absence* of a policy allowing temporary leaves, flextime, remote work arrangements, or other forms of workplace flexibility necessarily represents the *selection* of an alternative policy—i.e., it represents a choice to exclude certain options for working time and place. Yet employers are not required to justify those

58. 789 F. Supp. 867, 868 (W.D. Ky. 1990), *aff’d* 951 F.2d 351 (6th Cir. 1991).

59. *Id.* at 868–70.

60. *Id.* at 868; *see also* *Troupe v. May Dep’t Stores Corp.*, 20 F.3d 734 (7th Cir. 1994) (holding that employer’s attendance rules and inadequate leave policy were not subject to disparate impact review and dismissing pregnant woman’s Title VII claim). *Cf.* *Mathis v. Wachovia*, 509 F. Supp. 2d 1125, 1143 (N.D. Fla. 2007) (holding that the absence of a policy to investigate inequalities was not a practice subject to disparate impact review).

61. 282 F.3d 856, 858–62 (5th Cir. 2002).

62. *Id.* at 859–62.

63. *Id.* at 862.

choices, no matter how disparate their effects.

As noted in the ADA context, there are some jobs that are indeed time- or location-dependent.<sup>64</sup> Title VII's business necessity defense would allow employers to identify those jobs and retain full-time face-time practices despite their disproportionate impact. By treating full-time face-time requirements as *non-practices*, however, courts have shielded *all* of these exclusionary organizational structures from antidiscrimination review.

Courts have a long history of manipulating the concept of “particular employment practices” to render invisible many workplace policies that negatively affect women, including pay-setting schemes<sup>65</sup> and lay-off selections.<sup>66</sup> Courts have used a variety of semantic devices to define away employment practices in other contexts as well—often describing the employer's conduct as “passive reliance,” rather than active decision-making;<sup>67</sup> as a managerial “preference,” rather than an institutionalized directive;<sup>68</sup> or as a “one-time” decision, rather than a pattern.<sup>69</sup>

Despite this deep resistance to the transformative potential of Title VII's disparate impact tool, there have been a few visionary, pre-pandemic courts that have recognized the malleability of working time and location conventions and that have correctly treated full-time face-time requirements as “practices” subject to disparate impact review.<sup>70</sup> The dramatic workplace

64. For examples of location- and time-dependent jobs, see *infra* note 120 and accompanying text.

65. See Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 609 (2001) (noting courts' refusal to treat pay-setting systems as particular practices for women's disparate impact claims); Nantiya Ruan & Nancy Reichman, *Hours Equity is the New Pay Equity*, 59 VILL. L. REV. 35, 71–72 (2014) (explaining the hurdle that women part-time workers have in getting courts to treat unequal pay from “scheduling disparities” as particular practices subject to disparate impact review).

66. See, e.g., *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151 (7th Cir. 1997) (holding that employer's use of part-time status as a reduction-in-force selection criteria was not a particular practice and dismissing employee's sex-based disparate impact claim); *Gilbreath v. Brookshire Grocery Co.*, 400 F. Supp. 3d 580, 591 (E.D. Tex. 2019) (holding that a layoff or reduction-in-force, by itself, is not a particular practice subject to disparate impact review).

67. See, e.g., *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 305 (7th Cir. 1991) (holding that “passive reliance on employee word-of-mouth recruiting” is not a practice subject to disparate impact review).

68. See, e.g., *Gullet v. Town of Normal*, 156 F. App'x 837, 842 (7th Cir. 2005) (treating a hiring decision as a managerial “preference” rather than a practice subject to disparate impact review).

69. See, e.g., *Ilhardt*, 118 F.3d at 1156 (treating “one-time” lay-offs as non-practices).

70. See, e.g., *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 813, 818–19 (D.C. Cir. 1981) (permitting claim alleging union's lack of disability leave was a practice that disparately impacted women due to pregnancy); *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282, 287–89 (E.D. Tex. 1996) (permitting claim alleging employer's lack of sick leave to care for family members was a practice that disparately impacted women “because of their more frequent role as child-rearers”); *EEOC v.*

restructuring in the wake of COVID-19—and the gendered effects of workplace design that the pandemic has highlighted—validate this approach and reveal its importance for leveling the workplace playing field for women.

## II. HOW THE PANDEMIC’S WORKPLACE DISRUPTION CAN REVIVE EMPLOYMENT DISCRIMINATION LAW’S TRANSFORMATIVE POTENTIAL

During the pandemic, full-time face-time became the exception rather than the rule. “Office centrality is over,” declared Shopify CEO Tobi Lutke;<sup>71</sup> and the data bears him out. Within a few weeks after the World Health Organization declared COVID-19 a pandemic in early March 2020, nearly twenty-five percent of U.S. knowledge workers were telecommuting, which was a shift for about sixteen million employees.<sup>72</sup> In a recent Gallop poll, fifty-seven percent of U.S. employees reported that they had been offered or required to use remote or flextime options by the end of March, and sixty-two percent reported having worked from home full- or part-time by early April.<sup>73</sup> Globally, eighty-eight percent of office workers in a recent

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Warshawsky & Co., 768 F. Supp. 647, 651–55 (N.D. Ill. 1991) (upholding claim alleging employer’s lack of sick leave during the first year of employment was a practice that disparately impacted women due to pregnancy); *see also* Maganuco v. Leyden Cmty. High Sch. Dist. 212, 939 F.2d 440, 445 (7th Cir. 1991) (noting “that a policy which does not provide adequate leave to accommodate the period of disability associated with pregnancy” could “be vulnerable under a disparate-impact theory”).

71. *See* Jack Kelly, *Here are the Companies Leading the Work-From-Home Revolution*, FORBES (May 24, 2020), <https://www.forbes.com/sites/jackkelly/2020/05/24/the-work-from-home-revolution-is-quickly-gaining-momentum/#3a8b085f1848> [<https://perma.cc/W2TE-Y9TY>].

72. *Report: Remote Work in the Age of Covid-19*, SLACK (Apr. 21, 2020), <https://slackhq.com/report-remote-work-during-coronavirus> [<https://perma.cc/5DB2-85RM>].

73. *See* Brenan, *supra* note 8; Adam Hickman & Lydia Saad, *Reviewing Remote Work in the U.S. under COVID-19*, GALLUP (May 22, 2020), <https://news.gallup.com/poll/311375/reviewing-remote-work-covid.aspx> [<https://perma.cc/28F2-3W2A>]; *see also* Erik Brynjolfsson, et al., *COVID-19 and Remote Work: An Early Look at U.S. Data* 14, NATIONAL BUREAU OF ECONOMIC RESEARCH, Working Paper No. 27344 (Apr. 6, 2020), <https://www.nber.org/papers/w27344.pdf> [<https://perma.cc/J296-LSMB>] (reporting that over one-third of the U.S. labor force switched to remote work during the pandemic’s first week); Kristen Herhold, *Working from Home During the Coronavirus Pandemic: The State of Remote Work*, CLUTCH (April 16, 2020), <https://clutch.co/real-estate/resources/state-of-remote-work-during-coronavirus-pandemic> [<https://perma.cc/BDD9-YAJG>] (finding in a survey of 365 U.S. employees that 66% worked fully or partially from home because of COVID-19 and that the percentage of workers working remotely on a full-time basis increased from 17% to 44%); Jon Younger, *The Coronavirus Pandemic is Driving Huge Growth in Remote Freelance Work*, FORBES (March 29, 2020), <https://www.forbes.com/sites/jonyounger/2020/03/29/this-pandemic-is-driving-huge-growth-in-remote-freelance-work/#6ddd00fb7747> [<https://perma.cc/T83H-ZBCP>] (reporting that 57% of U.S.

survey reported working from home during the pandemic, which was a new experience for fifty-seven percent of those individuals.<sup>74</sup> In addition to remote working, many employers embraced flextime and temporary work interruptions by easing attendance rules, altering shift requirements, and implementing furloughs and unpaid leaves.<sup>75</sup>

In the wake of this dramatic workplace restructuring resulting from COVID-19, it is incumbent upon courts to revisit their restrictive rulings regarding workplace flexibility under both the ADA and Title VII. In a post-pandemic world, it is no longer tenable for courts to define work as something done only at a specified place and time, and without any work-life interruptions. Our new working reality offers both an opportunity and an obligation to reassess antidiscrimination law's approach to workplace flexibility.

#### A. Individualizing Design with the ADA

The successful shift of millions of employees into remote and flexible work arrangements due to COVID-19 has rendered indefensible the judicial treatment of full-time face-time requirements as “essential job functions” under the ADA. The biggest change has been the massive increase in work-from-home arrangements, which makes it inexcusable for courts to continue treating onsite presence as a presumed essential function. “Remote work may be the most influential legacy of the Covid-19 pandemic,” says Jen Geller, Senior Editor for the Workforce Executive Council.<sup>76</sup> Professor Joan Williams agrees: “[A]dvocates have long known that the main barrier to

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knowledge workers had begun telecommuting).

74. See *Survey Reveals 76% of Global Office Workers Want to Continue Working from Home Post-COVID-19*, GLOBAL WORKPLACE ANALYTICS (June 2, 2020), <https://globalworkplaceanalytics.com/brags/news-releases> [https://perma.cc/8MVM-35VL]; see also Adam Grant, *How Science Can Fix Remote Work*, LINKEDIN (May 14, 2020), <https://www.linkedin.com/pulse/how-science-can-fix-remote-work-adam-grant/> [https://perma.cc/XY5V-ZKCA] (stating that “[b]efore the pandemic, nearly half of global companies didn’t allow remote work,” while “[n]ow most are requiring it”).

75. See *The COVID-19 Corporate Response Tracker: How America’s Largest Employers Are Treating Stakeholders Amid the Coronavirus Crisis*, JUST CAPITAL (last visited Sept. 5, 2020), <https://justcapital.com/reports/the-covid-19-corporate-response-tracker-how-americas-largest-employers-are-treating-stakeholders-amid-the-coronavirus-crisis/> [https://perma.cc/YCK7-MXXW].

76. Jen Geller, *Remote Work will be a Legacy of the Pandemic; Job Losses May Not Be Over, Survey Finds*, CNBC (June 3, 2020), <https://www.cnbc.com/2020/06/03/remote-work-will-be-legacy-of-pandemic-conference-board-survey-finds.html> [https://perma.cc/QV7M-CF9R].

widespread adoption [of telecommuting] was a failure of imagination. That's over. Under COVID, many jobs that were 'impossible to do remotely' went remote with little transition time and modest outlays. . . . The unthinkable has become not just thinkable but mundane."<sup>77</sup>

In pre-pandemic cases, judges typically relied upon three unproven assumptions to conclude that full-time, onsite presence is a defining feature of nearly every job, enabling courts to reject telecommuting accommodation requests. Specifically, judges assumed that remote work: (1) inevitably reduces employee performance and productivity; (2) leaves employees inadequately supervised; and (3) renders teamwork impossible.<sup>78</sup> Thanks to the pandemic, these unproven assumptions have now been affirmatively disproven.

If anything, remote working improves employee performance. In a recent survey, two-thirds of managers reported that employees increase their productivity when working from home, and eighty-six percent of employees reported being most productive when working alone.<sup>79</sup> A study of about 53,000 federal employees at the Social Security Administration who were forced to telecommute because of the pandemic found that the transition to remote working increased employee efficiency.<sup>80</sup> The employees responded

77. Joan C. Williams, *The Pandemic Has Exposed the Fallacy of the "Ideal Worker,"* HARV. BUS. REV. (May 11, 2020), [https://hbr.org/2020/05/the-pandemic-has-exposed-the-fallacy-of-the-ideal-worker?utm\\_medium=email&utm\\_source=newsletter\\_monthly&utm\\_campaign=womenatwork\\_not\\_activesubs&deliveryName=DM81943](https://hbr.org/2020/05/the-pandemic-has-exposed-the-fallacy-of-the-ideal-worker?utm_medium=email&utm_source=newsletter_monthly&utm_campaign=womenatwork_not_activesubs&deliveryName=DM81943) [<https://perma.cc/V4XH-S3EK>].

78. See, e.g., *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 543–44 (7th Cir. 1995); *Mason*, 357 F.3d at 1119–22. The EEOC recently instructed employers to consider their employees' experiences with remote working during the pandemic when assessing accommodation requests for telecommuting in the future. See *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, at ¶ D.16 (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/KV7H-6Y4D>].

79. See Maddie Shepherd, *28 Surprising Working from Home Statistics*, FUNDERA (Apr. 7, 2020), <https://www.fundera.com/resources/working-from-home-statistics> [<https://perma.cc/Z4PN-4YC2>]; see also Brodie Boland, et al., *Reimagining the Office and Work Life after COVID-19*, MCKINSEY & COMPANY (June 8, 2020), <https://www.mckinsey.com/business-functions/organization/our-insights/reimagining-the-office-and-work-life-after-covid-19> [<https://perma.cc/G2DY-L9LT>] (finding that 41% of employees report being more productive since working remotely during the pandemic and 28% report being similarly productive). See generally Nicholas Bloom, *To Raise Productivity, Let More Employees Work from Home*, HARV. BUS. REV. (Jan-Feb 2014), <https://hbr.org/2014/01/to-raise-productivity-let-more-employees-work-from-home> [<https://perma.cc/878V-LG75>].

80. See Brian Naylor, *For These Federal Employees, Telework Means Productivity is Up, Their Backlog is Down*, NPR (May 5, 2020), <https://www.npr.org/2020/05/05/850106772/for-these-federal-employees-telework-means-productivity-is-up-their-backlog-is-d> [<https://perma.cc/F7ND-EHL2>].

to benefit recipients' calls more quickly, processed claims for new benefits and appeals of benefit denials at a faster pace, and reduced their case backlog by eleven percent.<sup>81</sup>

Employees not only tend to work more productively while telecommuting, they also tend to work longer hours and miss fewer days. Employees in the U.S. who began working remotely during the pandemic increased their average workday by nearly forty percent—adding three extra work hours per day.<sup>82</sup> Sixty-nine percent of telecommuters report lower rates of absenteeism than when working at a central worksite.<sup>83</sup> Telecommuting also increases employee loyalty, decreases turnover, and saves companies billions of dollars.<sup>84</sup> “The feeling that work couldn’t be done remotely is largely debunked,” says Paul Estes, Editor-in-Chief of Staffing.com.<sup>85</sup>

COVID-19 has also debunked the assumption that workers cannot be supervised remotely. “[S]upervisors have figured out how to supervise people without physically breathing down their necks,” says Professor Williams.<sup>86</sup> In some cases, empowering autonomy with remote check-ins can be a more effective managerial technique than in-person micromanagement.<sup>87</sup> The increase in employee productivity is further indication that remote supervision does not pose a barrier to successful work-from-home arrangements.

Online meeting platforms, including Zoom, Slack, and Google Hangouts, have also made teamwork achievable within a remote work environment. The scheduling platform, Doodle, compared the number of virtual meetings that took place immediately before and after the onset of COVID-19 (from February 1 to March 1, 2020).<sup>88</sup> Premium platform users

81. *Id.*

82. *U.S. Employees Working More Hours During COVID-19 Pandemic*, BUSINESS FACILITIES (Mar. 23, 2020), <https://businessfacilities.com/2020/03/u-s-employees-working-more-hours-during-covid-19-pandemic/> [<https://perma.cc/N2A7-N3HC>].

83. Shepherd, *supra* note 79.

84. *See id.*; *see also* Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 364–67 (2003).

85. Younger, *supra* note 73.

86. Williams, *supra* note 77.

87. *See* Matthew Moran, *Don't Panic! What COVID-19 Teaches US About Teamwork Under Pressure*, ASSOCIATION FOR PROJECT MANAGEMENT (Apr. 29, 2020), <https://www.apm.org.uk/blog/don-t-panic-what-covid-19-teaches-us-about-teamwork-under-pressure/> [<https://perma.cc/C9JN-FLHJ>]; *see also* SLACK, *supra* note 72.

88. *See* Bryan Robinson, *What Studies Reveal About Social Distancing and Remote Working*

increased their use of group virtual meetings by forty-two percent and one-on-one virtual meetings by thirty-three percent.<sup>89</sup> Some research indicates that moving online has prompted leaders to run more effective meetings that enhance teamwork capability—for example, by having more clearly-defined agendas, assigning specific participant roles, and using live polling tools.<sup>90</sup> Online meetings can also be expanded easily to include input from broader constituents, which can breakdown hierarchies and reduce silo effects in decision making.<sup>91</sup>

The Sixth Circuit is one of the only courts that has recognized the changing nature of our workplaces and the law’s need to account for this evolution. In a prescient pre-pandemic opinion, the Court declared that “the law must respond to the advance of technology in the employment context, . . . and recognize that the ‘workplace’ is anywhere that an employee can perform her job duties.”<sup>92</sup> Even in *Vande Zande*—the leading case rejecting telecommuting as incompatible with productivity, supervision, and teamwork—the court acknowledged that its assumptions about the essential nature of onsite presence might “change as communications technology advances.”<sup>93</sup> Those advances have certainly arrived with COVID-19, revealing that the “attendance is an essential function” mantra is a myth.

Judicial deference to employers’ attendance rules as a basis for rejecting

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*During Coronavirus*, FORBES (Apr. 4, 2020), <https://www.forbes.com/sites/bryanrobinson/2020/04/04/what-7-studies-show-about-social-distancing-and-remote-working-during-covid-19/#3fe624a7757e> [<https://perma.cc/9MWQ-9C97>].

89. *Id.*

90. See Kristine Glauber, *Teamwork in the Time of COVID-19: How To Lead Virtual Meetings*, DUKE CLINICAL AND TRANSLATIONAL SCIENCE INSTITUTE (Apr. 14, 2020), <https://www.ctsi.duke.edu/news/teamwork-time-covid-19-how-lead-virtual-meetings> [<https://perma.cc/6XTX-7WCZ>]; Matthew Handley, *What the Coronavirus Means for Working Together Remotely*, MARSH & MCLENNAN COMPANIES (last visited Sept. 5, 2020), <https://www.mmc.com/insights/publications/2020/march/what-the-coronavirus-means-for-working-together-remotely.html> [<https://perma.cc/K3U4-XP6W>].

91. See Aaron Levie, *Box and the Future of a Digital Workplace*, BOXBLOGS (May 22, 2020), <https://blog.box.com/box-and-future-digital-workplace> [<https://perma.cc/T6F3-R9TJ>] (explaining that pandemic-induced remote working has enhanced teamwork because “teams are not limited by the people that they sit by to get the best ideas flowing; . . . more voices, at all levels of the organization, can be heard in every meeting”); Kate Whiting, *Is Flexible Working Here to Stay? We Asked 6 Companies How to Make it Work*, WORLD ECONOMIC FORUM (Aug. 26, 2020), <https://www.weforum.org/agenda/2020/08/flexible-remote-working-post-covid19-company-predictions/> [<https://perma.cc/X889-YYQB>] (citing a CEO who believes that “[w]orking from home has busted established hierarchies and silos,” which has increased efficiency during the pandemic).

92. E.E.O.C. v. Ford Motor Co., 752 F.3d 634, 641 (6th Cir. 2014) (internal citation omitted).

93. *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538, 544 (7th Cir. 1995).

ADA accommodation requests for flextime, part-time, and shift changes has also been undermined by employers' responses to COVID-19. Many companies have relaxed their attendance policies and permitted modified schedules.<sup>94</sup> In considering how employees might return safely to central offices with social distancing requirements, employers are planning or contemplating shorter workweeks, staggered start-times, rotating schedules, and other flexible hour arrangements.<sup>95</sup> Federal agencies have been explicitly authorized to use a range of flexible schedules during the post-pandemic return to central worksites, including workdays that combine core and flexible hours, allowing employees to set their own schedules to meet bi-weekly work requirements, and permitting employees to select their own start and stop times.<sup>96</sup>

Employers' pandemic responses also undercut courts' refusal to treat temporary unpaid leaves as ADA accommodations. Within the pandemic's first month, nearly twelve percent of the U.S. workforce (about sixteen million workers) had been furloughed or temporarily laid off.<sup>97</sup> Twenty-five percent of the top 300 U.S. companies have instituted furloughs or unpaid leaves,<sup>98</sup> and fifteen percent of small businesses have furloughed some or all of their employees.<sup>99</sup> Employers plan for these leaves to be temporary, and many furloughed workers have already been called back to work.<sup>100</sup>

94. See, e.g., *The COVID-19 Corporate Response Tracker*, *supra* note 75.

95. See, e.g., Justin Harper, *Coronavirus: Flexible Working Will Be a New Normal After Virus*, BBC NEWS (May 22, 2020), <https://www.bbc.com/news/business-52765165> [<https://perma.cc/R9XK-79WQ>] (noting that "shorter working weeks have been applauded by human resources experts as an alternative to a mass return to offices"); Sundar Pichai, *A Message from our CEO: Working from Home and the Office*, THE KEYWORD (May 26, 2020), <https://www.blog.google/inside-google/working-google/working-from-home-and-office/> [<https://perma.cc/R75H-BPQR>] (announcing Google's plan to use rotating in-office shifts); *New CEO Survey Finds Dramatic Workplace Changes in Response to COVID-19*, BAY AREA COUNCIL (May 15, 2020), <https://www.bayareacouncil.org/press-releases/new-ceo-survey-finds-dramatic-workplace-changes-in-response-to-covid-19/> [<https://perma.cc/EBU4-EFN2>] (surveying Bay Area CEOs).

96. OFFICE OF PERSONNEL MANAGEMENT, FACT SHEET: THE USE OF FLEXIBLE WORK SCHEDULES IN RESPONSE TO CORONAVIRUS DISEASE 2019 (COVID-19) (May 27, 2020), <https://www.opm.gov/policy-data-oversight/covid-19/opm-fact-sheet-the-use-of-flexible-work-schedules-in-response-to-coronavirus-disease-2019-covid-19/> [<https://perma.cc/G4EY-3A7W>].

97. Brynjolfsson, et al., *supra* note 73.

98. *The COVID-19 Corporate Response Tracker*, *supra* note 75.

99. See Laura Wronski, *CNBC/SurveyMonkey Small Business Index Q2 2020*, CNBC (Apr. 2020), <https://www.surveymonkey.com/curiosity/cnbc-small-business-q2-2020/> [<https://perma.cc/3MTD-L97J>].

100. See, e.g., Tatyana Shumsky & Kristin Broughton, *Companies Choose Furloughs over Layoffs to Manage Coronavirus Slowdown*, THE WALL STREET JOURNAL ONLINE (July 6, 2020),

Given the scope of these employer-mandated, temporary leaves, courts may no longer take employers' at their word that an uninterrupted work-life is an essential function of virtually every job. Although the economic impact of temporary leaves is obviously different during a pandemic than in ordinary economic times, the varied impacts of leave requests can and should be assessed in the ADA's undue hardship defense.

By highlighting the malleability of when, where, and how work is performed, employers' responses to COVID-19 should force courts to stop ignoring the statutory and regulatory provisions that have supported workplace flexibility since the ADA's inception.<sup>101</sup> The EEOC interprets the ADA to require modifications not just to "physical and structural obstacles,"<sup>102</sup> but also to "organizational structures,"<sup>103</sup> such as "rigid work schedules,"<sup>104</sup> or other aspects of "when and/or how" a job function is performed.<sup>105</sup> Both the statute and its regulations recognize "job restructuring" and "part-time or modified work schedules" as potential accommodations.<sup>106</sup> The EEOC has explicitly rejected the notion of "attendance as an 'essential function,'"<sup>107</sup> stating that accommodations may include telecommuting,<sup>108</sup> unpaid leaves,<sup>109</sup> "adjusting arrival or departure times,"<sup>110</sup> "providing periodic breaks,"<sup>111</sup> and "altering when certain functions are performed."<sup>112</sup>

As explained above, a job modification cannot be deemed a reasonable accommodation if it requires *removal* of an essential job function. Full-time face-time requirements therefore *cannot* be essential functions, as the statute

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<https://www.wsj.com/articles/companies-choose-furloughs-over-layoffs-to-manage-coronavirus-slowdown-11593954001> [<https://perma.cc/YLV2-ZLFX>].

101. See Travis, *supra* note 1, at 46–67.

102. 29 C.F.R. § 1630, app. § 1630.9 (2019).

103. 29 C.F.R. § 1630.4(a)(iv) (2019).

104. 29 C.F.R. § 1630.9 (2019).

105. EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, "Types of Reasonable Accommodations Related to Job Performance" (2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [<https://perma.cc/45MR-VZZP>] (describing "Job Restructuring").

106. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii) (2019).

107. EEOC, *supra* note 105, at ¶ 22 n.65 (internal citation omitted).

108. *Id.* at ¶ 34.

109. *Id.* at ¶ 21.

110. *Id.* at ¶ 22.

111. *Id.*

112. *Id.*

and regulations endorse their removal by listing part-time and modified work schedules, telecommuting, and unpaid leave as potential accommodations. Courts readily ignored this statutory and regulatory language in pre-pandemic cases based on unsupported assumptions and deference to employers' resistance to workplace flexibility.<sup>113</sup> The pandemic working reality makes it indefensible to ignore these provisions any longer.

This does not mean that the ADA requires employers to accept *all* employee accommodation requests for workplace flexibility. Some jobs really are location- or time-dependent—although certainly far fewer than judges recognized pre-pandemic. Discarding the judicial presumption that full-time face-time is an essential function merely shifts the analysis from the employee's qualifications to the employer's undue hardship defense.<sup>114</sup> If an employer proves that a remote or flexible work arrangement would cause "significant difficulty or expense,"<sup>115</sup> then the employer may deny the accommodation. Focusing on undue hardship appropriately places the burden on employers to provide evidence for refusing workplace flexibility, rather than shielding all full-time face-time conventions from review.

The pandemic has already inspired researchers to devise objective methods to assess the remote-compatibility of various jobs, which will aid in applying the undue hardship inquiry. One assessment method uses data from O\*NET, which is the U.S. Department of Labor's Occupational Information Network database built from large-scale national surveys.<sup>116</sup> O\*NET provides detailed assessments for each occupation about the required skills and abilities, as well as the physical, social, and organizational factors that relate to remote work compatibility.<sup>117</sup>

Using this methodology, researchers characterized thirty-seven percent

113. See Travis, *supra* note 1, at 21–36, 46–76.

114. See EEOC, *supra* note 105, ¶¶ 22–23, 34; see also *Cehrs*, 155 F.3d at 782 (“The presumption that uninterrupted attendance is an essential job requirement improperly dispenses with the burden-shifting analysis[,] [so] the employer never bears the burden of proving that the accommodation proposed by an employee is unreasonable and imposes an undue burden upon it.”).

115. 42 U.S.C. § 12111(10)(A).

116. See Jonathan I. Dingel & Brent Neiman, *How Many Jobs Can Be Done at Home?*, NAT'L BUREAU OF ECON. RES. 2–4 (June 19, 2020), <https://brentneiman.com/research/DN.pdf> [<https://perma.cc/KX9Z-UMNX>]; see also Yichen Su, *Working from Home During a Pandemic: It's Not for Everyone*, FED. RES. BANK OF DALL. (Apr. 7, 2020), <https://www.dallasfed.org/research/economics/2020/0407> [<https://perma.cc/26NV-SGGY>].

117. See Dingel & Neiman, *supra* note 116, at 2–4; Su, *supra* note 116.

of U.S. jobs as remote-compatible.<sup>118</sup> These jobs include, among others: administrative assistants, accountants, computer scientists, software and web developers, sales representatives, lawyers and legal assistants, human resource professionals, psychologists, insurance agents, some types of engineers, and various financial specialists.<sup>119</sup> The occupations characterized as remote-incompatible include, among others: truck drivers, many members of the medical field, paramedics, EMTs, janitors, construction workers, food service workers, meat processors, police officers, fire fighters, mechanics, electricians, plumbers, postal service workers, and public transportation drivers.<sup>120</sup> The occupations identified as remote-compatible employ nearly forty percent of all full-time workers in the U.S.<sup>121</sup> and cover forty-six percent of all U.S. wages.<sup>122</sup> That finding further debunks the notion that onsite presence is an essential function of nearly every job, and it bolsters the need for having an individualized undue hardship assessment to distinguish location-independent from location-dependent jobs.

COVID-19 has not only highlighted the need for an individualized assessment of ADA workplace flexibility requests, but has also raised the stakes for individuals who seek these accommodations. Working at a central location with exposure to COVID-19 poses heightened risks for some individuals with disabilities, particularly those with chronic illnesses, lung disease, or a compromised immune system.<sup>123</sup> As a result, employees are filing more claims against employers alleging failure to accommodate their disabilities than any other COVID-related claim.<sup>124</sup> With the stakes higher than ever, courts have a responsibility to incorporate the lessons of COVID-

118. See Dingel & Neiman, *supra* note 116, at 2; see also Su, *supra* note 116 (using similar methodology to characterize 132 of 400 occupations as remote-compatible).

119. See Su, *supra* note 116; see also Dingel & Neiman, *supra* note 116, at 4–6 (identifying managers, educators, and those working in computers, finance, law, and scientific services as remote compatible).

120. See Su, *supra* note 116; see also Dingel & Neiman, *supra* note 116, at 4–6 (identifying farm, construction, production, agriculture, hotel, restaurant, and retail jobs as remote incompatible).

121. See Su, *supra* note 116.

122. See Dingel & Neiman, *supra* note 116, at 2.

123. See *Coronavirus Disease 2019 (COVID-19): People with Disabilities*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html> [<https://perma.cc/2WG8-RDL5>].

124. See Brandon Campbell, *Pandemic Fueling Disability Accommodation Claims*, LAW360 (May 27, 2020), <https://www.law360.com/articles/1277246/pandemic-fueling-disability-accommodation-claims> [<https://perma.cc/D49R-MPPH>].

19 and rethink their flawed approach to workplace flexibility accommodation claims.

### *B. Removing Barriers with Title VII*

The ease with which employers implemented new requirements regarding work locations and working hours should also force courts to reconsider their views about “particular employment practices” that are available for Title VII disparate impact review. Treating full-time face-time requirements as synonymous with “work”<sup>125</sup> is indefensible when millions of employees are performing the same tasks both pre- and post-pandemic, but in very different places, times, and formats. Employers’ responses to COVID-19 demonstrate that working location, hour, and attendance rules are malleable choices regarding job performance—i.e., they are workplace *practices* with measurable effects that should be subject to antidiscrimination analysis.

Before COVID-19, approximately seven percent of employers allowed employees to work remotely.<sup>126</sup> Just one month into the pandemic, that figure had increased to sixty-two percent.<sup>127</sup> That is a nearly nine-fold increase in the percentage of employers that have explicitly communicated to their employees that they either may or must change their work location. Since the pandemic’s onset, several major employers—including Twitter, Square, Facebook, Shopify, Upwork, and Coinbase—have announced new policies allowing some employees to permanently work from home, and other employers have extended work-from-home options.<sup>128</sup> Shopify’s

125. See, e.g., *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 584 (7th Cir. 2000) (describing onsite attendance as “the work for which [the employee] had been hired”).

126. Drew Desilver, *Before the Coronavirus, Telework Was an Optional Benefit, Mostly for the Affluent Few*, PEW RESEARCH CENTER (March 20, 2020), <https://www.pewresearch.org/fact-tank/2020/03/20/before-the-coronavirus-telework-was-an-optional-benefit-mostly-for-the-affluent-few/> [<https://perma.cc/VZ78-MWKX>]; Shepherd, *supra* note 79.

127. Brennan, *supra* note 8.

128. See Kelly, *supra* note 71; Ian Sherr, *The New Work-From-Home Policies at Facebook, Twitter, Apple and More*, CNET (May 29, 2020), <https://www.cnet.com/news/the-new-work-from-home-policies-at-facebook-twitter-apple-and-more/> [<https://perma.cc/P9KP-NJXV>]; see also Riley de León & Jen Geller, *Here’s How Every Major Workforce Has Been Impacted by the Coronavirus Pandemic*, CNBC (May 21, 2020), <https://www.cnbc.com/2020/03/13/workforce-wire-coronavirus-heres-what-every-major-company-is-doing-about-the-pandemic.html> [<https://perma.cc/3J87-9F7W>] (listing companies’ COVID-related policies); *Gartner CFO Survey Reveals 74% Intend to Shift Some Employees to Remote Work Permanently*, GARTNER

CEO, for example, notified its employees of a new policy called, “Digital by Default,” requiring most employees to permanently work remotely.<sup>129</sup> Similarly, the CEOs of both Upwork and Coinbase announced “Remote-First” policies, giving most employees the option to work from home indefinitely.<sup>130</sup>

In addition to new policies regarding remote work, many companies have responded to COVID-19 by relaxing their attendance rules and permitting flexible or modified schedules.<sup>131</sup> As noted above, many employers are adopting or considering shorter workweeks, staggered start-times, or rotating schedules to address safety and social distancing when employees return to central worksites.<sup>132</sup> The federal government has authorized its agencies to use a wide range of flexible scheduling options during the post-pandemic return from remote work.<sup>133</sup>

These are not just workplace “trends.” These are formally announced policy changes that successfully altered working time and place requirements for a vast portion of the U.S. workforce. COVID-19 has thus taught us that full-time face-time requirements are not “legitimate requirements” of virtually all jobs, as pre-pandemic cases incorrectly assumed.<sup>134</sup> As something that can be established, communicated, defined, altered, and reversed, both flexible and inflexible working time and location directives are “particular employment practices.” With so many flexible options available in the wake of the pandemic, an employer’s decision to *refuse* workplace flexibility can no longer be viewed as a *non-practice* that may escape antidiscrimination review.

Employers’ use of temporary lay-offs and furloughs also undermines courts’ treatment of inadequate leave policies as *non-practices* that are

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(Apr. 3, 2020), <https://www.gartner.com/en/newsroom/press-releases/2020-04-03-gartner-cfo-surey-reveals-74-percent-of-organizations-to-shift-some-employees-to-remote-work-permanently2> [<https://perma.cc/E53V-3MCB>] (reporting survey of 317 CFOs finding that 74% will shift some employees to remote work permanently).

129. Kelly, *supra* note 71.

130. Brian Armstrong, *Post COVID-19, Coinbase Will be a Remote-First Company*, THE COINBASE BLOG (May 20, 2020), <https://blog.coinbase.com/post-covid-19-coinbase-will-be-a-remote-first-company-cdac6e621df7> [<https://perma.cc/RE7F-9AMM>]; Kelly, *supra* note 71.

131. See *The COVID-19 Corporate Response Tracker*, *supra* note 75.

132. See Harper, *supra* note 95; Pichai, *supra* note 95; BAY AREA COUNCIL, *supra* note 95.

133. See OPM, *supra* note 96.

134. See, e.g., *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 583–84 (7th Cir. 2000) (assuming incorrectly that full-time face-time requirements are “legitimate requirements” of a job); *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 862 (5th Cir. 2002) (same).

beyond Title VII's reach. With sixteen million workers facing employer-mandated, temporary leaves within the pandemic's first month,<sup>135</sup> courts can no longer treat employer demands for an uninterrupted work-life as a defining feature of work. The Equal Employment Opportunity Commission has long recognized that "an employment policy under which insufficient or no leave is available" may violate Title VII by disproportionately excluding women.<sup>136</sup> Post-pandemic courts can no longer evade that directive.

Of course, treating working time, attendance, and location requirements as "practices" subject to Title VII disparate impact review does not mean that all such policies will be in jeopardy. If women (or members of other protected groups) demonstrate that they are negatively impacted by such policies, that merely shifts the burden to employers to demonstrate that the policies are "job related" and "consistent with business necessity." This gives employers the opportunity to retain full-time face-time requirements for jobs that truly are location- or time-dependent, while allowing courts to strike down requirements that lack business justification. It also allows employees to demonstrate alternative approaches to workplace flexibility that have a less disparate impact on protected group members but still meet employers' business needs.

The gendered impacts of working time and place conventions will likely shift over time for various reasons. For example, if men start shouldering equal caregiving responsibilities, inflexible work structures should no longer disproportionately impact women. Conversely, the pandemic itself has temporarily reversed the gendered benefits of some forms of workplace flexibility, particularly remote work.<sup>137</sup> While women have long sought

135. See Brynjolfsson, et al., *supra* note 73.

136. 29 C.F.R. § 1604.10(c) (2019); see also Porter, *Synergistic Solutions*, *supra* note 53, at 810–13 (proposing a broader EEOC guidance that would "redefine 'employment practice' to include workplace norms that often go unnoticed").

137. Cf. Deb Tennen-Zapier, *4 Ways Remote Work is Better for Women*, FAST COMPANY (March 15, 2020), <https://www.fastcompany.com/90477102/4-ways-remote-work-is-better-for-women> [<https://perma.cc/9FDC-ZRAH>] (describing how remote work benefited women before the pandemic), with EJ Dickson, *Coronavirus is Killing the Working Mother*, ROLLING STONE (July 3, 2020), <https://www.rollingstone.com/culture/culture-features/working-motherhood-covid-19-coronavirus-1023609/> [<https://perma.cc/U3MK-HHJ>] (describing how remote work is disproportionately harming women during the pandemic); see also Allison Robinson, *COVID-19 Is Causing a Backslide in Workplace Gender Equality. Here's How to Stop It.*, FORBES (Aug. 3, 2020), <https://fortune.com/2020/08/03/covid-19-working-moms-gender-equality-backslide/> [<https://perma.cc/4D6W-4AMF>].

increased telecommuting options to better support their disproportionate caregiving responsibilities and mismatched work and school schedules, involuntary work-from-home has disproportionately harmed women during the pandemic because of the lack of schools, daycares, summer camps, and other childcare sources.<sup>138</sup>

This reality does not diminish the need for courts to scrutinize workplace time, place, and attendance requirements under Title VII's disparate impact theory. Instead, it highlights the importance of subjecting organizational norms to continued review and demanding that employers engage in ongoing assessments of their practices' business needs. This will be particularly important as some employers reduce remote or flexible work options after the pandemic has subsided and schools have reopened, when women will finally have the chance to reap the benefits of the COVID-19-induced workplace experimentation.

## CONCLUSION

When I coined the phrase, “full-time face-time norm,” fifteen years ago to describe the essentialized workplace that was undermining the transformative effect of antidiscrimination law, I never anticipated that it would take a global pandemic to get employers and judges to imagine more inclusive ways to organize the when, where, and how of work performance. With the dramatic workplace restructuring brought on by COVID-19, imagination is no longer required. The pandemic has made it impossible to defend continued reliance on unproven assumptions that nearly all jobs are location- and time-dependent, and that nearly all occupations require an entirely uninterrupted work-life. The pandemic has proven these assumptions to be false.

Antidiscrimination law has always had the potential to address the barriers that rigid working time, location, and attendance requirements can create for certain groups of workers, including some individuals with

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138. Misty L. Heggeness & Jason M. Fields, *Working Moms Bear Brunt of Home Schooling While Working during COVID-19*, U.S. Census Bureau (Aug. 18, 2020), <https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html> [https://perma.cc/WBJ2-GRT2]; Caitlin Mullen, *Moms' Careers Suffering Most from Pandemic Interruptions*, BIZWOMEN (July 21, 2020), <https://www.bizjournals.com/bizwomen/news/latest-news/2020/07/moms-work-suffers-pandemic-forces-them-cut-back.html?page=all> [https://perma.cc/2PBG-59DN].

disabilities and women with disproportionate caregiving responsibilities. The lessons of COVID-19 should rekindle this potential by demonstrating the malleability of our conventional workplace design. For individuals with disabilities, this means that full-time face-time requirements should no longer be treated as “essential job functions,” thereby enabling full assessment of workplace flexibility accommodation requests. For women, this means that full-time face-time requirements should now be viewed as the “particular employment practices” that they have always been, enabling full assessment of their disparate impact and business justifications.

Employee demands for workplace flexibility will not disappear when the pandemic is behind us. As commentators have recognized, there’s no “putting the remote work genie back in the bottle.”<sup>139</sup> The Center for Disease Control has called for dismantling full-time face-time requirements for safety reasons, recommending increased use of telecommuting and videoconferencing, more flexible work schedules, and more flexible attendance, sick leave, and family leave policies.<sup>140</sup> By revealing the true malleability of workplace design, the pandemic has offered not just incredible challenges, but also an incredible opportunity. Using the lessons of COVID-19, it’s time for judges to re-examine their assumptions about the defining features of “work” and empower antidiscrimination law to more meaningfully expand equal employment opportunities.

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139. Hickman & Saad, *supra* note 73.

140. See *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (May 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> [<https://perma.cc/A59D-XHMW>].