Subordination Through Schedules

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Our jobs are not only about the work we do—they are also about when and where we do that work. For a variety of reasons, employees with disabilities often seek modifications of their employers' policies regarding when and where work is performed. These accommodations are often necessary for the employee to remain employed. The Americans with Disabilities Act ("ADA") requires employers to provide reasonable accommodations to employees with disabilities, and these accommodations can include schedule changes. But research demonstrates that when responding to accommodation requests under the ADA, employers are often reluctant to grant requests to modify the rules regarding when and where work is performed, seeing these rules as unalterable. If an employee sues under the ADA, courts usually side with employers, thereby not requiring the employer to provide the modification sought by the disabled employee. Given that schedule changes are the most frequently requested accommodation under the ADA, the entrenchment of these scheduling rules causes many workers with disabilities to lose their jobs or otherwise suffer harm—in short, they are subordinated through their schedules.

In conceptualizing how to solve this, the pandemic's experience with remote work is helpful. This experience taught us that for many jobs, where *work is performed isn't that important, and that remote work can be successful. In order to replicate that experience for* when *work is performed (schedules, hours, shifts) I propose a universal accommodation mandate. If everyone has the right to request accommodations—especially modifications of the rules regarding when and where work is performed—we might see a replication of the COVID-19 remote work experience, but without the disastrous effects of the pandemic. More employees requesting other schedule accommodations should help employers realize that many of their rigid scheduling rules are not necessary, just like COVID-19 taught them that*

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in-person presence is not always necessary. Only then can we end the subordination of disabled workers through their schedules.

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INTRODUCTION

Employers often have very rigid rules regarding when, where, and how much[1] work is performed. For instance, managers might insist that:

- Office Hours are 8:30–5:00—no changes allowed.
- All assembly-line workers must rotate between day shift and night shift—two weeks on day shift, two weeks on night shift—no exceptions.
- Every job in the building is a full-time job. No one can put in half as many hours and still turn out a good product.
- Punching in at the time clock 30 seconds late is still late.
- All sales workers are required to work 55–60 hours per week. We all hustle around here. That's the way we stay ahead of the competition.
- This plant has a no-fault attendance policy; if you're absent more than eight workdays per year, you will be terminated.

These are *entrenched* policies. They are built into the fabric of the company. For example, for many employers, if you asked who set the office hours to be 8:30–5:00 and *why* (why those particular hours), most people would not know the answer. You would probably hear some variation of the response "that's just the way it's always been done."

I have been working on this problem for years,[2] because the more entrenched and long-standing a rule is, the harder it will be to get employers to consider changing it, even if doing so would be relatively easy. As I and others have demonstrated, employers and courts often do not see their

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1. I want to be clear that when I refer to "how much" work to be done, I am referring to how many *hours* the employee works, not how much work they actually accomplish during those hours. Often, these two things are correlated, but not always. I think everyone would agree that there are many situations where someone is not doing any work during the time they are supposed to be working. In this article, I often use the shorthand of "when and where we work" to also encompass the number of hours someone is required to work.

2. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 KAN. L. REV. 355, 361–65 (2010); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 73–78 (2014) [hereinafter *Backlash*]; Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 981–86 (2014); Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 229–33 (2016) [hereinafter *Stigma*]; Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 91–96 (2016) [hereinafter *Everyone*]; Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MO. L. REV. 121, 149–56 (2019) [hereinafter *Hardship*].

scheduling norms as policies or practices that can be modified; they simply see them as the way work is structured and therefore not amenable to any modifications.[3]

Despite the fact that the ADA requires employers to provide accommodations that would allow disabled workers to perform the essential functions of their jobs,[4] there are many examples in which courts perpetuate this schedule subordination by not requiring employers to provide these accommodations. Courts have held, for example, that: (1) a full-time schedule is an essential function of the job, thereby negating the employer's obligation to allow the employee to work part-time;[5] (2) mandatory overtime is an essential function of the job;[6] (3) a request for a part-time schedule is actually a request to create a new position, which is not required under the ADA;[7] (4) a leave of absence is not a reasonable accommodation because it does not allow an employee to currently perform the essential functions of the job;[8] (5) attendance is an essential function of the job, thereby allowing employers to maintain extremely stringent attendance policies;[9] and (6) in-

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3. *See* CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE, at xiii (2010); NICOLE BUONOCORE PORTER, THE WORKPLACE REIMAGINED: ACCOMMODATING OUR BODIES AND OUR LIVES 81–89 (2023); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 39 (2005).

4. 42 U.S.C. § 12112(b)(5)(A).

5. *See, e.g.*, White v. Standard Ins. Co., No. 12-1287, 2013 WL 3242297, at *549–50 (6th Cir. June 28, 2013) (holding that a full-time schedule is an essential function of the job); Knospore v. Friends of Animals, Inc., No. 3:10CV612 (MRK), 2012 WL 965527, at *11 (D. Conn. Mar. 20, 2012) (same); Carsoelli v. Allstate Ins. Co., No. 01-C-6834, 2004 WL 407004, at *5 (N.D. Ill. Feb. 23, 2004) (same).

6. *See, e.g.*, Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1303–06 (11th Cir. 2000) (holding that mandatory overtime was an essential function of the job).

7. Jeannette Cox, *Work Hours & Disability Justice*, 111 GEO. L.J. 1, 10–12 (2022) (discussing such cases).

8. *See, e.g.*, Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 481 (7th Cir. 2017) (holding that an extended leave of absence is not a reasonable accommodation because it does not allow the employee to perform the essential function of the job); Scruggs v. Pulaski County, 817 F.3d 1087, 1093 (8th Cir. 2016) (holding that an extension of FMLA leave is not a reasonable accommodation); Hwang v. Kansas State Univ., 753 F.3d 1159, 1161 (10th Cir. 2014) (holding that an extended leave of absence for an employee recovering from cancer is not required); Basden v. Pro. Transp., Inc., 714 F.3d 1034, 1037 (7th Cir. 2013) (holding that the employer was not required to give the plaintiff even one month of leave to attempt to obtain a diagnosis and treatment for multiple sclerosis); Graves v. Finch Pruyn & Co., Inc., No. 09-1444-CV, 2009 WL 3850437, at *560–61 (2d Cir. Nov. 17, 2009) (stating that even a two-week leave of absence is not reasonable because plaintiff made no showing that the leave would allow him to perform the essential functions of his job).

9. *See, e.g.*, Blackard v. Livingston Parish Sewer Dist., No. 12-704-SDD-RLB, 2014 WL 199629, at *3–5 (M.D. La. Jan. 15, 2014) (holding that regular attendance is an essential function

person presence is an essential function of the job, thereby allowing employers to refuse remote-work accommodations.[10]

The problem with employers' and courts' refusal to allow or require these types of accommodations is that requests to modify when and where work is performed are the most frequently requested accommodations under the ADA; many workers with disabilities need variations of their schedules to properly manage their disabilities.[11] Accordingly, if we hope to improve the lives and careers of workers with disabilities, we must get rid of subordination through scheduling.

So how do we do it? How do we convince employers to let go of their rigid rules regarding when, where, and how much work is performed? One interesting example of this happening is the experience with remote work during COVID.[12] Before the pandemic, employers were generally reluctant to allow employees to work from home full-time.[13] And even when employers were arguably obligated under the ADA to allow an employee to work from home as an accommodation for a disability, employers often refused, and courts usually sided with the employers.[14] Employers' legal argument was that in-person presence was an essential function of the job and therefore does not have to be waived as a reasonable accommodation.[15] But

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of most jobs); Lewis v. N.Y.C. Police Dept., 908 F. Supp. 2d 313, 326 (E.D.N.Y. 2012) (holding that plaintiff was not qualified because of absences due to a disability); Brown v. Honda of Am., No. 2:10-CV-459, 2012 WL 4061795, at *4–6 (S.D. Ohio Sept. 14, 2012) (holding that attendance is an essential function of the job).

10. *See infra* Section I.C.

11. Lisa Schur et al., *Accommodating Employees with and Without Disabilities*, 53 HUM. RES. MGMT. 593, 601 (2014).

12. *See generally* PORTER, *supra* note 3, at 90–92.

13. Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25, 31 (2020); Orly Lobel, *Remote Law: The Great Resignation, Great Gigification, Portable Benefits, and the Overdue Shuffling of Work Policy*, 63 SANTA CLARA L. REV. 1, 6 (2023) (noting that pre-COVID-19, only 23% of employees worked remotely on a regular basis); Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1, 15 (2021); D'Andra Millsap Shu, *Remote Work Disability Accommodations in the Post-Pandemic Workplace: The Need for Evidence-Driven Analysis*, 95 TEMPLE L. REV. 201, 206 (2023). *See generally* Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 CORNELL L. REV. 1927 (2022) (discussing dozens of cases where courts dismissed the claims of ADA plaintiffs when their employers refused to let them work from home).

14. Hickox & Liao, *supra* note 13, at 48 (stating that courts often defer to employers when holding that a remote work accommodation is not possible); Porter, *supra* note 13, at 16 (stating that before the pandemic many employers refused to grant work-from-home accommodations); Kanter, *supra* note 13, at 1946–48, 1954 n.96 (same); Shu, *supra* note 13, at 214 (same).

15. *See, e.g.*, EEOC v. Ford Motor Co., 782 F.3d 753, 757–58 (6th Cir. 2015) (en banc) (holding that work-from-home was not a reasonable accommodation); Vande Zande v. Wisconsin

at a more practical level, the problem was that employers could not imagine how working from home could work. How can employees assist clients or customers from home? How can employees brainstorm with colleagues or be adequately supervised? How will we ever know if they are working, how hard they are working, and what specific hours they are working?[16]

Then COVID-19 hit. When everything shut down during the early days of the pandemic, the number of employees working from home skyrocketed. Nearly two-thirds of American employees were working from home.[17] Everyone scrambled to learn online platforms that made both teamwork and remote supervision possible.[18] Even lawyers and courts got on board, with depositions, hearings, and even trials taking place remotely.[19]

We all learned that it is possible to successfully work from home. And there is plenty of evidence that working from home has, in fact, been very successful.[20] Of course, working from home is not possible for many workers, and even when possible, it does not benefit all workers, including all workers with disabilities.[21] More importantly, it's not the only schedule modification that employees with disabilities need—they also might need to vary their hours, change their schedules or shifts, and occasionally miss work.[22] Accordingly, in order to end subordination through scheduling, we need to

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Dept. of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (announcing the general rule that working from home is ordinarily not a reasonable accommodation).

16. Porter, *supra* note 13, at 16; *see also* Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL'Y 203, 219 (2020) (discussing the fact that judges often assume that teamwork and supervision is not possible when employees are working from home).

17. *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/NJE2-Q96Q].

18. Stephanie Lowe, *How Telecommuting During the COVID-19 Pandemic Impacts the Disability Interactive Process*, CAL. PUB. AGENCY LAB. & EMP. BLOG (June 18, 2020), https://www.calpublicagencylaboremploymentblog.com/disability/how-telecommuting-during-the-covid-19-pandemic-impacts-the-disability-interactive-process/ [https://perma.cc/EF9P-9DP7].

19. Porter, *supra* note 13, at 21.

20. *Id.*; Shu, *supra* note 13, at 233–34.

21. In the spring of 2023, several articles and op-eds in the popular press have revealed some of the disadvantages with remote work. *See, e.g.*, Jordan Metzl, *Working from Home Is Less Healthy than You Think*, N.Y. TIMES (Mar. 14, 2023), https://www.nytimes.com/2023/03/14/opinion/wfh-return-to-office-health.html?smid=url-share (discussing the negative physical and mental health consequences of remote work); Fred Turner, *You Call This 'Flexible Work'?*, N.Y. TIMES (Apr. 12, 2013), https://www.nytimes.com/2023/04/12/magazine/flexible-work-home.html?smid=url-share (discussing the disadvantages of a blurred boundary between work and home).

22. *See* PORTER, *supra* note 3, at 126.

find a way of mimicking the lesson learned from the pandemic—that not all rigidly held rules are necessary.

One way to conceptualize the remote-work experience during the pandemic is that it was the equivalent of millions of employees asking for remote-work accommodations simultaneously. Instead of fielding these requests one by one (which would have been unwieldy or even impossible), employers had to restructure their workplaces almost overnight so that all eligible employees could work from home. Similarly, if employers are inundated with requests for accommodations related to other schedule changes, such as flex time (shifting an employee's start and end times), employers might realize that providing flex time is not that difficult, just as they realized that allowing remote work was not that difficult. But this realization will never happen if *only* employees with disabilities are entitled to accommodations. There simply are not enough disabled workers seeking accommodations.[23] Accordingly, the only way to get large numbers of employees seeking similar schedule accommodations is through a universal accommodation mandate—one that accommodates everyone.

This Article makes three primary contributions towards the goal of ending subordination through schedules. First, it demonstrates the unyielding rigidity of employers' rules regarding when and where work is performed. Second, it explores our experience with COVID-19 and how the pandemic worked to (partially) dismantle the requirement of in-person attendance. But because the norm of in-person attendance is not the only schedule norm that makes life difficult for many people with disabilities, the third contribution of this paper is to propose a universal accommodation mandate to end employers' reliance on rigid norms regarding when and where we work. As I demonstrate below, only when employers are forced to accommodate large swaths of the workforce will we make progress towards ending schedule subordination.[24]

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23. To be clear, this is not because there are not enough employees with disabilities. Although statistics vary, after the ADA was amended in 2008, the majority of Americans have a condition that likely would (and should) meet the definition of disability under the ADA. *See* Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 553 (2021). However, many of these employees do not need an accommodation, and even if they did, they might not consider themselves disabled. And even if they did consider themselves disabled, they might not be willing to claim their disabilities, in large part because of the stigma attached to many disabilities. *See generally* Nicole Buonocore Porter, *Disclaiming Disability*, 55 U.C. DAVIS L. REV. 1829 (2022); *see also* Eyer, *supra* note 23, at 564–68.

24. *See infra* Part III.

Although I have discussed this proposal in earlier work,[25] recent legal developments and scholarly arguments have occurred that might challenge my central thesis—that an individual (but universal) accommodation mandate is the best way to break down employers' entrenched rules and policies regarding when and where we work. These developments include the enactment of the Pregnant Workers Fairness Act,[26] the change to the undue hardship standard for religious accommodations under Title VII,[27] an increase in state and municipal laws proposing employer mandates that address schedules,[28] and scholars' criticism of the reactive (rather than proactive) nature of individual accommodations.[29] After exploring these developments and critiques, I nevertheless end where I started: a universal accommodation mandate remains the best way to end employers' subordination of people with disabilities through their schedules.

This Article proceeds in five additional parts. Part II provides a history and description of many of the most common components and issues surrounding schedules, including number of hours, schedules, shifts, attendance policies, and leaves of absence. Part III demonstrates just how entrenched and rigid these rules are and discusses the harm that these rigid rules cause. Part IV discusses how COVID-19 helped to loosen the requirement that all work must be performed at a central location, but this Part also acknowledges the disadvantages of remote work. Part V argues that the best way to mimic the remote-work experience of the pandemic is a universal accommodation mandate. This Part also addresses and responds to the recent developments that might challenge my thesis that a universal accommodation mandate remains the best way to end subordination through schedules. Finally, Part VI briefly concludes.

I. HISTORY AND DESCRIPTION OF THE RULES REGARDING WHEN, WHERE, AND HOW MUCH WE WORK[30]

This Part provides a history and description of the most common components of our schedules—hours, shifts, attendance policies, and leaves of absence. Regardless of the type of job one has, from the burger flipper at a fast-food joint to the CEO of a major corporation, all jobs have rules or

25. PORTER, *supra* note 3, at 127–28; *Everyone*, *supra* note 2, at 108–28.
26. 42 U.S.C. § 2000gg-1.
27. Groff v. DeJoy, 600 U.S. 447 (2023); *see also infra* Section V.C.1.
28. *See infra* Section V.C.1.
29. *See infra* Section V.C.3.
30. Some of this history is derived in part from PORTER, *supra* note 3, at 74.

expectations (of varying rigidity) about when, where, and how many hours the job requires.

A. Hours

Before the Fair Labor Standards Act was enacted in 1938, although hours varied quite a bit, many employers required very long hours.[31] Before unionization became common, employees were at the mercy of their employers, and most of the time, of their foremen, who often wielded absolute power over their employees, including firing them for any reason or no reason.[32] Accordingly, it's not surprising that employees during this time were not willing to push back against the hours required to work. Modern expectations about management prerogatives, such as unilateral control over the timing of work, are the result of the historical struggles between management and workers over how to define the boundaries of the working relationship.[33] During this time, employers continually found new ways to obtain more and more control over workers' time and their productive process.[34]

Moreover, because of the separate spheres ideology that developed (men belonged at work and women belonged at home), most men working during the industrial revolution had the ability to work as many hours as needed, because they usually had a wife who was at home and could handle the household and childcare responsibilities.[35] By the time that women began entering the workforce in significant numbers, the full-time, year-round norms of work were already firmly established.[36]

In 1938, President Franklin D. Roosevelt signed the Fair Labor Standards Act ("FLSA"), which banned oppressive child labor, set a minimum wage, and set a maximum workweek.[37] The main purpose of the Act was to

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31. *Id.* at 74.

32. SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY 15–16 (2004); Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1108 n.59. In fact, in some factories, bosses tracked their workers time judiciously, and no one could challenge the boss's accounting of the time, in part because none of the workers were allowed watches of their own. Turner, *supra* note 21.

33. *See* Albiston, *supra* note 32, at 1150; JACOBY, *supra* note 32, at 34.

34. *See* JACOBY, *supra* note 32, at 15–16; Turner, *supra* note 21.

35. *See* Turner, *supra* note 21.

36. *See* ALBISTON, *supra* note 3, at 67.

37. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

minimize unemployment during the depression.[38] This Act is often credited with giving us the forty-hour workweek, although as initially enacted, it set full-time as forty-four hours per week.[39] Even though the forty-hour norm is so common today, historically, many employees worked much more.[40]

Interestingly, workweeks were also sometimes shorter than the now-standard forty hours.[41] Even before the FLSA, employers sometimes voluntarily reduced employees' hours to minimize unemployment during times of depressed prosperity.[42] As noted by historian Sanford Jacoby: "In order to reduce the number of layoffs, firms either shortened daily or weekly work hours or rotated shifts, thus maximizing the number of employed workers but reducing average earnings."[43] For instance, during the time period from 1929 to 1933, average weekly hours in manufacturing plants dropped from forty-four to thirty-eight.[44] "[E]mployers hoped that work-sharing would ease demands for unemployment insurance and other public measures which were ideologically repugnant and which could prove costly."[45] When the depression was at its worst in 1932, some unions were trying to bargain for a six-hour day to avoid layoffs and unemployment.[46]

Some of the standardization we see with hours and schedules is the result of unionization, both actual unionization as well as the threat of unionization.[47] For instance, once unions had the legal protection of federal laws, management tried to standardize as many policies as possible as a way of avoiding unionization.[48] Some of these policies were related to discipline and discharge. But some were related to standard hours. The idea was to take away some of the power that had previously been vested in foremen and to have decisions made at the company level rather than the department level.[49] "Less discretion by supervisors leads to more consistent treatment, which is something unions care about."[50]

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38. *Id.*; Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 117, 120 (2012).
39. Turner, *supra* note 21.
40. *See, e.g.*, *id.*
41. JACOBY, *supra* note 32, at 158.
42. *Id.* at 157.
43. *Id.*
44. *Id.* at 158.
45. *Id.* at 159.
46. *Id.*
47. *Id.* at 47.
48. *Id.*
49. *See id.* at 47.
50. PORTER, *supra* note 3, at 76.

So where are we now with respect to hours worked? Statistics vary, of course, but by many estimates, Americans put in more hours than any other industrialized nation.[51] From 1967 to 2000, the average number of hours worked in a year went up from 1,716 to 1,878.[52] The average number of weeks worked in that same time period increased from 43.5 to 47.[53] If you combine a married couple's hours, the total increased from 3,331 in 1979 to 3,719 in 2000.[54]

Other studies indicate that the picture with respect to hours is not as clear as we once thought it was. As Jerry Jacobs and Kathleen Gerson discovered, although many Americans feel conflicted between work and home, not all of these people are working too many hours.[55] There is a divide between those who work too many hours and those who work too few hours.[56] Moreover, the reports of increased time working might reflect the fact that Americans take less vacation time and more women are in the workforce and working more hours rather than a per-week increase in hours worked.[57] Nevertheless, these researchers agree that for many Americans, long hours cause a real obstacle to being able to balance work and home.[58]

Several factors explain why employers have an incentive to force employees to work long hours. First, for employees who are salaried and therefore exempt from FLSA-mandated overtime, it is much cheaper for an employer to force those employees to work longer hours than it is to hire another employee.[59] Moreover, the number of employees working in exempt positions has doubled since the FLSA was enacted in 1938.[60] Second, even

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51. *See Americans Work Longest Hours Among Industrialized Countries, Japanese Second Longest. Europeans Work Less Time, But Register Faster Productivity Gains New ILO Statistical Volume Highlights Labour Trends Worldwide*, INT'L LABOUR ORG. (Sept. 6, 1999), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_071326/lang--en/index.htm [https://perma.cc/GL8L-5ZY8].

52. Stephen F. Befort, *Accommodation at Work: Lessons from the Americans with Disabilities Act and Possibilities for Alleviating the American Worker Time Crunch*, 13 CORNELL J.L. & PUB. POL'Y 615, 629 (2004).

53. *Id.*

54. *Id.* at 630.

55. JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY AND GENDER INEQUALITY 85, 169 (2004); Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, *in* PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 131, 132 (Judy Fudge & Rosemary Owens eds., Hart Publishing 2006).

56. Schultz & Hoffman, *supra* note 55, at 132.

57. JACOBS & GERSON, *supra* note 55, at 128–29.

58. *Id.* at 166.

59. Befort, *supra* note 52, at 631–32; Schultz & Hoffman, *supra* note 55, at 139.

60. Befort, *supra* note 52, at 632.

with non-exempt employees, who are entitled to time and a half for hours worked over forty, because of the costs of benefits, many employers still find it cheaper to pay for overtime rather than hiring additional employees.[61] The cost of benefits has increased substantially—from 5.1% of salaries in 1948 to 15.4% in 2000[62] and is undoubtedly higher now. Third, the desire to pay for overtime rather than hire additional employees is motivated in part because, for many industries, the labor demands are unpredictable.[63] Understandably, employers do not want to hire a bunch of new workers when labor demands are high only to have to lay them off when demand wanes.[64]

B. Shifts

What shifts we work is largely dependent on our jobs and industries. For example, medical professionals usually work "three 12-hour shifts per week rather than the traditional five 8-hour shifts."[65] For industries that operate around the clock (which is not limited to the medical profession), employers are forced to assign some workers to the less desirable evening or weekend shifts.[66] But outside of the obvious businesses for which twenty-four-hour operation is necessary—hospitals, hotels, police and fire departments—some businesses (especially in the manufacturing industries) make a deliberate decision to operate 24/7.[67] "Manufacturing companies realized decades ago that running an assembly line around the clock was cheaper and more efficient than shutting down production at night and starting it up again every morning."[68]

Not surprisingly, most people prefer not to work at night. (The one exception to this is a couple who decides to "tag team" parent so that someone is always home with the children.[69]) Assuming there are not enough employees who voluntarily choose to work the evening shifts, employers

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61. *Id.*

62. *Id.*

63. *See* Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 383–86 (2003).

64. *See id.*

65. PORTER, *supra* note 3, at 77.

66. *Id.*; Robert C. Bird & Niki Mirtorabi, *Shiftwork and the Law*, 27 BERKELEY J. EMP. & LAB. L. 383, 388–89 (2006) (noting that most employees do not want to work alternative shifts, and employers often have to demand that employees work them).

67. *See* Bird & Mirtorabi, *supra* note 66, at 387–88.

68. *Id.* at 387.

69. Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2198–99 (2021).

must come up with some method of assigning employees to the less desirable shifts. For non-unionized companies, employers often had to pay premium wages to entice employees to work at night:[70]

> But for companies where a union is present, seniority systems usually determine who must work at night. The most junior employees are assigned the unpopular shifts (often evening and/or weekend) until they have built up enough seniority to transfer to the day shift. Some employers who are non-unionized but who do not want to pay premium wages use rotating shifts, where employees work for some period of time on the day shift, and then rotate to the night shift for the same period of time (usually weeks or months, but sometimes more often).[71]

There are significant costs of shift work, both for workers and employers. As stated by two commentators: "What practice contributes to the world's most devastating industrial accidents, costs employers $206 billion annually, promotes fatigue, depression, flu, infertility, obesity and heart disease, yet receives negligible judicial recognition and attracts little attention from legal scholars? The answer is deceptively mundane: shiftwork."[72] About thirteen percent of the American workforce works non-standard shifts.[73] These employees suffer all kinds of health consequences, and their employers "pay" for non-standard shifts in terms of the high costs of workplace accidents.[74] All of these costs are exacerbated when employers use rotating shifts (rather than a straight night shift).[75] There are many disabilities that might make it difficult (or even impossible) to work the night shift, including diabetes, narcolepsy, night blindness, and mental illness, to name a few.[76]

C. Attendance Policies

As noted above, during the early days of industrialization, foremen had virtually complete control over every aspect of their employees' jobs and this included attendance policies.[77] Even today, many employers continue to have

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70. Terrence M. McMenamin, *A Time to Work: Recent Trends in Shift Work and Flexible Schedules*, MONTHLY LAB. REV. 9 (Dec. 2007), https://www.bls.gov/opub/mlr/2007/12/art1full.pdf [https://perma.cc/T7MR-6JCN].

71. PORTER, *supra* note 3, at 78.

72. Bird & Mirtorabi, *supra* note 66, at 384.

73. *Id.* at 384–85.

74. *Id.* at 385.

75. *Id.* at 390.

76. *Id.*

77. JACOBY, *supra* note 32, at 13.

very stingy and rigid attendance policies. When I was a practicing lawyer, several of my manufacturing clients had very stringent, "no-fault" attendance policies. Under these policies, employees would incur a "point" or "occurrence" for every absence, regardless of the reason, unless it was protected under the Family and Medical Leave Act ("FMLA").[78] Employees were only allowed seven such absences over an entire year. After seven, they would be terminated. Think about how fast an employee could incur those seven absences—car trouble, employee is sick (but not sick enough to qualify for FMLA leave), child is sick, child's school has a snow day, child's in-home daycare is closed, or the nanny or babysitter is sick. I left private practice to join legal academia in 2004, and honestly, I thought these no-fault policies were an anomaly. Not so, according to a 2020 article.

The organization "A Better Balance" published an article in June 2020 discussing the attendance policies of sixty-six of the nation's largest employers who together employ eighteen million workers.[79] The basic message of the study and article is that many employers have policies that do not comply with federal and state laws.[80] But for our purposes, the import of the Better Balance article is that many large employers continue to use "no fault" attendance policies, where employees incur points for all absences, regardless of the reason.[81] In reality, it is unlawful for an employer to penalize an employee for taking FMLA leave, and some employees would be entitled to excused absences under the ADA. However, many of these employers' policies did not notify employees of their right to leave under the FMLA or the ADA and sometimes provided misleading information about the employees' right to use those laws.[82]

Overly stringent attendance policies might force employees to make impossible choices between their own health (or the health and wellbeing of their loved ones) and their jobs. A couple examples: A single mother incurred a point when her eight-month-old had pneumonia.[83] Another worker received a point after visiting the emergency room because she was vomiting blood.[84]

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78. 29 U.S.C. §§ 2601-2654; *see also* BAKST ET AL., MISLED & MISINFORMED: HOW SOME U.S. EMPLOYERS USE "NO FAULT" ATTENDANCE POLICIES TO TRAMPLE ON WORKERS' RIGHTS (AND GET AWAY WITH IT) 8–9 (2020), https://www.abetterbalance.org/wp-content/uploads/2020/06/Misled_and_Misinformed_A_Better_Balance-1-1.pdf [https://perma.cc/75SM-BHR8].

79. BAKST ET AL., *supra* note 78, at 1.

80. *Id.* at 2.

81. *Id.* at 8.

82. *Id.* at 14, 23.

83. *Id.* at 9.

84. *Id.*

Some of the policies called for discipline after only two occurrences (points) and some probationary employees could be terminated with only one absence.[85]

Perhaps the most troubling effect of these policies is that they incentivize employees to come to work if they are sick so that they do not incur a point that could lead to discipline or even termination.[86] Coming to work sick has always been a problem, but it has taken on new significance since the COVID-19 pandemic—especially given that many of the employers with stringent attendance policies were in the meatpacking or manufacturing industries, where employees work close together.[87] One meatpacking employer offered $500 bonuses "to any worker who did not miss a shift for any reason between April 1 and May 1, 2020."[88] The employer would ostensibly excuse absences related to COVID-19, but only if the employer ordered the employee to stay home or the employee had a doctor's note.[89] As many readers know, getting a doctor's note during the early days of the pandemic was close to impossible.[90]

To be fair, it's not all bad news. As noted in an article by Deborah Widiss, many full-time employees have access to a week or two of paid sick days each year.[91] This certainly helps people with disabilities and other health conditions. But it's nowhere near a universal policy, and it's not always job-protected.

D. Leaves of Absence

Before the passage of the FMLA, employees had no federally protected right to leave if needed for their own health conditions, because they had a baby, or needed to care for a family member.[92] Despite the passage of the FMLA, only fifty-six percent of the population has access to the federally

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85. *Id.*

86. *Id.* at 5.

87. *Id.* at 27.

88. *Id.*

89. *Id.*

90. *Id.* ("The unavailability of testing during much of the crisis, and many doctors' reluctance to write . . . notes [ordering a worker to stay home] when they are seeing many patients remotely . . . virtually guarantees that workers who stay home when exhibiting symptoms will incur points.").

91. Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J.F. 215, 225 (2021).

92. Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 327 (2014).

guaranteed right to twelve weeks of unpaid leave via the FMLA.[93] Although many employers provide leave even when not required to, this leave is not often paid,[94] and many low-wage workers cannot afford to take lengthy leaves of absence without pay.[95] In recent years, several states have adopted leave statutes that provide partial pay and require employers to provide leave for an employee's own health needs or for employees to care for family members with medical needs.[96]

However, despite the advent of FMLA leave, state leave laws, and employers who voluntarily provide leave even without a legal mandate, taking leave is still stigmatized. All of these leave laws have not changed the default entrenched norm of year-round employment with perfect (or close to perfect) attendance.[97]

Moreover, many employees with disabilities are not protected by the FMLA because they have not worked for their employer long enough or their employer is not large enough (fifty or more employees) to be covered by the FMLA.[98] And even when employees with disabilities are entitled to FMLA leave, the statute only requires twelve weeks of leave in a twelve-month period.[99] Many people with disabilities might require more time off to heal.[100] And yet in recent years, several courts have held that a leave of absence for a disabled worker who is not covered by the FMLA, or an extended leave for a disabled worker who has exhausted their twelve weeks of FMLA, is not a reasonable accommodation under the ADA.[101]

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93. Dylan Miettinen, *As the Family and Medical Leave Act Turns 30, Millions of Americans Still Lack Access to Paid Leave*, MARKETPLACE (Feb. 3, 2023), https://www.marketplace.org/2023/02/03/a-fmla-turns-30-millions-of-americans-still-lack-access-to-paid-leave/ [https://perma.cc/UZ37-37GM].

94. One statistic reveals that "[o]nly 12% of the workforce has access to employer-provided paid family leave," and lower-paid workers are less likely to have access to paid family leave. Catherine Albiston & Lindsey Trimble O'Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 5 (2016).

95. *See id.* at 33; Widiss, *supra* note 91, at 226.

96. Widiss, *supra* note 91, at 227–30 (discussing these laws).

97. ALBISTON, *supra* note 3, at 67; Albiston & O'Connor, *supra* note 94, at 35.

98. *See* 29 U.S.C. § 2611(2)(B)(ii) (only covering employers with 50 or more employees); *id.* § 2611(2)(A) (only protecting employees who have worked for the company for one year and who have worked 1,250 hours in the past year).

99. 29 U.S.C. § 2612(a)(1).

100. *See generally* Ryan H. Nelson, *Now and Again: Reappraising Disability Leave as an Accommodation*, 46 BYU L. REV. 1489 (2021) (explaining that people with disabilities sometimes need a leave of absence to recuperate from an illness or injury and that such need for leave sometimes extends past the FMLA's allowed twelve weeks).

101. *See, e.g.*, Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 481 (7th Cir. 2017) (holding that a long-term leave of absence, after the expiration of twelve weeks of FMLA leave, is not a reasonable accommodation under the ADA); Hwang v. Kan. State Univ., 753 F.3d 1159,

To be clear, according to Ryan Nelson in 2021, "all but one circuit court . . . has held that leave *may* be an accommodation at least *some* of the time."[102] But if an employee needs more leave than allotted under the FMLA or more leave than the employer traditionally allows, many courts hold that this additional leave is not a reasonable accommodation under the ADA.[103] This means that, for many employees with disabilities, they could be terminated if their disabilities require them to take a leave of absence either to heal from a surgery or to recover from a flare-up of an episodic disability, such as multiple sclerosis ("MS").[104] And the employees who have the most need for leaves of absence are often those workers who have physically demanding jobs—many of these workers are also the most vulnerable, low-income workers.[105]

II. EMPLOYERS' ENTRENCHED SCHEDULING NORMS

With an understanding of the history of how the rules surrounding schedules has developed over time, we now move to a discussion of just how entrenched and rigid these workplace norms are. This Part discusses how employees themselves see these rules as entrenched and unavoidable, before turning to the perceptions of employers and then courts. As stated succinctly by Catherine Albiston, workplace practices surrounding schedules are so "taken-for-granted that it is hard for employers, courts, and even workers to imagine work being organized in any other way."[106] These policies seem so "natural, normal, and inevitable that they appear to be unchangeable reality rather than workplace conventions."[107]

1162 (10th Cir. 2014) (holding in a Rehabilitation Act case that an extended leave of absence for an employee recovering from cancer is not required).

102. Nelson, *supra* note 100, at 1531 (emphasis added).

103. *See id.* at 1534–39.

104. *See, e.g.*, Basden v. Pro. Transp., Inc., 714 F.3d 1034, 1039 (7th Cir. 2013) (holding that an employee who had not worked for more than one year and therefore was not entitled to FMLA leave, was not permitted to take even a short thirty-day leave as an ADA accommodation while she was experiencing symptoms of MS and trying to get a diagnosis).

105. *See* PORTER, *supra* note 3, at 134–35.

106. ALBISTON, *supra* note 3, at 25.

107. *Id.*

A. Employees' Perceptions of Their Employers' Scheduling Rules[108]

In order to conceptualize this discussion, imagine you have just been offered a new job. One of the first things you will want to know (perhaps after the pay) is the hours you will be expected to work. For some jobs, where employees punch time clocks, you will want to know about how many hours you will be working and which shifts you will be assigned to work. For many people, this information might determine whether or not they accept the offer.[109]

But even if you're being offered a professional (salaried) job rather than an hourly job, you will still want to know the hour and schedule culture at that particular workplace. In a law firm, you might want to know the billable hour quota or expectations. But you might also want to know whether the culture of the workplace involves a certain amount of "face time," and if so, how much.[110] Although this varies quite a bit and has undoubtedly changed because of COVID-19 (discussed more below), most law firms (and undoubtedly many other professional jobs) require a certain amount of face time. So even lawyers who meet or exceed their billable hour quota might still be denigrated if they are not in the office enough (although how many hours is "enough" is often amorphous).[111]

These performative long hours are common in many industries.[112] Bragging about long hours (even pulling all-nighters) is also very common.[113] Blue-collar workers who get paid overtime will brag about their long hours and how much extra money they are bringing home (likely to fulfill their gender-normed obligation to be the breadwinners for their families).[114] And

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108. This Section is derived in substantial part from a book written by the author. *See* PORTER, *supra* note 3, at 81–86.

109. Joanne Conaghan, *Time To Dream? Flexibility, Families, and the Regulation of Working Time*, *in* PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS, *supra* note 55, at 101, 104 (discussing the importance of hours to how we define a job).

110. PORTER, *supra* note 3, at 81; Travis, *supra* note 16, at 204 (coining the phrase "full-time face-time norm").

111. PORTER, *supra* note 3, at 81; *see also* Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms: The Project for Attorney Retention, Final Report, Third Edition*, 8 WM. & MARY J. WOMEN & L. 357, 408 (2002).

112. *See, e.g.*, Erin Griffith, *Why Are Young People Pretending To Love Work?*, N.Y. TIMES (Jan. 26, 2019), https://www.nytimes.com/2019/01/26/business/against-hustle-culture-rise-and-grind-tgim.html.

113. *Id.*

114. JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 80–81 (2010) (discussing the fact that, for men, being a good provider is seen as being a good father, and working long hours is how one becomes a good provider).

professionals will brag about their long hours even though they don't get paid for extra hours directly because they believe it demonstrates their commitment to the job.[115]

Put simply, our lives revolve around when and where we work. When jobs deviate from the standard forty-hour 9:00–5:00 schedule, we reference the deviations—part-time, flex time, shiftwork, etc.[116] Although work can be organized in many ways, most desirable and better paying jobs incorporate the dominant time norms around full-time uninterrupted labor.[117] And asking for a change to one's hours is usually a very big deal, causing the employee a great deal of anxiety.[118]

Long hours are not the only component of schedules that are entrenched. Shifts are, too. As noted above, most employees do not want to work night shifts or rotating shifts. But many workers are not given a choice.[119] And yet, despite the fact that most employees would prefer to have more control over their shifts, we accept these rigid requirements as natural and unavoidable.[120] Certainly, for some industries, they are. We understand why hospitals need to staff nurses and doctors 24/7, and their reason for scheduling twelve-hour shifts—continuity of patient care—makes sense. But many of the rigid scheduling rules that employees must obey have no justification other than tradition or habit—a "this is the way we've always done it" mentality.

One study demonstrated how much employees have internalized the belief that their employers *should* have complete control of the rules surrounding when, where, and how much we work. In this study, researchers polled workers regarding how they describe "good" employees.[121] Sure enough, most of their answers revolved around the "ideal worker"[122] norm. Specifically, study participants reported that hours worked and consistent attendance were central to their employer's idea of a good worker, even more so than good performance.[123] The study participants also reported that employers "especially valued workers who put work before other obligations, sacrificed for the employer, and were willing to put in extra time on the

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115. ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK 12 (1997) (mentioning men who "proudly proclaim their ten-hour workdays and biweekly company travel schedules").

116. Albiston, *supra* note 32, at 1104; *see also* ALBISTON, *supra* note 3, at 32.

117. Albiston, *supra* note 32, at 1104–06.

118. PORTER, *supra* note 3, at 83.

119. Bird & Mirtorabi, *supra* note 66, at 389.

120. ALBISTON, *supra* note 3, at 7.

121. Albiston & O'Connor, *supra* note 94, at 34.

122. *Id.*

123. *Id.* at 33–34.

job."[124] Some other responses included: "always coming to work and never [asking for time off]"; "at work every day on time, stays when overtime is needed"; and "being there all the time."[125]

Frustratingly, employers expect these ideal workers long after they have stopped providing the types of jobs that would allow employees to be ideal workers—jobs with sufficient wages to support a family on one income with benefits and job security.[126] In other words, employers expect even low-wage workers who have insecure hours to live up to this norm.[127] Some have referred to this as a "one-way honor system."[128] And employees themselves accept without question that employers have the right to demand the ideal worker ethic even though the employers are giving little in exchange.[129]

These norms are so expected and inevitable that employees often do not take advantage of their employers' flexibility even when it's offered.[130] There are several possible reasons for this. First, employees might be worried about the stigma that accompanies these options.[131] As I've discussed in depth, there is a very real stigma associated with asking for any "special treatment" in the workplace—a phenomenon I call "special treatment stigma."[132] Employees who are given some kind of workplace flexibility are often resented by their coworkers.[133] Second, many employees who take advantage of the flexibility offered by their employers find that their schedule is not honored, or they experience career disadvantages from having taken advantage of the flexibility.[134] In fact, some studies reveal that even requesting time off might lead to career disadvantages.[135]

One example is attorneys who want to reduce their hours. A common arrangement in law firms is the 80/80 plan, where the lawyer earns eighty percent of her regular pay in exchange for a billable hour quota that is eighty

124. *Id.* at 34.
125. *Id.* at 35.
126. *Id.* at 36.
127. *Id.*
128. *Id.*
129. *Id.*
130. Joan C. Williams et al., *Cultural Schema, Social Class, and the Flexibility Stigma*, 69 J. SOC. ISSUES 209, 209 (2013).
131. *Id.*
132. *Stigma*, *supra* note 2, at 233–34.
133. PORTER, *supra* note 3, at 97.
134. Albiston & O'Connor, *supra* note 94, at 37.
135. *Id.* at 37–38.

percent of the normal full-time quota.[136] For many of these attorneys, one or more of the following things happen after transitioning to such a schedule. First, the schedule may not be honored. Many attorneys find that their hours begin to slowly (or not so slowly) creep up after the change in schedule.[137] They might be called in on a scheduled day off, or simply given more work than they can possibly complete during their arranged reduced-hours schedule.[138] Second, many attorneys find that the quality of the work given to them diminishes.[139] This might be because their supervising attorneys perceive them to be less committed to their jobs.[140] Or more innocently (although still problematic), partners might not give work to the reduced-hours employee because they think the attorney is too busy or because the attorney is not in the office when the partner is looking for someone to get involved on a new case or project.[141]

And third, the attorney who works a reduced-hours arrangement might suffer from diminished advancement opportunities.[142] For instance, when it comes time for raises or bonuses, the reduced-hours attorney might notice that their raise or bonus is less than it was when they worked full time and less than other similarly situated attorneys.[143] And to be clear, I am not referring to a raise or bonus that is *proportionately* less. We would expect that attorneys on the 80/80 plan would get eighty percent of the average or normal raise or bonus. But often, they are given much less.[144] Similarly, associate attorneys on an 80/80 arrangement should still be able to advance to partner, even it if takes twenty percent longer to do so. But many attorneys find that when they go on a reduced-hours schedule, they are taken off the

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136. Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 63 n.56 (2006) (describing the common 80/80 arrangement).

137. Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2224 (2002).

138. *Id.* at 2225–26.

139. Porter, *supra* note 136, at 64–66; Williams, *supra* note 137, at 2232.

140. Porter, *supra* note 136, at 64.

141. *Id.*

142. *Id.*

143. *See id.* at 75–76 (discussing proposed bonus recommendations for part-time lawyers).

144. *See id.*

partnership track completely and put on the "mommy track."[145] Because of this reality, many employees avoid flexibility options even when offered.[146]

All of this emphasizes just how rigid these time norms are—how often employees have internalized the view that long hours are necessary and that employers do and should have complete control over when and where their employees work. In sum, employees see these norms as "natural and inevitable background features of our everyday lives."[147]

B. Employers' Subordination Through Schedules

Although workplaces provide more flexibility to their employees today than ever before, there are still many, many employers who insist on rigid start/end times, refuse to allow anything other than full-time work, have strict attendance policies, and are stingy with leaves of absence.[148] Empirical research indicates that employers often deny requests to modify schedules even when the law requires such modifications, and even when their official policies allow such modifications.[149]

Michelle Travis calls this the "full-time, face-time norm," and as she notes, this norm has become quite entrenched and has shown "remarkable resilience" to attempts to change it and to legal challenges.[150] The full-time, face-time norm includes "full-time work with very long hours or unlimited overtime, rigid work schedules for core work hours, uninterrupted work-life performance . . . and performance [of work] at [the employer's] central location" (as opposed to working from home).[151] As Travis states, this is not just a descriptive norm; it is also normative, describing how workplaces "*should* or *must* be designed."[152]

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145. *See id.* at 65–66 (discussing the "mommy track"). To be clear, it is not just caregivers who need to work reduced hours. Many people with disabilities also need reduced hours. However, "part-time" work is often seen as a woman's issue, which is why it is often called the "mommy track."

146. Sarah Jane Glynn & Emily Baxter, *Real Family Values: Flexible Work Arrangements and Work-Life Fit*, CTR. FOR AM. PROGRESS (Dec. 19, 2013), https://www.americanprogress.org/article/flexible-work-arrangements-and-work-life-fit/ [https://perma.cc/3G8Y-CZWS].

147. ALBISTON, *supra* note 3, at 2.

148. *See* Albiston & O'Connor, *supra* note 94, at 7 (discussing employers' stringent workplace policies).

149. ALBISTON, *supra* note 3, at x.

150. Travis, *supra* note 3, at 12.

151. *Id.* at 10.

152. *Id.*

What is surprising is that these norms continue despite evidence that they have negative consequences. As Travis notes, providing more flexibility to employees "not only improves recruiting but also reduces absenteeism and turnover," and can increase productivity.[153] Accordingly, we might ask—why? Why are employers so wedded to their default organizational norms?

One reason the long-hours norm is so entrenched is because employers have a hard time assessing workplace output, so hours logged "serve as a proxy for effort and productivity."[154]

Michelle Travis identifies a second reason that these norms are so sticky. Most successful managers are able to meet these norms (they perform as ideal workers), so they expect everyone else to do so as well.[155] In fact, studies show that "supervisors who are married to homemakers provide less . . . flexibility than supervisors who have" employed spouses.[156]

Third, this rigidity exists because "employers want to avoid giving too much discretion to individual supervisors and managers."[157] This reason actually makes some sense; lawyers often advise their corporate clients to avoid "giving too much discretion to low-level supervisors and managers because there is a fear that the discretion will be exercised in discriminatory ways (or in ways that can be perceived as discriminatory):"[158]

> [F]or instance, imagine a supervisor routinely allows one employee to leave work an hour early but then refuses another employee's similar request. If the worker who leaves early is white and the worker who is refused is Black (or the leaving-early worker is a man and the refused worker is a woman), the refused worker might perceive that the decision was discriminatory. It might or might not be (it could just be favoritism, which is wrong but not illegal) but that discretion often causes a perception of discrimination, so employers have an incentive to take away as much discretion from supervisors as possible.[159]

Finally, scholars have blamed the cognitive processes of supervisors and managers, including fundamental attribution error, which "overestimate[s] the role of a person's internal . . . characteristics" and "underestimate[s] the power that the [external] situation has in controlling the other person's

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153. *Id.* at 12.
154. Albiston & O'Connor, *supra* note 94, at 51; *see also* Travis, *supra* note 3, at 16.
155. Travis, *supra* note 3, at 13.
156. *Id.*
157. PORTER, *supra* note 3, at 87.
158. *Id.*
159. *Id.*

conduct."[160] This theory predicts that decisionmakers will attribute any failures of their employees "to internal characteristics of the workers rather than to the situational constraints of a workplace that is organized around the full-time face-time norm."[161] So when a supervisor tries to decide why women with children or individuals with disabilities are not succeeding in the workplace, they blame the employee's personal circumstances and "the workplace itself simply fades into the background."[162]

C. Courts Perpetuate This Subordination

Thus far, this Part has explored how time, schedule, and shift norms are entrenched in the minds of both employees and employers. This Section demonstrates that courts perpetuate this entrenchment. As noted by Catherine Albiston, courts often "rely on established cultural meanings of work and time, rather than on statutory mandates, to resist enforcing changes to institutionalized time standards."[163]

As noted earlier, the ADA requires employers to provide reasonable accommodations to individuals with disabilities who are "qualified" for the job, unless doing so creates an undue hardship for the employer.[164] A "qualified" individual is defined as someone who can perform the essential functions of the job with or without a reasonable accommodation.[165] Accordingly, when determining whether an employer violated the ADA by failing to provide a reasonable accommodation, courts will first have to determine the essential functions of the job and then determine whether there is a reasonable accommodation that the employer could provide that would allow the employee with a disability to perform those essential functions.

In my prior work researching ADA cases, I demonstrated that courts were more reluctant to require employers to provide accommodations when those accommodations involved schedule changes than when the requested accommodations involved the physical functions of the job.[166] I explored this issue when discussing the effects of the ADA Amendments Act on the case

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160. Travis, *supra* note 3, at 13.
161. *Id.* at 15.
162. *Id.*
163. ALBISTON, *supra* note 3, at xiii.
164. 42 U.S.C. § 12112(b)(5)(A).
165. *Id.* § 12111(8).
166. *Backlash*, *supra* note 2, at 73–78; *Hardship*, *supra* note 2; *see also* Arnow-Richman, *supra* note 63, at 363–65.

law and then again when exploring the undue hardship defense.[167] The trend remained in both sets of cases.

The way most courts analyze these cases under the ADA is to state that the particular schedule (the employer's rule regarding when, where, or how much work is performed) is an essential *function* of the job.[168] Once something is deemed an essential function under the ADA, the employer is not required to eliminate that function.[169] For instance, if strict punctuality is deemed an essential function, allowing an employee to be late to work because of a disability would not be a reasonable accommodation, because it would eliminate the essential function—strict punctuality.[170]

Catherine Albiston's research demonstrates the same phenomenon—that despite accommodation mandates under the ADA, plaintiffs have little success obtaining changes to work schedules, "even though schedule adjustments are far less expensive than changes to physical structures."[171] Her research also demonstrated that accommodations such as schedule changes were the most likely to be *denied* whereas accommodations to the physical environment were the most likely to be *granted*.[172] Courts are so skeptical of proposed accommodations that would modify time norms that they often reject such accommodations as unreasonable without considering whether those changes could be accomplished easily.[173] This is true for accommodations regarding attendance policies, leaves of absence, reduced-hour schedules, etc.[174]

Michelle Travis has also discussed this phenomenon in the context of ADA claims. As she states, "judges have assumed that jobs are defined at least in part by the default organizational structures that make up the full-time face-time norm, thereby placing those structures beyond the reach of antidiscrimination law and undermining the law's transformative potential."[175] The only thing the employer must do is present *some* evidence

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167. *See Backlash*, *supra* note 2; *Hardship*, *supra* note 2.

168. Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1083 n.3 (2010); Travis, *supra* note 3, at 23; Shu, *supra* note 13, at 222.

169. *See, e.g.*, Holly v. Clairson Indus., LLC, 492 F.3d 1247, 1256 (11th Cir. 2007).

170. *Id.*; *see also* ALBISTON, *supra* note 3, at 129–30.

171. *See* ALBISTON, *supra* note 3, at 9.

172. *Id.* at 67.

173. *Id.* at 112.

174. *Id.* at 124–25; *see also* Arnow-Richman, *supra* note 63, at 362–64; Cox, *supra* note 7, at 16–19 (discussing cases where courts defer to employers' statements that full time hours are essential functions of the job).

175. Travis, *supra* note 3, at 6.

that it considered the scheduling rule to be an essential function of the job.[176] Employers meet this requirement quite easily by writing job descriptions that state full-time, overtime, strict punctuality, reliable attendance, etc. are essential functions of the job.[177] Or employers might implement policies addressing these scheduling rules.[178] Once they've done so, it is a rare case for the court to challenge the employer's judgment.[179]

Moreover, plaintiffs' claims are defeated before the court even gets to the employers' affirmative defenses. In the ADA context, that means that courts rarely address the issue of whether a modification to the scheduling rules would cause the employer an undue hardship.[180] And given how difficult it is to prove undue hardship, if cases proceeded past the essential functions analysis to the undue hardship analysis, many more plaintiffs should win (or at least survive summary judgment).[181]

D. How Rigid Schedules Cause Disabled Workers' Subordination

For most employees, the lack of flexibility in their workplaces is problematic. However, for some employees, the long hours and strict schedules are not just undesired, annoying, and inconvenient—they are dangerous to their health or safety. Many employees with disabilities have difficulty working overtime, or sometimes even full-time if they are recovering from an illness or surgery.[182] Some of the disabilities that have led employees to request more reasonable hours include MS, hepatitis C, some mental illnesses, diabetes, and cancer.[183]

A couple of examples. One case involved an employee who had MS and was a store manager for an AT&T store.[184] She submitted medical documentation to limit her work schedule to no more than forty hours per week, but her employer refused, stating that working overtime was an

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176. *See id.* at 33.

177. *See id.* at 24–33 (discussing cases).

178. *See id.* at 33.

179. *See id.* at 36.

180. *See id.* at 23.

181. *But see id.* at 49–56 (discussing many cases where courts *did* grant the employer summary judgment on the issue of undue hardship). *See generally Hardship*, *supra* note 2.

182. LISA SCHUR ET AL., PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED? 50–52 (2013); Cox, *supra* note 7, at 3.

183. SCHUR ET AL., *supra* note 182, at 55; Cox, *supra* note 7, at 22 (discussing cases involving employees who needed to work reduced hours because of MS, hepatitis C, and diabetes).

184. EEOC v. AT&T Mobility Servs., LLC, No. 10–13889, 2011 WL 6309449, at *2 (E.D. Mich. Dec. 15, 2011).

essential function of the job.[185] Accordingly, the employer terminated the plaintiff and won the subsequent lawsuit the plaintiff brought.[186] In a case with similar facts, one plaintiff was a systems engineer who worked between sixty to eighty hours per week.[187] After he was diagnosed with hepatitis C, he requested an accommodation that would allow him to reduce his schedule to forty hours per week so he could get adequate rest and reduce his stress level.[188] Although the employer accommodated him temporarily, it refused to do so permanently, claiming it could not do so without causing an undue hardship.[189] The court sided with the employer and stated that the overtime schedule was an essential function of the job.[190]

Employers' stringent policies with respect to shifts an employee is required to work also leads to disabled workers' subordination. For instance, courts routinely hold that employers do not have to grant an accommodation to allow a disabled employee to avoid working rotating shifts.[191] For disabilities like diabetes, some mental illnesses, kidney failure, and many others, working rotating shifts is dangerous if not impossible.[192] In all of the cases just cited,[193] the employees lost their jobs because they could not work rotating shifts and their employers were unwilling to budge on requiring them, even if there was no other reason except that it was a long-standing rule that everyone had to follow.

As discussed earlier, some courts also hold that an employer does not have to grant a leave of absence if the employee is not entitled to one under the FMLA. One employee who was trying to get his diabetes stabilized was denied a leave of absence and therefore terminated.[194] In a very troubling case, the Seventh Circuit held that an employee was not entitled to a measly

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185. *Id.* at *4.

186. *Id.* at *1–4, *7.

187. Davis v. Microsoft Corp., 37 P.3d 333, 335 (Wash. Ct. App. 2002), *aff'd*, 70 P.3d 126 (Wash. 2003).

188. *Id.*

189. *Id.*

190. *Id.* at 337.

191. *See, e.g.*, Kallail v. Alliant Energy Corp. Servs., 691 F.3d 925, 932 (8th Cir. 2012); Rehrs v. Iams Co., 486 F.3d 353, 358 (8th Cir. 2007); Azzam v. Baptist Healthcare Affiliates, Inc., 855 F. Supp. 2d 653, 655–56, 662 (W.D. Ky. 2012); Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996).

192. *See, e.g.*, *Diabetes and Shift Work*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 29, 2023), https://www.cdc.gov/diabetes/library/features/diabetes-shift-work.html [https://perma.cc/G3S3-HE7T].

193. *See* cases cited *supra* note 191.

194. Fuentes v. Krypton Sols., LLC, No. 4:11cv581, 2013 WL 1391113, at *1 (E.D. Tex. Apr. 4, 2013); *see also* sources cited *supra* Section I.D.

thirty-day absence when she began having symptoms of MS and had not been employed long enough (one year) to be entitled to FMLA leave.[195] MS is notoriously hard to diagnose, so she asked for a short leave of absence to get diagnosed and begin proper medication.[196] Even though there was no evidence that a thirty-day leave would have caused any hardship to the employer, the court held that the employer was not required to give her the leave of absence, thereby leaving in place her termination.[197]

In all these cases, the plaintiffs were terminated because their employers refused to modify their rigid scheduling norms. Although it's possible to find jobs with more flexibility, it's not easy and it's certainly not guaranteed. Many people with disabilities deliberately choose jobs that might not be as lucrative or as career-advancing if those jobs have the flexible scheduling they need because of their disabilities. Thus, even when employers are not denying disabled workers scheduling accommodations, disabled workers are still indirectly subordinated through these rigid scheduling norms.

So how do we solve this? How do we convince employers that their rigid scheduling norms are not always necessary? How do we end this subordination through schedules? Before detailing my proposed solution, I discuss how the pandemic helped to change employers' rigid rules regarding remote work.

III. THE PANDEMIC'S EXPERIENCE WITH REMOTE WORK

This Part explores the effect of the COVID-19 pandemic on remote work as an accommodation for disabilities. I first provide the landscape of work-from-home as an accommodation prior to the pandemic before turning to our experience with remote work during pandemic. Finally, this Part explores what we can expect with remote work going forward, both as a practical matter and as an accommodation for people with disabilities.

A. Remote Work Before the Pandemic

Many people with disabilities intermittently or permanently need to work from home. Some disabilities that might require a remote work accommodation include mobility impairments that make commuting

195. Basden v. Pro. Transp., Inc., 714 F.3d 1034, 1037 (7th Cir. 2013).
196. *Id.* at 1038.
197. *Id.* at 1036–39.

difficult,[198] bowel or bladder impairments (where constant and close access to a bathroom is necessary), mental health conditions that make functioning outside of the home difficult,[199] complications from pregnancy that require an employee to be on bed rest,[200] pressure ulcers as the result of paraplegia and sitting in a wheelchair,[201] impairments where preparing for and traveling to work causes fatigue or pain,[202] and flare-ups of intermittent diseases like rheumatoid arthritis or MS.[203]

Although many employers allowed some employees to work from home pre-pandemic, most employers did not.[204] Specifically, in a 2017–18 study, only 15% of employees worked from home every day and 25% did so intermittently.[205] A 2019 study indicates that 70% of employers allowed telework on an ad hoc basis, 42% of employers allowed it part time, and 27% of employers allowed it full time.[206] Many employers refused requests to work from home because they could not imagine how it could work. How could employees be supervised, meet with clients, or interact and brainstorm with colleagues if they were working from home?[207]

When employees with disabilities sued because their remote-work accommodations were denied, most of the time they lost.[208] Employers varied in their response to this accommodation request. Obviously, working from home is not possible for millions of jobs, including most jobs in the manufacturing, hospitality, service, and healthcare sectors.[209] It is impossible

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198. Kanter, *supra* note 13, at 1988; Shu, *supra* note 13, at 211.

199. Porter, *supra* note 13, at 17; Shu, *supra* note 13, at 211.

200. Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 599, 604–05 (6th Cir. 2018).

201. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995).

202. Shu, *supra* note 13, at 211.

203. Porter, *supra* note 13, at 18; Kanter, *supra* note 13, at 1988; SCHUR ET AL., *supra* note 182, at 55; Shu, *supra* note 13, at 211.

204. Porter, *supra* note 13, at 18–19; Hickox & Liao, *supra* note 13, at 31; Shu, *supra* note 13, at 203.

205. Kanter, *supra* note 13, at 1981.

206. *Id.*

207. *See* Hickox & Liao, *supra* note 13, at 51–52; Travis, *supra* note 16, at 219; Porter, *supra* note 13, at 16.

208. *See* Travis, *supra* note 16, at 209; Kanter, *supra* note 13, at 1946 n.62; Shu, *supra* note 13, at 204, 214.

209. Porter, *supra* note 13, at 18; *see also* Hickox & Liao, *supra* note 13, at 46 (mentioning nurses as an example of a job that cannot generally be performed remotely); Travis, *supra* note 16, at 211; Kanter, *supra* note 13, at 1945 (discussing types of jobs that cannot be performed from home—food servers, cashiers, and truck drivers); Shu, *supra* note 13, at 208 (noting that some jobs are incompatible with remote work, such as those jobs involving production, construction, and service, which require in-person reaction with either other people or with specialized equipment or machinery).

to manufacture a car, clean a hotel room, cut someone's hair, or take care of patients in a hospital from home.[210] But even when it is possible to do the job from home, the general rule for decades has been that remote work is not a reasonable accommodation in most cases.[211] Most courts have held that in-person presence is an essential function of the job.[212] Although some courts have been willing to truly scrutinize the plaintiff's job to see if it can be successfully performed at home, most courts simply defer to the employer's judgment in this regard.[213]

B. The COVID-19 Experience with Remote Work

When COVID-19 forced the country to shut down in March 2020, many American workers had no choice but to work from home.[214] Millions of employees continued to perform their job duties from home, relying on existing technology such as Zoom and other online platforms that allow video conferencing.[215] These platforms have made both teamwork and remote supervision possible.[216] Even things like court hearings and trials, that we never imagined could be performed at home, were successfully performed at home (most of the time).[217]

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210. Porter, *supra* note 13, at 18; Shu, *supra* note 13, at 203; *see also* Travis, *supra* note 16, at 225.

211. Kanter, *supra* note 13, at 1936; Porter, *supra* note 13, at 18–19; Travis, *supra* note 16, at 209; Shu, *supra* note 13, at 220.

212. Kanter, *supra* note 13, at 1946 n.62, 1954 n.96 (discussing cases where courts found in favor of employers who had denied a remote work accommodation); Shu, *supra* note 13, at 226–29 (discussing cases where employers successfully argued that in-person presence is an essential function of the job); Travis, *supra* note 16, at 207; *see, e.g.*, Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995); EEOC v. Ford Motor Company, 782 F.3d 753, 762–63 (6th Cir. 2015); Hickox & Liao, *supra* note 13, at 48.

213. Kanter, *supra* note 13, at 1936, 1954 n.96 (discussing cases where courts ruled in favor of employers regarding remote work accommodations); Shu, *supra* note 13, at 222 (providing further examples of cases where courts gave substantial deference to employers' judgments on remote work accommodations); *see also* Porter, *supra* note 13, at 19–20.

214. *See* Porter, *supra* note 13, at 20–21; *see also* Travis, *supra* note 16, at 217.

215. Lobel, *supra* note 13, at 6 (stating that in the height of the pandemic, 71% of employees were working from home); Porter, *supra* note 13, at 21; Kanter, *supra* note 13, at 1934 (discussing the improvement in technology that makes remote work possible).

216. Porter, *supra* note 13, at 21; Kanter, *supra* note 13, at 1948–50 (stating that technology has made remote teamwork and supervision possible, but also noting the loss of privacy that might happen with remote supervision).

217. Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic's End*, BLOOMBERG L. (May 18, 2023, 1:45 AM), https://news.bloomberglaw.com/us-law-week/virtual-court-hearings-earn-permanent-spot-after-pandemics-end [https://perma.cc/HL34-Z5N4]; Porter, *supra* note 13, at 21. Of course, there have been some hilarious snafus with remote court hearings

Moreover, there is plenty of evidence that remote-work arrangements have been very successful.[218] Many employees have been more productive working from home.[219] Some employees have increased their workday by three or more hours per day and have suffered less absenteeism.[220] Other benefits to employers from allowing remote-work arrangements include decreased attrition and increased loyalty.[221] Employees who can telecommute are more satisfied with work and report higher morale.[222] Many workers who worked from home during the pandemic would like for it to continue after the pandemic is over.[223] A June 2022 study indicates that when employees are given the opportunity to work from home, 87% will take it.[224] And as recently as April 2023, surveys revealed that most Americans want to continue to work from home at least a few days per week.[225] Many people are thriving with remote work because the lack of a commute has given them more time with their families and/or pets, and more time for exercise.[226] In one study, 25% of respondents reported lower stress levels when working from home and 73% said they ate healthier.[227]

With respect to people with disabilities, some have argued that remote work put them on an equal footing with non-disabled coworkers. For

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and oral arguments. *See, e.g.*, Jay Reeves, *Embarrassing Zoom Fails in Virtual Court*, LAWS. MUTUAL (Apr. 19, 2021), https://www.lawyersmutualnc.com/blog/embarrassing-zoom-fails-in-virtual-court [https://perma.cc/N6UL-7GRF] (detailing a dozen zoom fails during court hearings). Moreover, some lawyers and judges have not found the experience to be as valuable as others. *See, e.g.*, Reed, *supra* note 217 (discussing the pros and cons of virtual court hearings).

218. Kanter, *supra* note 13, at 1982–87 (discussing the benefits of remote work for both employees and employers); Travis, *supra* note 16, at 219–20; s*ee* Maddie Shepherd, *Twenty-Eight Surprising Working from Home Statistics*, FUNDERA (Apr. 7, 2020), https://www.fundera.com/resources/working-from-home-statistics [https://perma.cc/XX3S-KJWN].

219. Kanter, *supra* note 13, at 1982; Lobel, *supra* note 13, at 6; Shepherd, *supra* note 218; Shu, *supra* note 13, at 208; Travis, *supra* note 16, at 219–20.

220. Travis, *supra* note 16, at 220; *see also* Kanter, *supra* note 13, at 1987–88 (stating that employees working from home take fewer sick days because they often can still work even when ill or when disabilities flare up but would not be able to attend work in person).

221. Shepherd, *supra* note 218; Lobel, *supra* note 13, at 6 (noting improved worker retention when employees are allowed to work from home); *see also* Kanter, *supra* note 13, at 1982 (stating that remote work increased job satisfaction).

222. Lobel, *supra* note 13, at 6; Porter, *supra* note 13, at 21–22.

223. Kanter, *supra* note 13, at 1934 (stating that 81% of employees in one survey indicated that they do not want to go back to the office after the pandemic or they would prefer a hybrid schedule).

224. Kanter, *supra* note 13, at 1943.

225. Turner, *supra* note 21.

226. Metzl, *supra* note 21; *see also* Kanter, *supra* note 13, at 1984 (stating that employees who were working remotely experienced greater work-life balance).

227. Kanter, *supra* note 13, at 1984.

instance, people with disabilities were often already accustomed to spending most of their time at home, and they already had experience with staying in touch and supporting each other remotely.[228] Remote work also helps people with disabilities avoid any disability bias that they might experience from coworkers or supervisors.[229] And employers benefit too; they will usually spend less on accommodations for employees with disabilities if they are working remotely.[230]

Moving forward, there is plenty of evidence that employers might voluntarily extend these remote-work arrangements, having seen the benefits first-hand.[231] Several large employers have already indicated plans to allow most (or all) eligible employees to continue to work from home at least part time and sometimes full time.[232] In one study, 74% of private companies plan to move 5% of their pre-pandemic onsite workforce to permanent remote positions.[233] In part, this success is based on increased productivity of those performing remote work (especially now that children are back in school).[234] Allowing remote work can also save on overhead costs if employers are able to downsize their physical office spaces.[235] Experts are now speculating that the remote work landscape after the pandemic will stabilize at around 20% of full-time working days being performed remotely.[236]

Not surprisingly, there are still skeptics. Some think that remote communications are not as effective as in-person communications.[237] Employers worry about the long-term effects of remote work on workplace

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228. *Id.* at 1981–82.

229. *Id.* at 1980.

230. *See id.*

231. Porter, *supra* note 13, at 23; Hickox & Liao, *supra* note 13, at 26. Some of those benefits include expanding the talent pool by expanding the geographic reach of the employer. Lobel, *supra* note 13, at 7.

232. Hickox & Liao, *supra* note 13, at 26; *see also* Kanter, *supra* note 13, at 1986 (providing examples of employers that are willing to continue remote work arrangements).

233. Kanter, *supra* note 13, at 1985.

234. *See* Gleb Tsipursky*, Workers Are Less Productive Working Remotely (At Least That's What Their Bosses Think*, FORBES (Nov. 3, 2022, 1:03 PM), https://www.forbes.com/sites/glebtsipursky/2022/11/03/workers-are-less-productive-working-remotely-at-least-thats-what-their-bosses-think/ [https://perma.cc/Z7U4-ZRUB]; *see also* Metzl, *supra* note 21; *see also* Kanter, *supra* note 13, at 1985–88 (stating that employers can save money with remote work arrangements).

235. Lobel, *supra* note 13, at 7.

236. Shu, *supra* note 13, at 206.

237. *Productivity Gains from Teleworking in the Post COVID-19 Era: How Can Public Policies Make It Happen?*, OECD (Sept. 7, 2020), https://read.oecd-ilibrary.org/view/?ref=135_135250-u15liwp4jd&title=Productivity-gains-from-teleworking-in-the-post-COVID-19-era [https://perma.cc/PMU3-ERXQ].

culture.[238] I've heard from lawyers and academics that starting a new job when working from home made it very difficult to be mentored and to assimilate into the workplace culture.[239] If employers allow employees to work remotely from anywhere (including a different state from where the employer is located), employers will have to comply with more state laws that often vary from each other in significant ways.[240] Because of these disadvantages, I think it would be naïve to expect all employers to voluntarily continue remote work.

But even if more employers voluntarily offer remote work going forward or are forced to under the ADA, the pandemic has also taught us that working from home is not ideal for all workers. First of all, it is impossible for all essential workers.[241] As mentioned earlier, you cannot serve food, clean a hotel room, perform surgery, put out fires, or assemble a car from home.[242] So discussing remote work as the panacea for all scheduling problems is not only incorrect, but perhaps even insensitive to those who don't have remote work as an option.

Second, many people do not have the privacy or space to successfully work from home. Either they have roommates, children, or other family members sharing the home, or there is not a suitable home office for remote work.[243] Or even if they have the proper space, they might not have the right technology to make remote work successful.[244]

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238. Shu, *supra* note 13, at 235.

239. Kanter, *supra* note 13, at 1990 (discussing the problem with remote work of not being seen at work in a way that can help with career advancement); Shu, *supra* note 13, at 235 (noting the concern employers have with the lack of mentorship when their employees are working full time from home); s*ee also* Lobel, *supra* note 13, at 18–19 (noting that remote work can cause problems with career advancement because lack of face-time in the office might make these workers appear to their bosses as less committed).

240. Lobel, *supra* note 13, at 8.

241. Barbara Hoffman, *Accommodating Disabilities in the Post-COVID-19 Workplace*, 11 IND. J. L. & SOC. EQUAL. 51, 60 (2023); Kanter, *supra* note 13, at 1945 (citing U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2003-1, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (Feb. 3, 2003), https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation [https://perma.cc/4BJJ-NEL8]); Shu, *supra* note 13, at 208.

242. Porter, *supra* note 13, at 18.

243. Kanter, *supra* note 13, at 1989 (indicating that one problem with remote work is the lack of space); Lobel, *supra* note 13, at 17.

244. Shu, *supra* note 13, at 212 (noting the lack of remote communication technology for disabled workers); *see also* Kanter, supra note 13, at 1989 (noting the need for a high-speed internet connection); Lobel, *supra* note 13, at 17 (noting the resource disparity among workers to effectively work remotely).

Third, many bemoan the lack of a firm boundary between work and home—a boundary created by the physical separation of work and home.[245] This often means that our private home lives are no longer private. Supervisors can track keystrokes on company-owned computers and networks.[246] Monitoring software has become more common during the pandemic, which increases our lack of privacy when working from home.[247]

Fourth, recent research reveals that the spaces where we work matter, such that being physically close to one another improves collaboration between workers.[248] This can not only lead to more productive employees, but can also lead to less discrimination and harassment in the workplace.[249] Remote work drives down interaction considerably; in one study, remote workers communicated nearly eighty percent less than coworkers who work in close proximity with each other.[250]

Finally, recent evidence reveals that, despite the increased time for healthy behaviors (like exercise), there are also negative physical and mental health effects from remote work. A major physical consequence is simply the lack of movement when both the kitchen and the bathroom are within a few steps of your home office.[251] One *New York Times* op-ed discussed the health benefits of regular movement (including reduced risk of cardiovascular conditions, chronic diseases such as diabetes, and mental health conditions) and expressed concern about the negative effects of reduced movement caused by remote work, such as the fact that sedentary lifestyles are strongly linked to disease.[252] Although many people who are working from home are finding more time for structured exercise, data on step counts during the

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245. Kanter, *supra* note 13, at 1989 (discussing the problem of not having boundaries between work and home when employees are working remotely); Lobel, *supra* note 13, at 17; Turner, *supra* note 21.

246. Lobel, *supra* note 13, at 10.

247. Turner, *supra* note 21; *see also* Lobel, *supra* note 13, at 10 (noting the tension between monitoring technologies and privacy laws).

248. Tristin K. Green, *I'll See You at Work: Spatial Features and Discrimination*, 55 U.C. DAVIS L. REV. 141, 160, 167 (2021) (discussing studies that indicate that spatial features of workplaces matter, that interactions sustained over time are more likely to be positive, and that being physically closer together leads to more collaboration).

249. *See id.* at 160 (discussing studies that suggest that sustained workplace interactions can increase positive interracial relations); *Addressing Bias, Stigma, and Discrimination in a Virtual Work Environment*, AM. PSYCH. ASS'N (Mar. 2022), https://www.apa.org/pi/health-equity/virtual-work [https://perma.cc/F6CH-LX96] (discussing how the shift to remote work has increased discrimination).

250. Green, *supra* note 248, at 167.

251. *See* Metzl, *supra* note 21.

252. *Id.*

pandemic have shown a decrease in non-exercise movement, such as walking from the parking lot or bus stop into the office, walking to lunch, etc.[253]

There are also mental health consequences from remote work. Remote work can be isolating.[254] As stated by one commentator: "Humans are social animals. . . . Despite advances in technology, our brains thrive with in-person relationships."[255] Studies have also shown increased rates of depression and anxiety while working remotely.[256]

The above disadvantages might apply to all employees who are working from home. But there also might be some disadvantages of remote work that are specific to people with disabilities. This is because, for some disabilities, working from home is harder, not easier. For instance, employees with visual disabilities and/or disabilities exacerbated by prolonged computer use might be more effective working on the employer's premises.[257] Or some employees with hearing impairments become more fatigued and stressed from having to concentrate during conference calls to compensate for poor audio quality.[258]

Despite some of these disadvantages of remote work, there are still many disabled employees who will continue to need a remote work accommodation.[259] Accordingly, the next Section explores how courts have handled remote work accommodation issues since the start of the pandemic and predicts what we can expect in the future with respect to this issue.

C. Remote Work as an ADA Accommodation Post-COVID-19

In ADA accommodation cases where remote work is requested as an accommodation for a disability, it is an open question how employers and courts are going to treat these cases. Some employers are embracing remote work.[260] But for those who are not, several plaintiffs have sued their employers who denied a remote work accommodation after the plaintiff had

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253. *Id.*

254. Kanter, *supra* note 13, at 1989 (discussing feelings of isolation caused by remote work); Shu, *supra* note 13, at 208; Lobel, *supra* note 13, at 17.

255. Metzl, *supra* note 21.

256. *Id.*; *see also* Shu, *supra* note 13, at 211–12 (noting that for some people with mental illnesses, the solitude of remote work can exacerbate their disabilities).

257. Hoffman, *supra* note 241, at 60.

258. *Id.*

259. *Id.* at 105 (noting that remote work is an effective reasonable accommodation for many disabled workers); Kanter, *supra* note 13, at 1992–93; Shu, *supra* note 13, at 255 (for some people with disabilities, working from home makes work "less painful, more dignified, and technologically feasible").

260. Kanter, *supra* note 13, at 1985–87 (discussing how some employers are planning to continue some form of remote work post-pandemic).

been successfully working from home during the pandemic.[261] The legal issue in these cases is whether those employees who worked from home during the early days of the pandemic were able to perform the essential functions of their jobs.[262] Or did the employer excuse some of the essential functions because it was forced to close its doors or because it wanted to protect its employees during a public health crisis?[263]

D'Andra Shu examined all remote work cases between April 2020 and December 2022, regardless of whether the facts of the case occurred before or after the pandemic started.[264] Although all of her results are interesting and worth a read, I will highlight just a few.

First, Shu noticed that courts were reluctant to mention COVID-19 at all. In fifty-two of the sixty cases where the original facts took place before the pandemic started (but the case was decided after the start of the pandemic), the courts did not mention COVID-19 at all.[265] To be fair, one could argue that the pandemic experience was not relevant because when the employers in these cases made the decision to deny a remote work accommodation, they were working with the facts and knowledge available at that time. Many of us had not used any of the video conferencing technology that became so popular during the pandemic. Nevertheless, it is odd that the courts would not even mention the effect COVID-19 has had on the ability to work from home.

Second, the success rate for plaintiffs was pretty good (especially compared to usual success rates in failure to accommodate claims). Of the sixty-five cases, employees survived summary judgment in thirty-two of them, which is very close to fifty percent.[266] This was certainly a very positive outcome.

Third, and more negatively, courts generally hung onto the general default rule that remote work is not a reasonable accommodation, which seems shocking given the evidence we now have about how successful remote-work arrangements can be.[267] Courts also continued to defer to the employer's judgment that in-person presence was an essential function of the job,[268] and

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261. *Id.* at 1957–58, 1970 (discussing some of the post-COVID cases); Shu, *supra* note 13, at 243–54 (discussing the post-COVID cases involving a remote work accommodation request).

262. Kanter, *supra* note 13, at 1936–38; Shu, *supra* note 13, at 215–16.

263. Shu, *supra* note 13, at 239.

264. *Id.* at 243.

265. *Id.* at 244.

266. *Id.* at 245–47.

267. *Id.* at 247–48.

268. *Id.* at 249 (stating that in twelve out of twenty cases, courts deferred to the employer's judgment that in-person presence was required).

refused to consider the plaintiff's evidence of how they were able to perform the essential functions of their jobs remotely during the pandemic.[269]

Fourth and finally, several courts refused to consider evidence of how the employer operated during the pandemic and how successful remote work arrangements were during the pandemic.[270] In sum, as Shu noted, the post-pandemic results with respect to remote-work accommodations are mixed.[271]

So, although it remains to be seen what happens with these lawsuits, I think employers will have some difficulty arguing that remote work is not possible when we have so much evidence to the contrary.[272] In other words, I think it's likely that the pandemic made progress towards ending many rigid workplace rules that onsite presence is required at all times.[273]

Therefore, one of the few benefits that might come out of the global pandemic is that employers will have been forced to reimagine their workplaces—to realize that *where* employees do their work is not nearly as important as *how well* they work or *how much work* they accomplish during their working hours.[274] But remote work is not the only accommodation that workers with disabilities need with respect to their workplace schedules.[275] Workers with disabilities might also need flexible start/end times, reduced hours, to work a different shift, more lenient attendance policies, or the ability to take a leave of absence to allow for medical appointments or to accommodate occasional flare-ups of their disabilities.[276] So even though the pandemic might have loosened the rigid requirement of in-person presence, there are still all of the other rigid scheduling rules that cause subordination of workers with disabilities.[277] And if employers were capable of recognizing that their rigid rules regarding in-person presence are not necessary, then

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269. *Id.* at 250.

270. *Id.* at 251.

271. *Id.* at 254.

272. PORTER, *supra* note 3, at 91–92; *see also* Kanter, *supra* note 13, at 1943, 2000 ("[E]mployers who sent their workforce home to work during the pandemic will have difficulty claiming that jobs that were done remotely during the pandemic can be performed now only at the workplace.").

273. *See* PORTER, *supra* note 3, at 92; *see also* Kanter, *supra* note 13, at 2002 ("There's no real going back.").

274. PORTER, *supra* note 3, at 92; Travis, *supra* note 16, at 230.

275. *See* Travis, *supra* note 16, at 222 (illustrating the need for other ADA accommodations, such as temporary unpaid leave).

276. Travis, *supra* note 16, at 222; *see also* Lobel, *supra* note 13, at 15–16 (noting that remote work has led to employees seeking other types of workplace schedule flexibility, to improve mental health and/or work/life balance).

277. PORTER, *supra* note 3, at 128.

maybe they can also recognize that some of their other stringent scheduling rules are not as necessary and inevitable as they once believed.[278]

IV. ENDING SCHEDULING SUBORDINATION THROUGH A UNIVERSAL ACCOMMODATION MANDATE

This Part argues that the best way to end subordination through schedules is with a universal accommodation mandate. But before getting into the details of my proposal, I explore other solutions that have been proposed to eliminate the harshness of employers' strict and rigid norms regarding when, where, and how many hours work is performed.

A. Other Proposals

The arguments that have been made in favor of ending schedule subordination fall into two main categories—litigation or legislation that would force an employer to change some component of their scheduling rules directly. I will discuss each in turn.

1. Litigation

The first proposal that has been argued over the years is to work harder to enforce the laws that we already have on the books. Michelle Travis has convincingly argued that the ADA has the potential to dismantle these rigid rules.[279] In other words, employees should be able to seek modifications of their schedules under our current law. She's not wrong, but courts have not gotten on board. The success rate for failure-to-accommodate claims is still very low, even after the ADA Amendments Act.[280] And as discussed earlier, the success rate for failure-to-accommodate claims is even lower when the accommodation sought is a request to modify scheduling rules rather than the physical functions of the job.[281]

The other problem with litigation is that it moves slowly. Most employees who need an accommodation for their disability but are denied one by their employer will not sue, but even if they do, and they are successful, litigation

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278. *See id.* at 92; *see also* Travis, *supra* note 16, at 230.

279. Travis, *supra* note 3, at 46–53.

280. Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2067–68 (2013); PORTER, *supra* note 3, at 121.

281. *See* PORTER, *supra* note 3, at 121 (explaining that employers and courts are more reluctant to allow accommodations related to the "structural norms" of the workplace).

can take years. Meanwhile, whether or not employees sue, they are likely out of a job or risking their health as soon as their accommodation is denied. So, despite the fact that our current laws could have been (and should be) interpreted to end scheduling subordination, they haven't been, and it seems unlikely they will be anytime soon.

2. Legislation

One way is to think about the pandemic experience with remote work is to analogize it to enacting a law that required *all* employers to allow *all* eligible employees to work from home, for any reason. Viewing the pandemic as dismantling the in-person presence norm in this way might lead us to think that we could and should enact legislation that would force employers to modify other scheduling rules.[282]

Some reforms that have occasionally been proposed include: a four-day workweek, reduced hours for everyone, or part-time parity.[283] Or maybe we could prohibit employers from using rotating shifts because we know that they create negative health consequences for many individuals with disabilities (and let's face it, for almost everyone).[284] As discussed below, there has been renewed interest at the state level in some of these proposals.[285] There have also been plenty of proposals to mandate paid leave.[286] And some of those proposals have argued for universal leave, meaning that it could be taken for any reason.[287]

But here's the problem with these proposals: even if it were possible to enact any of this proposed legislation at the federal level, none of them would help every worker (or even most workers) with a disability because the scheduling needs of people with disabilities vary so much. Some people with disabilities need more lenient attendance policies. Some need to avoid overtime or work part-time. Some might benefit from a four-day (forty-hour) work week so they can schedule needed medical treatment on the day off.

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282. *See id.* at 126 (illustrating the benefits of remote work over in-person work).

283. *Id.* at 124–27.

284. Bird & Mirtorabi, *supra* note 66, at 6–7.

285. *See infra* Section V.C.2.

286. *See, e.g.*, Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005); Widiss, *supra* note 69 (discussing various state paid leave laws).

287. Befort, *supra* note 52, at 634–35; PORTER, *supra* note 3, at 139–41; *see infra* Section V.C.2 (discussing some states who have recently enacted legislation that allow for leave to be taken for any reason).

But other people with disabilities could not work four ten-hour days. There simply is no one-size-fits-all solution.[288]

B. Universal Accommodation Mandate

Having dispensed with those alternatives, let's look at another way to conceptualize what happened during the pandemic with respect to remote work. Specifically, we can analogize the pandemic experience as the equivalent of millions of employees asking their employers for an accommodation to work from home all at the same time.

Once an employer was inundated with such requests and was regularly granting them, the sheer number of employees working from home *successfully* forced the employer to rethink its stance on remote work and to realize that it can be successful.[289] Moreover, because the number of employees requesting a remote work accommodation all at once made it completely impractical and unwieldy to address each of these accommodation requests one at a time, employers were forced to grant this accommodation to everyone, without fielding individual requests.[290]

Thus, thinking about the pandemic experience as an avalanche of individual accommodation requests to work from home, and in order to replicate the pandemic experience with other schedule components, we need an avalanche of employees requesting such accommodations.[291] The effort to get rid of the rigid practices regarding when and where we work will not be successful if *only* employees with disabilities requested modifications to their employers' rigid scheduling rules, for two reasons. First, there are not enough employees with disabilities (or as I've demonstrated, not enough employees who are willing to *claim* their disabilities[292]), and we need many requests to provide employers with the evidence that such modifications can be successful, just like the pandemic gave employers the evidence that remote work can be successful.[293] And second, if only employees with disabilities are allowed to request accommodations, they will continue to suffer from "special treatment stigma"—the stigma that arises from receiving

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288. PORTER, *supra* note 3, at 126.
289. *Id.* at 118.
290. *Id.*
291. *Id.*
292. Porter, *supra* note 23, at 1842–55 (discussing ADA cases where plaintiffs refuse to say they were disabled, causing them to lose their case).
293. PORTER, *supra* note 3, at 118.

accommodations in the workplace, which are often seen by employers and coworkers as undeserved special treatment.[294]

Accordingly, my solution[295] is a universal accommodation mandate, where all employees would have the right to request an accommodation regardless of the reason and the employer would have to grant the accommodation absent an undue hardship.[296] My proposal includes a two-tier undue hardship defense where necessary accommodation requests would be subject to the more stringent ADA undue hardship defense (significant difficulty or expense) and other accommodation requests would be subject to the more lenient undue hardship defense borrowed from the religious accommodation context under Title VII.[297] Necessary accommodations fall into two categories—(1) accommodations needed in order to allow the employee to perform the essential functions of the position; and (2) accommodations that are needed to allow an employee to attend to *unavoidable* caregiving obligations.[298]

With respect to the first one, although most people who need accommodations to allow them to perform the essential functions of the job will be people with disabilities, my proposal would apply to other workers as well, such as older workers, pregnant employees, employees recovering from short-term illnesses or injuries, and even workers with body sizes that are outside the typical range.[299] Although many of these workers would qualify

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294. *Id.* at 114–15; *Stigma*, *supra* note 2, at 233–51 (discussing the "special treatment stigma" often associated with workplace accommodations).

295. PORTER, *supra* note 3, ch. 9; *Everyone*, *supra* note 2.

296. PORTER, *supra* note 3, at 145–46; *Everyone*, *supra* note 2, at 110.

297. PORTER, *supra* note 3, at 146–47; *Everyone*, *supra* note 2, at 110. This Title VII standard changed in June 2023. *See* Groff v. DeJoy, 600 U.S. 447 (2023). I discuss the implications of this case below. *See infra* Part V.C.1.

298. PORTER, *supra* note 3, at 147–49; *Everyone*, *supra* note 2, at 111–18.

299. PORTER, *supra* note 3, at 148–49; *Everyone*, *supra* note 2, at 111–15.

as having a disability,[300] not all of them would,[301] and more importantly, proving that you have a disability under the ADA is still difficult,[302] and might also be stigmatizing.[303] So if everyone can seek an accommodation, then some workers who would have been left out by the ADA would now be much more likely to get an accommodation that would allow them to successfully perform their jobs.

Because this Article is focused on people with disabilities, I will not explore in much depth the second category of accommodation requests that my proposal deemed as necessary: mandatory caregiving obligations. But briefly stated, a mandatory caregiving obligation is one that would cause a reasonable person to feel compelled to meet that obligation despite knowing it might or will result in discipline, including discharge.[304] For instance, a

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300. For instance, older workers are likely to have impairments that would qualify as a disability under the broadened definition of disability after the ADA was amended in 2008. Seth D. Harris, *Increasing Employment for Older Workers with Effective Protections Against Employment Discrimination*, 30 CORNELL J. L. & PUB. POL'Y 199, 211–12 (2020); PORTER, *supra* note 3, at 14. Pregnancy will sometimes be considered a disability if it is accompanied by complications that restrict the pregnant person's daily activities. *See, e.g.*, EEOC v. Mfrs. & Traders Tr. Co., 429 F. Supp. 3d 89, 104–05 (D. Md. 2019); *see also* sources cited in Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After* Young v. UPS: *Where We Are & Where We Should Go*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 73, 85–90 (2020) (discussing cases where pregnancy was found to be a disability). With respect to short-term illnesses and injuries, proving a disability is certainly possible, as after the ADA Amendments, there is no longer an official long-term or permanent requirement. *See, e.g.*, Nunies v. HIE Holdings, Inc., 908 F.3d 428, 432 (9th Cir. 2018) (illustrating that a temporary shoulder injury can constitute a disability); Cooper v. Hawaii, No. 18-CV-284 JAO-RT, 2019 WL 2552766, at *4–5 (D. Haw. June 20, 2019).

301. For instance, despite there no longer being a formal requirement for an impairment to be long-term, many cases still hold that short-term illnesses or injuries do not qualify as disabilities. *See, e.g.*, Hayes v. Elmington Prop. Mgmt., No. 2:19-cv-02312-JTF-jay, 2019 WL 8016518 (W.D. Tenn. Dec. 20, 2019) (discussing cases holding that post-ADAAA, short-term injuries or illnesses are not disabilities). Having a body size outside the typical range will very likely not qualify as a disability and yet might make it difficult for the person to perform some essential functions of the job. For instance, I am very short (4'11"), which might make it difficult for me to do jobs that involve machinery or equipment that is too high for me to reach comfortably. But my short stature is not a disability. *See, e.g.*, Morey v. Windsong Radiology Grp., P.C., 794 F. App'x 30, 32–33 (2d Cir. 2019) (holding that short stature is not a disability). Someone who is very large might not fit into a small space required for some jobs, but courts have routinely held that obesity is not a disability. *See, e.g.*, Richardson v. Chicago Transit Auth., 926 F.3d 881, 890 (7th Cir. 2019) (holding that obesity is not a disability).

302. Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383, 392–408 (2019) (detailing all of the mistakes that courts and litigants are still making when interpreting the definition of disability after the ADA Amendments Act); PORTER, *supra* note 3, at 115.

303. PORTER, *supra* note 3, at 101–02; Porter, *supra* note 23, at 1858–61.

304. PORTER, *supra* note 3, at 151.

reasonable person would feel compelled to miss work (even knowing that it might result in termination) if their child had been in a car accident and was in the hospital.[305] Accordingly, that would be an unavoidable caregiving obligation and the employer would have to accommodate it unless the employer could prove an undue hardship using the more stringent ADA test—significant difficulty or expense.[306] But a reasonable person would not feel compelled to attend a child's party at school or chaperone a school field trip if missing work meant that they were going to be disciplined or terminated.[307] Accordingly, these would be *avoidable* caregiving obligations. Employers would still be required to provide them unless they could demonstrate an undue hardship, but now the undue hardship test is the more lenient one for religious accommodations under Title VII.[308]

A universal accommodation mandate should lead to many more employees requesting accommodations, and this should cause employers to realize that, just like remote work, other modifications of workplace schedules are possible and can be quite successful.[309]

As just one example, if many employees request flexible start/end times (but still work the same number of hours), employers might see that these changes are not as burdensome as imagined. More importantly, these employers might realize that it would be more efficient to dispense with their rigid start/end times completely by allowing *all* employees to choose their preferred start/end times (when possible), rather than having to consider individual accommodation requests.[310] But even if this wholesale restructuring never takes place, allowing everyone to request accommodations will take away the special treatment stigma suffered by those workers with disabilities who need accommodations in order to remain employed.

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305. *Id.*

306. *Id.* at 154.

307. *Id.* at 154–55.

308. *Id.* at 155. As discussed *infra* Section V.C.1, the Title VII religious accommodation standard changed with the Supreme Court's decision in *Groff v. DeJoy*, 600 U.S. 447 (2023). However, it remains a more lenient standard than the ADA undue hardship standard; accordingly, my two-tier undue hardship standard would remain the same, continuing to distinguish between necessary accommodations and non-necessary accommodation requests.

309. PORTER, *supra* note 3, at 118; *Everyone*, *supra* note 2, at 124–25.

310. PORTER, *supra* note 3, at 118; *see also* Jennifer Bennett Shinall, *Becoming Visible*, 74 OKLA. L. REV. 27, 42 (2021) (arguing that the pandemic's mass move to remote work led to "economies of scale" for some of the commonly requested pandemic accommodations, such as software, technology, equipment, etc.).

C. Recent Obstacles for My Universal Accommodation Mandate

Since my book that discussed this proposal in more detail went to press, there have been three new developments that might create obstacles or criticisms to my universal accommodation mandate. First, there have been two legal developments in the federal reasonable accommodation context: one affecting accommodations for pregnancy, and the other affecting accommodations for religion. Second, on the state level, some states are experimenting with legislation that would require employers to change one aspect of their rigid schedules for all workers. And finally, a couple of scholars have recently criticized the reactive nature of the ADA's reasonable accommodation mandate, which is focused on individual accommodations rather than any type of proactive structural change. This Section discusses and responds to these developments.

1. Changes to Federal Reasonable Accommodation Laws

There have been two legal developments at the federal level that affect the law of reasonable accommodations in the workplace. The first is the passage of the Pregnant Workers Fairness Act ("PWFA"), and the second is the Supreme Court's decision in *Groff v. DeJoy* that changed the standard for proving undue hardship in religious accommodation cases.[311] I discuss each in turn.

The Pregnant Workers Fairness Act[312] was enacted in December 2022 with fairly wide bipartisan support.[313] Modeled after the ADA,[314] the PWFA requires employers to provide "reasonable accommodations" to employees with limitations related to pregnancy, childbirth, and related medical conditions, unless doing so would be an undue hardship.[315]

Prior to the passage of this statute, there were several possible protections for pregnant employees who needed accommodations in the workplace, but they left many gaps and created a confusing array of possible laws that might

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311. Groff v. DeJoy, 600 U.S. 447, 468 (2023).

312. 42 U.S.C. §§ 2000gg–2000gg(6).

313. Deborah A. Widiss, *The Federal Pregnant Workers Fairness Act: Essential Support, Especially in Post-*Dobbs *America*, 27 EMP. RTS. & EMP. POL'Y (forthcoming 2024) (manuscript at 8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4564223 [https://perma.cc/YSB8-FKVY].

314. In fact, the statute specifically states that it is modeled after the ADA and that the terms "reasonable accommodation" and "undue hardship" should be interpreted the same as they are under the ADA. 42 U.S.C. § 2000gg(7).

315. 42 U.S.C. § 2000gg(1).

apply.[316] As explained by Deborah Widiss in her forthcoming article, *some* pregnant workers could be accommodated under the Pregnancy Discrimination Act pursuant to the 2015 Supreme Court decision in *Young v. UPS*.[317] Additionally, *some* pregnant workers might have been protected by the ADA if they had complications with their pregnancies that courts were willing to classify as disabilities.[318] And many states have enacted their own Pregnant Workers Fairness Acts, which provide protection similar to that provided by the new federal legislation.[319] But despite these laws, some studies indicate that 250,000 pregnant workers were denied accommodations each year.[320] The federal PWFA should ameliorate the confusion and gaps in protection caused by these various laws and allow pregnant workers who need accommodations to receive them.

This statute is a big win for pregnant workers. However, because it is modeled after the ADA, and many courts interpret the reasonable accommodation obligation under the ADA narrowly, often deferring to employers' assertions of the essential functions of the job,[321] it is possible that courts will mimic their faulty analyses in cases brought under the PWFA.[322] Only time will tell.

The other development is the Supreme Court's 2023 decision in *Groff v. DeJoy*.[323] In this case, the Court revisited the standard for religious accommodations for the first time in almost fifty years.[324] The last Supreme Court case that discussed the undue hardship standard was *TransWorld Airlines v. Hardison* in 1977, which stated that, in the religious accommodation context, the employer's defense of undue hardship is met if

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316. Widiss, *supra* note 313 (manuscript at 4–9).

317. *Id.* (manuscript at 6); 42 U.S.C. § 2000e(k); Young v. United Parcel Serv., Inc., 575 U.S. 206, 226–27 (2015).

318. Widiss, *supra* note 313 (manuscript at 6); Porter, *supra* note 300, at 85–90.

319. Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*, 22 NEV. L.J. 1131, 1131 (2022).

320. Widiss, *supra* note 313 (manuscript at 5).

321. PORTER, *supra* note 3, at 53, 161–62.

322. However, Deborah Widiss argues that the PWFA has unique language that might lead to a broader interpretation than under the ADA. Widiss, *supra* note 313 (manuscript at 20–21). Specifically, the PWFA states that an employee can still be considered qualified even if they cannot perform the essential functions of the job as long as that inability is for a temporary period and the employer can reasonably accommodate the pregnant worker's inability to perform the function. 42 U.S.C. § 2000gg(6). Widiss argues that this should allow for a broader interpretation for pregnancy accommodations than for reasonable accommodations under the ADA. I hope she is right.

323. Groff v. DeJoy, 600 U.S. 447 (2023).

324. *Id.* at 456–57.

a proposed accommodation caused more than a "*de minimis*" expense.[325] It is this "no more than a *de minimis* expense" standard that I borrowed for non-necessary accommodations when I previously discussed my universal accommodation mandate with the two-tier undue hardship defense.[326] As the Court states in *Groff*, in many cases, meeting the undue hardship standard for religious accommodations was very easy.[327]

In *Groff*, the Court did not explicitly overrule *Hardison*, but clarified it.[328] *Groff* involved a postal worker who was an Evangelical Christian and believed that Sundays should be devoted to worship, rather than work.[329] This originally did not pose a problem because the post office did not deliver on Sundays. However, because of a contract with Amazon, Sunday deliveries became necessary, and workers were required to rotate through Sunday shifts.[330] Although Groff's employer was able to cover his shifts (sometimes by the postmaster), he continued to receive progressive discipline for not working Sundays.[331] Eventually, he sued for religious discrimination under Title VII, arguing that the "USPS could have accommodated his Sunday Sabbath" without causing USPS an undue hardship.[332] Both the district court and Third Circuit disagreed, finding for USPS.[333]

The Supreme Court reversed, holding that demonstrating "'more than a de minimis cost' . . . does not suffice to establish 'undue hardship' under Title VII."[334] Pointing out that the prior standard does not comport with how we would define "undue hardship" in common parlance,[335] the Court held that "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[336] In doing so, the Court explicitly rejected the plaintiff's suggestion that the Court should adopt the ADA undue hardship standard of "significant difficulty or expense,"[337] stating that such a suggestion goes "too far."[338] Accordingly, this new standard for religious accommodations is more

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325. Trans World Airlines, Inc., v. Hardison, 432 U.S. 63, 84 (1977).
326. PORTER, *supra* note 3, at 146–47; *Everyone*, *supra* note 2, at 119.
327. *Groff*, 600 U.S. at 464–65.
328. *Id.* at 454.
329. *Id.*
330. *Id.*
331. *Id.* at 454–56.
332. *Id.* at 456.
333. *Id.*
334. *Id.* at 468.
335. *Id.*
336. *Id.* at 470.
337. *Id.*
338. *Id.* at 471.

difficult for employers to meet than the prior religious accommodation standard of "nothing more than a de minimis expense," but is still easier to meet than the ADA standard of "significant difficulty or expense."

So, what do both of these developments in the federal accommodation landscape mean for my proposal? First, I think it's great that federal law has become more accommodating for more employees. As stated above, although some pregnant workers could prove that they had a disability, and therefore were entitled to an accommodation under the ADA, not all pregnant workers were able to do so.[339] And courts often rejected very minimal religious accommodations using the prior "nothing more than a de minimis expense" standard.[340]

Second, although the federal landscape has arguably expanded the number of employees who are entitled to accommodations, it remains the case that there are many workers who would not be entitled to accommodations under the ADA, the PWFA, or Title VII's religious accommodation provision. Moreover, even if technically entitled to accommodations under any one of these three provisions, claiming that right to an accommodation can be difficult[341] and/or stigmatizing.[342] My universal accommodation mandate would avoid both of these problems.

A third issue related to *Groff* is whether my standard for non-necessary accommodations (under my two-tier undue hardship test) should change given the Court's holding in *Groff*, which changed the religious accommodation standard. As a reminder, under my proposal, necessary accommodations are subject to the more stringent standard under the ADA of "significant difficulty or expense." Non-necessary accommodations are subject to the easier undue hardship test used for religious accommodation cases pre-*Groff*, where an undue hardship could be proven with anything more than a de minimis expense.[343] The question becomes: should my standard for non-necessary accommodations change along with the change in standard post-*Groff* for proving undue hardship for religious accommodations?

Both standards have benefits. The more lenient pre-*Groff* standard has a forty-plus-year body of case law to draw on when determining whether a non-

339. *See supra* text accompanying note 318.

340. *Groff*, 600 U.S. at 464.

341. *See* PORTER, *supra* note 3, at 115–16.

342. *Id.* at 101.

343. Necessary accommodations constitute those that would be required to perform the essential functions of the job and those that would be required to comply with unavoidable caregiving obligations. *See supra* notes 302–303 and accompanying text.

necessary accommodation under my universal accommodation mandate causes an undue hardship. It also might be more palatable for accommodations that some might see as "frivolous."[344] On the other hand, it might be more convenient to modify the standard of my proposal to follow the new religious accommodation standard. Ultimately, as of this writing (the day after the *Groff* decision came down), I think it is much too early to make a decision about which of the two religious accommodation standards (pre-*Groff* or post-*Groff*) is better for non-necessary accommodations under my proposed universal accommodation mandate. I think we need several years of case law to see how the post-*Groff* standard develops before making this decision.

2. State Laws Addressing Schedule Subordination

Other recent developments include a few states that have passed or proposed legislation that attempts to ameliorate some of employers' rigid scheduling norms.

For example, in February 2023, legislation was pending in Maryland that would "offer employers a tax incentive for testing out a four-day workweek with at least 30 employees and letting the state's labor department collect research on their experience."[345] Other states are considering similar legislation.[346] The touted benefits of a four-day work week include benefits for the environment as well as benefits for employees who can use the extra day to be with their families. Alternatively, people with disabilities might use the extra day for necessary medical treatments.[347]

However, as I and others have argued, both caregivers and people with disabilities have idiosyncratic needs, so changing the standard five-day workweek would not benefit everyone.[348] For instance, parents with school-age children would likely prefer to work earlier hours in the day so they can

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344. *See* PORTER, *supra* note 3, at 158, 171–73 (discussing arguably "frivolous" accommodations).

345. Chris Marr, *Four-Day Work Weeks Would Earn Tax Breaks with Maryland Proposal*, BLOOMBERG L. (Feb. 9, 2023), https://news.bloomberglaw.com/product/blaw/bloomberglawnews (search "Four-Day Work Weeks Would Earn Tax Breaks with Maryland Proposal"; then click "go"; then follow search link).

346. *Id.*

347. *Id.*; Arnow-Richman, *supra* note 168, at 1084 (noting that the 4/40 week is helpful for families).

348. *See* Arnow-Richman, *supra* note 168, at 1085 (stating that caregivers have idiosyncratic needs); PORTER, *supra* note 3, at 126.

be home when their kids are home from school; the extra day off and four longer workdays might be inconvenient or impossible.[349] Similarly, some people with disabilities might experience too much pain or fatigue working four longer days.[350]

Because employees' needs with respect to when and where they work are so varied, attempts to change the scheduling norm like Maryland and other states are proposing will not accommodate all or even most people with disabilities. Accordingly, I stand by my prior argument that, because disabled employees' needs vary so much, only individual accommodations can allow each worker to successfully combine work and their health and well-being.[351]

The one exception is attendance policies and leaves of absence. As I have previously argued, "*all* workers can benefit from paid days off and more lenient attendance policies."[352] Accordingly, I previously proposed a reform that would provide short-term paid leave (ten days per year) to all workers, regardless of the reason for the leave.[353] Having made such a proposal myself, I was happy to see that some of the recent state reforms include paid time off for any reason.

For instance, the Illinois legislature passed a bill that requires many Illinois employers to provide paid time off, up to forty hours or five workdays per year for full time employees.[354] Importantly, unlike other states that provide paid leave only for an employee's own illness or (less frequently) the illness of an employee's family member, Illinois' paid leave can be used for any reason.[355] Nevada and Maine have similar laws.[356]

This, like my universal accommodation mandate, should minimize the stigma attached with requesting and receiving time off. If everyone has the same right to time off, employees who do not fall into a narrow, protected class (e.g., disabled, eligible for FMLA leave, etc.) should not resent their

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349. PORTER, *supra* note 3, at 126.

350. *Id.*

351. *Id.* at 128.

352. *Id.* at 127.

353. *Id.* at 139–43.

354. Chris Marr, *Illinois Paid Leave Brings a Twist to Expanding Sick Time Laws*, BLOOMBERG L. (Feb. 1, 2023), https://news.bloomberglaw.com/daily-labor-report/illinois-paid-leave-brings-a-twist-to-expanding-sick-time-laws [https://perma.cc/9XV7-ED3K]; Paid Leave for All Workers Act, Ill. SB 208, 102nd Cong. (2023) (enacted), https://aboutblaw.com/6vJ [https://perma.cc/S9KP-NVYM].

355. Marr, *supra* note 354. *See generally* Widiss, *supra* note 91, at 225 (discussing the landscape with respect to paid leave).

356. Marr, *supra* note 354; *see, e.g.*, NEV. REV. STAT. ANN. § 608.0197 (2019).

coworkers who have sometimes had the right to paid leave under a variety of state and local laws.[357]

I am heartened by these efforts, and I hope they continue. However, even though job-protected paid time off is important for all workers (and especially workers with disabilities), other scheduling rules still create barriers for people with disabilities.[358] Some workers with disabilities might need to work reduced hours or can work full-time but not overtime. Some might need to vary their hours because their disability makes it difficult for them to work early in the morning or late at night.[359] Because people with disabilities (and many other workers) have varying needs with respect to when and where they work, the universal accommodation mandate I propose is the only way to meet the unique needs of all workers with disabilities.

3. Response to Recent Critiques of the Accommodation Model

The third recent development does not involve new law but instead involves scholarly arguments that could be characterized as threatening my central thesis that individual (but universal) accommodations are the best way of ending subordination through schedules. Specifically, two commentators have recently made compelling arguments critiquing the reasonable accommodation mandate of the ADA because it is reactive in nature, rather than requiring employers and other entities to proactively improve the accessibility of their businesses.[360]

Disability scholar Ruth Colker argues that the primary problem with the accommodation mandate is that it fails to achieve disability justice.[361] She points out that in order to seek an accommodation, the person with a disability must be aware of their disability, be willing to disclose it, and have the cultural, political, and economic capital to ask for an accommodation.[362] Because of this, the people most likely to benefit from the accommodation

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357. PORTER, *supra* note 3, at 139–41 (proposing and defending a paid leave law that would apply to all workers).

358. *Id.* at 126.

359. *Id.*

360. *See* Ruth Colker, *The Americans with Disabilities Act's Unreasonable Focus on the Individual*, 170 U. PA. L. REV. 1813, 1819, 1820 (2022); Karla Gilbride, *Evolving Beyond Reasonable Accommodations Towards "Off-the-Shelf" Accessible Workplaces and Campuses*, 30 AM. U. J. GENDER SOC. POL'Y & L. 297, 312 (2022).

361. *See* Colker, *supra* note 360, at 1815.

362. *Id.* at 1818.

model are those who are more privileged. Therefore, the only way to achieve disability justice, Colker argues, is to make structural changes.[363]

Colker points to Title III of the ADA (which applies to places of public accommodation, such as stores, restaurants, theaters, etc.) as a better model because it requires entities to make accessibility changes before anyone asks for them, and these changes will benefit all people with disabilities (and many people without).[364] For instance, to comply with Title III, an entity would not just install a temporary ramp for one person with a disability who needed it; instead, the entity would install the ramp permanently, and that ramp would benefit many, both those with disabilities and those who are pushing strollers or pulling rolling suitcases.[365] Some examples of this type of structural change might include: (1) allowing all employees to work from home so people with disabilities do not need to ask for an individual accommodation; or (2) providing lifting devices and other auxiliary aids to help all employees with lifting heavy objects, not just those workers with disabilities.[366]

Colker argues that these types of structural changes would provide more long-term benefits for all employees with disabilities rather than solving the problem for only one employee.[367] If employers more frequently engaged in universal design solutions, they would see that there are benefits of accommodations that inure to other employees in addition to the employee with a disability.[368]

Karla Gilbride also recently criticized the ADA's individual accommodation mandate.[369] Similar to the argument I have been making for years about accommodations causing special treatment stigma, Gilbride criticizes the reasonable accommodation model for reinforcing the notion that those who receive accommodations are receiving special treatment.[370] Instead, she argues in favor of what she calls "off-the-shelf" accessibility, which is similar to universal design—an architectural principle advocating for building designs that are useable by a broad range of human beings, including children, the elderly, those with disabilities, and people of different sizes.[371] Some examples of using universal design principles when providing for other types of accommodations (beyond accessibility of the physical

363. *Id.* at 1819.
364. *Id.* at 1823.
365. *Id.* at 1849.
366. *Id.* at 1828–29.
367. *Id.* at 1834.
368. *Id.* at 1837–38.
369. Gilbride*, supra* note 360.
370. *Id.* at 298.
371. *Id.* at 304.

structure) are curb cuts, closed captioning, and automatic door openers.[372] All three of these provide benefits to people with disabilities but also to other non-disabled individuals. (In case it's not obvious, curb cuts are helpful for those pushing strollers or riding bikes. Closed captioning helps those for whom English is not their first language or who might be watching TV in a noisy environment. And automatic door openers also help those individuals who have their arms full of groceries or who are carrying children.[373])

Although Gilbride recognizes the benefits of the accommodation mandate—specifically, that it recognizes that every person with a disability is unique and has unique needs—she also argues that the reasonable accommodation concept requires people to disclose and claim their disability when they might not be aware that they have a disability, and even if they are, disclosing it might be invasive and stigmatizing.[374] She points to other harms that come from an individual accommodation mandate, including: (1) delays in receiving an accommodation (if the needed accommodation is something that would take the employer some time to implement);[375] (2) limiting the career mobility for the employee with a disability because once they've gone through the trouble of obtaining an accommodation at their current employer, they might be less likely to move to another employer and start the process all over;[376] and (3) the concept of "reasonable" is too subjective, and therefore can cause implicit bias.[377]

Instead of the reasonable accommodation mandate, Gilbride argues that employers should be required to anticipate the needs of people with disabilities and build an environment anticipating accommodations they might need.[378] She recognizes that employers do not necessarily know what they will need to do, so advocacy groups should dedicate time to producing "best practices" resources or performing audits for companies.[379] And recognizing that employers will not likely be proactive about seeking out best practices and making structural changes, Gilbride argues that grants and/or

372. *Id.* at 305–06.

373. *Id*. One example of off-the-shelf accessibility is when Apple started releasing its iPhones with voiceover, which allows visually impaired individuals to navigate the touchscreen of an iPhone. *Id.* at 308.

374. *Id.* at 310; *see also* Porter, *supra* note 23, at 58.

375. Gilbride, *supra* note 360, at 311. She also notes that these delays might lead to stigma because the delay might cause coworkers to learn about the disability, and perhaps even to be resentful of the burden caused by the accommodations. *Id.* at 312.

376. *Id.* at 312–13.

377. *Id.* at 313.

378. *Id.* at 311.

379. *Id.* at 315–16.

tax breaks should be offered for employers who implement "off-the-shelf" accessibility.[380] In sum, Gilbride argues that although the reasonable accommodation mandate is beneficial in that it recognizes that all people with disabilities are different and have different needs, the reactive nature of the accommodation mandate has prevented workplaces from preemptively making changes that could be useful for the full spectrum of human difference.[381]

I agree with these critiques of the reasonable accommodation mandate. However, I do not think that they diminish the force of my proposal for a couple of reasons. First, much of the stigma that attaches to requesting accommodations would disappear (or at least be drastically diminished) with my proposal. Some of the stigma attached to seeking accommodations for disabilities involves the stigma in having to claim a disability.[382] But under my proposal, everyone would have the right to seek an accommodation for any reason.[383] And although there is a benefit to asserting that a particular accommodation is *necessary* to allow the worker to perform their job,[384] under my proposal, employees would only need to demonstrate that the accommodation is needed to perform their job, regardless of whether that inability is related to a disability, pregnancy, advanced age, or simply size and build.[385]

Additionally, stigma also accompanies the ADA's reasonable accommodation mandate because many coworkers are resentful of the accommodations provided to people with disabilities.[386] But if all workers have the right to ask for and receive accommodations for any reason, the stigma of receiving accommodations should dissipate if not disappear.[387]

The second reason that my proposal survives the criticism of the individual accommodation mandate is because most of the changes discussed in both Colker's and Gilbride's articles are not the types of accommodations that are most frequently requested and/or needed in the workplace. The anticipatory-

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380. *Id.* at 316.

381. *Id.* at 319; *see also* Green, *supra* note 248, at 199 (arguing that the ADA is too focused on the individual, which inhibits broader change).

382. *See* PORTER, *supra* note 3, at 102, 115–16.

383. *Id.* at 145; *Everyone, supra* note 2, at 110.

384. PORTER, *supra* note 3, at 13. As explained above, if an accommodation is *necessary*, rather than merely *desired*, the employer would be subject to the more stringent undue hardship test, significant difficulty or expense. *Id.* Accordingly, employees would be more likely to receive the accommodation if they can demonstrate that it is necessary to allow them to perform their jobs.

385. PORTER, *supra* note 3, at 13.

386. *Id.* at 97–101.

387. *Id.* at 114–15.

accommodation model works well for modifying the physical structure of a building. In other words, employers *should* make bathrooms accessible before an employee who uses a wheelchair is hired. These types of modifications are instrumental to Title III of the ADA, which applies to all places of public accommodation.[388] And Colker is exactly right that it is much more efficient and effective for an entity to modify the physical structure of their building once, to make it accessible for the broadest range of individuals possible, and to make those changes permanently, than to wait and modify the building for just one individual with a disability.[389] It is even more cost-effective if this accessibility is incorporated into the building before it's built or before the entity undertakes significant renovations.[390]

Colker uses the example of an early and well-known accommodation case, *Vande Zande v. State of Wisconsin Department of Administration*,[391] where the plaintiff who used a wheelchair asked her employer to lower the sink in the new breakroom it was building so that it would be at a height where she could reach it.[392] The employer refused, instead installing a shelf at an appropriate height in the breakroom and insisting that she could use the bathroom for any sink needs.[393] The court sided with the employer,[394] and Colker rightly points out that the court's opinion pays no attention to the value of making structural changes so that the "next employee who uses a wheelchair can easily enter [and access] the workplace."[395] But what Colker does not mention in her critique of the *Vande Zande* decision is that the only reason the employer was not required to install a sink at a level appropriate for wheelchair users is because the building was built before the effective date of the ADA.[396] If it had been built after the effective date (such as most buildings these days), it would have to meet the specific accessibility guidelines in place under the ADA.[397] Accordingly, most (albeit certainly not all) issues surrounding the accessibility of the physical structures of workplaces are now moot. To be fair, there are still many small businesses

388. 42 U.S.C. § 12182(b)(2)(A); Colker, *supra* note 360, at 1823.
389. Colker, *supra* note 360, at 1815.
390. This is part of the benefit of "universal design."
391. Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995).
392. *Id.* at 545.
393. *Id.* at 545–46.
394. *Id.* at 546.
395. Colker, *supra* note 360, at 1826–27.
396. *Zande*, 44 F.3d at 545.
397. 42 U.S.C. § 12183(a)(1) (stating that all facilities built after the ADA's effective date are required to be "readily accessible to and useable by persons with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements" of the regulations enacted to implement Title III).

that are not complying with ADA's accessibility guidelines, and enforcement under Title III remains a big problem. But many of these small businesses are exempt from the employment provisions of the ADA because they employ fewer than 15 employees;[398] therefore, they would not be the appropriate target of an employment failure-to-accommodate lawsuit.

The other type of accommodation that works well with this anticipatory-accommodation model is the purchase of auxiliary equipment that helps several employees do their job, or software that is accessible to those with visual impairments.[399] I agree that employers should be proactive about these types of accommodations. This is especially important for things like software. As Gilbride notes, if employers have to make proprietary software accessible for a visually impaired employee, this process can take months.[400] So if the employer waits to do this until an employee with a visual impairment asks for it, there will likely be a long delay before the employee can be a productive member of the workforce, and such delay will likely draw unwanted (and often negative) attention to the worker's visual impairment.[401]

One example of an employer making a very non-sensical decision regarding proactive accommodations is *Hudson v. Tyson Farms, Inc.*[402] In this case, the plaintiff had back pain from a prior injury, and during her first week on the job as a tray packer, her back pain became worse from standing.[403] The company had made some attempt to allow employees to stand more comfortably by having floor mats on the concrete floor that employees could use while standing for their entire shifts.[404] These mats allowed the plaintiff to alleviate her back pain, but the employer only had a limited number of such mats, so for some shifts, the plaintiff did not have a mat to stand on and it made her back pain worse.[405] She asked the employer to assign her a specific mat but the employer refused, stating that there were not enough mats for every employee.[406] The employer's unwillingness to accommodate the plaintiff was one of the reasons she ended up leaving her

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398. *Id.*; 42 U.S.C. § 12111(5)(A) (defining "employer" as having 15 or more employees).

399. Colker, *supra* note 360, at 1829 (discussing auxiliary aids to help employees with lifting restrictions); Gilbride, *supra* note 360, at 315 (discussing accessible software).

400. Gilbride, *supra* note 360, at 312.

401. *See id.* For one example of the delay caused by an employer not proactively building software to be accessible with screen readers, see Reyazuddin v. Montgomery Cnty, 789 F.3d 407, 409 (4th Cir. 2015).

402. Hudson v. Tyson Farms, Inc., 769 F. App'x 911 (11th Cir. 2019).

403. *Id.* at 913.

404. *Id.*

405. *Id.*

406. *Id.*

job.[407] And yet, assigning the plaintiff a specific mat, even if it meant buying an extra one, clearly should have been required as a reasonable accommodation, and if I'm picturing the mats correctly, such an accommodation could not have possibly caused an undue hardship. But it would have been even better for the employer to anticipate employees having difficulty standing on concrete for eight-hour shifts and install mats at every workstation, or better yet, build the plant with a more cushioned floor covering. As Colker notes, "it is more expensive to accommodate injured employees than to avoid the injuries through auxiliary aids at the outset."[408]

Accordingly, with respect to auxiliary aids and accessible software (along with building accessibility), criticism of the accommodation mandate is fair, and requiring employers to proactively structure their workplaces to be more accessible is a good idea. But as Gilbride notes, even with universal design and off-the-shelf accessibility, there will still be some employees with disabilities who have unique needs that are not met by universal design and that could not have been anticipated.[409]

Moreover, this anticipatory-accommodation model does not work as well for modifications of when and where work is performed. As noted earlier, schedule modifications are the most frequently requested accommodations in the workplace.[410] And with respect to these schedule modification requests, the needs of people with disabilities are very diverse.[411] Some might need more lenient attendance policies, while others might need to avoid overtime or work part time. Some might benefit from a four-day-per-week schedule so that they can schedule necessary medical treatments on their day off. But other people with disabilities might be too fatigued to work ten-hour shifts. In other words, there is no one-size-fits-all solution.[412] Just as not all people with disabilities will benefit from working from home,[413] not all people with disabilities need the same schedules. Accordingly, it would be impossible for an employer to proactively modify their schedules in a way that would meet

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407. *See id.* at 919.

408. Colker, *supra* note 360, at 1829.

409. Gilbride, *supra* note 360, at 310 ("Reasonable accommodations are an essential component of an accessible workplace or educational institution. One thing that makes them genuinely revolutionary as a legal concept is that they recognize individuality—unlike the canonical 'ordinary person' standard of tort law, reasonable accommodations start from the premise that every person with a disability is unique.").

410. Schur et al., *supra* note 11, at 601.

411. PORTER, *supra* note 3, at 125.

412. *Id.* at 126.

413. *Id.*; *see also supra* notes 256–257 accompanying text.

the needs of *all* disabled employees. Only an individual accommodation model works for modifications to employers' rigid scheduling rules.

Finally, to the extent that it is possible for employers to make more global changes with respect to when and where work is performed, a universal accommodation mandate should nudge them in this direction. As I and others have argued, when more employees are entitled to accommodations, the more frequent requests should cause employers to realize that it would be more efficient to modify the rule for everyone, rather than having to administer many individual accommodation requests.[414] As discussed earlier, if several employees in one workplace seek an accommodation of flextime hours (working the same number of hours but varying start and end times), the employer might realize that allowing flextime is not only relatively simple but also that it would be more efficient for the employer to set up a system whereby all employees can work flextime hours rather than fielding individual accommodation requests.

This can also work for modifications to the physical functions of the job. If several employees have difficulty lifting heavy weights (because of disabilities, pregnancy, advanced age, or even small stature) and therefore seek an accommodation, the employer might realize that there are assistive devices or auxiliary aids that could help all employees with the lifting tasks.[415] Obviously, as Colker and Gilbride argue, it would be better for an employer to anticipate the difficulty of heavy lifting and structure the job in such a way that minimizes such heavy lifting.[416] But even if they don't, a universal accommodation mandate can serve the same purpose of getting employers to make broad structural changes to the workplace that will benefit all people with disabilities and all workers, whether currently disabled or not.

V. CONCLUSION

The pandemic exposed the error of one scheduling rule most employers previously followed—that in-person presence is always required for all jobs. It turns out that many employees can successfully work from home. But most employers still insist on many other rigid rules regarding when and how much work is performed, including full-time or overtime hours, set shifts, specific start/stop times, and stringent attendance policies. All of these rules make it very difficult for people with disabilities to balance their work lives and their

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414. PORTER, *supra* note 3, at 117.

415. PORTER, *supra* note 3, at 117; Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 751 (2014); Colker, *supra* note 360, at 1828–29.

416. *See* Colker, *supra* note 360, at 1837; *see also* Gilbride, *supra* note 360, at 307.

health, and many end up losing their jobs or risking their health. This Article has argued that the best way to stop employers from this subordination through schedules is with a universal accommodation mandate that would allow all employees to request accommodations—including a modification of the rules regarding when and where they work. By allowing all workers to seek schedule changes, employers will be forced to realize how easy it is to grant many scheduling accommodations. Hopefully, they will also realize that it would be even more efficient to dispense with their own rigid scheduling norms, and instead focus on how much or how well employees perform their jobs rather than when and where employees perform those jobs. Only then can we hope to end subordination through schedules for workers with disabilities.