

The NCBA Professional Vitality Committee creates sourced articles centered on reducing inherent stress and enhancing vitality in the lives of legal professionals and offers those resources as a benefit for members of the North Carolina Bar Association.

One Size Does Not Fit All: Contemplating and Evaluating Flexible Work Arrangements

PREFACE.....	2
INTRODUCTION.....	3-5
<u>I. FLEXIBLE WORK, DEFINED.....</u>	<u>5-14</u>
A. THE TRADITIONAL MODEL: LITTLE TO NO FLEXIBILITY.....	5-7
B. THE UNCONVENTIONAL MODEL: “FLEX SCHEDULES” AND TELEWORK.....	7-9
C. WORKPLACE FLEXIBILITY AS A GROWING TREND AND RELEVANT LEGISLATION.....	10-14
<u>II. THE BUSINESS CASE FOR FLEXIBLE WORK.....</u>	<u>14-26</u>
A. INCREASED PRODUCTIVITY.....	14-15
B. COMPETITIVE ADVANTAGE IN HIRING.....	15-16
C. EMPLOYEE MORALE, HEALTH, RETENTION, AND TURNOVER.....	16-19
D. BENEFITS OF FLEXIBLE TIME POLICIES TO CAREGIVING EMPLOYEES.....	19-20
E. LEGAL LIABILITY.....	20-24
F. A CASE STUDY ON ONE TYPE OF FLEXIBLE SCHEDULE, THE 4-DAY WORKWEEK....	24-25
G. THE SNOWBALL EFFECT OF FLEXIBLE WORK?.....	26-26
<u>III. IN GENERAL, FLEXIBLE WORK CAN IMPROVE EMPLOYEES’ WORK-LIFE BALANCE.....</u>	<u>26-29</u>
A. INCREASED AUTONOMY AND CONTROL TO WORK EFFECTIVELY.....	26-27
B. WORKPLACE FLEXIBILITY HELPS EMPLOYEES ACHIEVE “FLOW”	27-29
<u>IV. FLEXIBLE WORK POLICIES MAY NOT MAKE SENSE FOR ALL PRACTICES OR PEOPLE.....</u>	<u>29-31</u>
<u>V. BEST PRACTICES WHEN IMPLEMENTING FLEXIBLE WORK POLICIES.....</u>	<u>31-37</u>
A. AVOID ONE-OFF POLICIES AND THE “FLEXIBILITY STIGMA”.....	32
B. IMPLEMENT FLEXIBLE WORK POLICIES THAT ARE REASON-NEUTRAL.....	33
C. DISTINGUISH BETWEEN VOLUNTARY FLEXIBLE WORK ARRANGEMENTS AND REASONABLE ACCOMMODATIONS.....	34
D. MODEL COMPACT BETWEEN EMPLOYER AND EMPLOYEE WHEN TELEWORKING....	34-35
E. ATTORNEY-CLIENT RELATIONSHIP CONSIDERATIONS.....	35-36
F. TECHNOLOGY AND CYBERSECURITY CONSIDERATIONS.....	36
G. SET CLEAR BOUNDARIES AND EXPECTATIONS FOR GETTING IN TOUCH.....	36-37
H. PREVENTING LOSS OF OFFICE CULTURE.....	37
CONCLUSION.....	37-38
ADDENDUM: RESOURCES TO WORK FROM HOME EFFICIENTLY.....	39-41

PREFACE

“Necessity is the mother of invention.” Many of you know that this phrase first appeared in Plato’s dialogue, “Republic,” authored in approximately 375 B.C. While many things have changed in the few thousand years since it was first authored, this quote remains timeless and prescient. Perhaps now that we’re living in the post-Industrial Revolution world, this phrase may be more applicable today if we substituted the word “innovation” for “invention.”

To orient our readers as to the time and situational context of this piece, it should be noted that the North Carolina Bar Association’s Professional Vitality Committee edited the first draft of this article in late 2019 and early 2020,¹ before a pandemic was even a remote possibility. Thus, the article was authored when most of us were working in different situations—physically, professionally, and psychologically. Since that time, as now well known, the people and economies of the United States and North Carolina have been affected in tremendous ways as a result of the novel coronavirus known as COVID-19. Necessarily, many firms, supervisors, and attorneys have recently had the unexpected opportunity to assess the results and effectiveness of having a “more flexible” workplace.

COVID-19 created a home situation unlike any other—both individuals and parents of school-aged children must make space for “work from home” as well as “home school.” For every person in a household, trying to establish a workplace schedule may be necessary to keep the home from becoming a state of constant stress, with fractured schedules that may result in the perceived pressure for each individual to remain productive all hours of the day. For many, this may mean that instead of being one’s sanctuary for relaxation and comfort, the home has quickly been transformed into a place of greater stress than the workplace or school.

After government-imposed work-related regulations loosen, many firms may return to “business as usual.” For others, however, the results of this involuntary, sudden adaptation to workplace flexibility for some attorneys may lead to permanent change, whether it’s fewer offices, less office space, or more flexibility in work hours (whether in or away from the traditional brick-and-mortar physical office).

Following COVID-19, employers and employees might all have evolved attitudes on alternative work arrangements. Knowing what the world looked like before COVID-19 is a helpful guidepost for what we can reasonably expect going forward. Many of us have a desire to carry forward some of the positive lessons we’ve learned or will learn from the pandemic. The ability to be more flexible in work location and hours may certainly be among them, which makes the following information and considerations all the more timely and relevant.

What follows are many thoughts for consideration by both employers trying to manage employees in a virtual work setting and by those employees who are trying to work from home efficiently and effectively, many for the first time.

¹ Consequently, please be mindful of citations and websites, which may have changed since the time of drafting. Please also note that some of the research data referenced throughout the article may have changed significantly as a result of COVID-19’s seismic impact on workplaces throughout the country and, indeed, the world.

INTRODUCTION

Historically, traditional law firms have been known for their demanding hours, rigid dress codes, and inflexible employment policies. Today, however, law firms and other legal workplaces, including public sector organizations and companies with in-house counsel, employ increasingly diverse workforce policies. Some are now following the trend more common in today's non-legal business workplaces by implementing policies allowing workers to mold the space, time, and way in which they work into a framework that matches the needs and preferences of the employee and his or her own individual circumstances.

Today's lawyers are not the first generation perplexed by the seemingly elusive formula for work-life balance, nor are lawyers the only profession to grapple with how best to lead an equally fulfilling life both in and out of the office. There are, however, certain work-life challenges unique to today's lawyers. For one, productivity expectations have increased and seemingly continue to climb. Indeed, full-time attorneys in the 1960s billed approximately 1300 hours per year;² by contrast, it now is increasingly common for full-time attorneys to bill between 2000 and 2300 hours per year.^{3, 4} Add to these increasing billable hour expectations the fact that today's technological advances enable increasingly rapid, immediate communication between lawyers and their clients—regardless of where those lawyers are or what those lawyers are doing. And all this while client expectations for immediate, around-the-clock responsiveness increases and the attention span of humans simultaneously decreases.⁵

Although this article may be viewed by some as a critique of and challenge to the status quo, it bears mentioning that much already has changed and continues to change. Decades ago, most attorneys felt it would be fatal to their career if they requested a reduced hours or part-time schedule after becoming a parent or caregiver. Simply put, the competitive legal workplace of the past was structured such that an attorney putting in long hours of facetime would easily and quickly eclipse another attorney on an alternative work schedule, even if the two attorneys were comparatively talented. Twenty years ago, law firm policies regarding workplace flexibility were often vague and resulted in arbitrary decisions applying such policies. Firms feared that formalized policies would lead to a “slippery slope” in the delicate power balance existing in any employer-employee relationship.

² Deborah L. Rhode, *Lecture: Balanced Lives for Lawyers*, 70 *FORDHAM L. REV.* 2207, 2210 (2002).

³ E.g., Catherine Gage O'Grady, *Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate*, 30 *LAW & PSYCHOL. REV.* 23, 43 (2006).

⁴ Of course, any lawyer who has worked in the private practice of law, or “retail law” as some colloquially refer to it, knows that the ratio of hours worked to hours billed almost always is painfully less than 1:1. For reference, a 2000-billable hour year roughly translates to a 60-hour work week. *Id.* The time a lawyer can or cannot bill to a client is heavily regulated; there are infinite ways to lose time in a day, but some of the most common for lawyers include the following: time costs associated with maintaining an active law license (attending a required number of continuing legal education hours per year, for example), marketing efforts, managing support staff or junior attorneys, information technology maintenance and troubleshooting, involvement in voluntary professional organizations, reviewing bills and managing collections, etc.

⁵ Kevin McSpadden, “You Now Have a Shorter Attention Span Than a Goldfish,” *TIME* (May 14, 2015), available at www.time.com/3858309/attention-spans-goldfish/ (internal citations omitted).

Over the years, however, many law firms realized that flexible work was critical to attracting and retaining the most talented attorneys. Indeed, a recent survey found that more than half of medium and large law firms and in-house departments offered some type of flexible work arrangement in 2018.⁶ Interestingly, however, the flexible work trend is growing at a faster pace across all other industries than inside the traditionally-conservative legal industry; indeed, “[n]early seven of 10 employers [across industries] allow employees to work from home at least some of the time, according to the Society for Human Resource Management, a professional group.”⁷ Sue Shellenbarger, a Wall Street Journal work-family columnist for the past three decades, writes:

When I started my column in 1991, the share of married mothers holding paid jobs outside the home had reached 71%, up from 42% at the end of 1960s. Many were hitting a brick wall. Managers..., almost all of them men, had little patience for the stresses that mothers faced. Some women were so worried they’d be penalized at work for caring about their kids that they hid family photos at the office. Any suggestion that working fathers might want paternity leave drew disdainful laughter.⁸

Despite the growing trend of legal employers adopting flexible work policies and cultures, “law and finance are presently among the worst fields for work-life balance and flexibility.”⁹ Perhaps this is because attorneys still feel anxious about the effect on career prospects that the decision to take advantage of a flexible work policy can have and, therefore, many attorneys are reticent to do so. Moreover, “despite these flexible work arrangements increasing in popularity and gaining some national support, they are far from commonplace.”¹⁰ And then there is the issue of work creep:¹¹ even for those attorneys who opt-in to a flexible work schedule, the demands of the legal profession continue to compete with and “creep in” to time reserved for non-work demands, obligations, and personal interests. Even for legal workplaces where flexible work

⁶ Jason Tashea, “More than half of law firms provide flexible work arrangements, says new report,” AMERICAN BAR ASSOCIATION JOURNAL (Jan. 16, 2019), available at <http://www.abajournal.com/news/article/half-of-firms-offer-flexible-work-arrangements-says-new-report> (internal citations omitted).

⁷ Sue Shellenbarger, “The Challenges that Working Mothers Still Face,” THE WALL STREET JOURNAL (Jan. 3, 2020), available at <https://www.wsj.com/articles/the-challenges-that-working-mothers-still-face-11578067249>.

⁸ *Id.*

⁹ Ivana Djak, “Current Developments 2014-2015: The Case for Not ‘Accommodating’ Women at Large Law Firms: De-Stigmatizing Flexible Work Programs,” 28 GEO. J. LEGAL ETHICS 521, 539 (Summer 2015).

¹⁰ “A Reasonable Solution for Working Parents: Expanding Reasonable Accommodation Under the Americans With Disabilities Act to Parents of Children with Disabilities,” 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 709, 729 (Spring 2019).

¹¹ “[T]he 24/7 economy, pervasive communication technology and pressure to collaborate across time zones are robbing parents of control over their time. Job creep—the tendency of work to seep into every waking moment—means that few jobs can be done from 9 to 5 anymore, accelerating a tsunami of work.” Sue Shellenbarger, “The Challenges that Working Mothers Still Face,” THE WALL STREET JOURNAL (Jan. 3, 2020), available at <https://www.wsj.com/articles/the-challenges-that-working-mothers-still-face-11578067249>.

policies exist and thrive, the ongoing demands of clients continue to distract lawyers from life, home, and familial priorities.

Although referenced anecdotally throughout this article, it is beyond the scope of this writing to define an exhaustive list of the myriad sociocultural, economic, and technological forces responsible for the unique work-life challenges facing the legal profession of today. This article likewise mentions but does not explore the benefits realized or setbacks created by the billable hour, or any alternatives thereto. Instead, the purpose of this article is to analyze flexible time and place of work policies in the legal profession by analyzing—through the lens of work-life balance and professional vitality considerations: (1) what does and does not constitute flexible work; (2) the business case for flexible work and how it benefits the employer; (3) how flexible work benefits the employee; (4) whether a flexible work policy makes sense for a specific legal workplace; and (5) how to effectively manage the risks inherent in such policies.

I. FLEXIBLE WORK, DEFINED

A. THE TRADITIONAL MODEL: LITTLE TO NO FLEXIBILITY

Traditional models look like your standard “9 to 5” job requiring “facetime,” meaning that a lawyer is expected to be physically present in the office working during set hours, dictated by the employer. Workplaces espousing this type of “presenteeism” culture are common in many legal workplaces, which are known for their conservative and risk-averse approach to management.

Advocates of traditional models emphasize that such approaches provide employees with a comforting predictability that comes with knowing exactly when and where one is to perform his or her work. Employees then are able, ideally, to compartmentalize work in a separate “mental file folder” from those folders pertaining to one’s familial or other non-work obligations or personal interests. This allows employees, in effect, to have firm boundaries between their lives in and out of the office, which in turn allows them to focus exclusively on work between the hours of 9 a.m. and 5 p.m. (or whenever they are required to start and finish work, as the case may be), and tend to everything else in their lives between 5 p.m. and 9 a.m. If an employee’s work style is such that segregating work and non-work demands into separate and distinct categories works well for him or her, then there certainly is wisdom in this school of thought.

Advocates of non-traditional models, on the other hand, say that what used to be legitimate reasons for mandating the dual expectations of facetime and set working hours no longer exist—and have not existed since the close of the 20th century. As one anti-traditionalist lawyer puts it,

In the past, many people could not work from home, and it was important that everyone be in the office at the same time each day to start completing assignments. Because employees were less accessible after hours years ago, employees also needed to show up to work at a set time so managers could keep track of their workers.

However, people are accessible pretty much all the time in the present day, and most attorneys can complete almost all of their work in the comfort of their homes. As a result, it rarely makes sense for associates to be in the office at 9 a.m. each day, especially when attorneys can finish work later if they arrive at the office later in the day ... [When I worked at a traditional model firm], requiring everyone to be at the office at 9 a.m. every day was completely unnecessary and created burdens for associates and other employees. Clients knew they could email us whenever they wanted and receive a response around the clock. I think I only had a handful of conversations with clients on the landline at my office while working at that firm, and being accessible to clients is a poor excuse to require associates to be at the office at 9 a.m. . . . Furthermore, [it] is regressive and can create hardships that may make it more difficult for associates to fulfill other responsibilities in their lives.¹²

A growing portion of today's workforce, particularly working mothers, share this view and believe that integration between work and non-work demands allows them to seamlessly triage competing priorities and complete the most tasks, both work- and non-work related. However, traditional model advocates counter that having remote accessibility can lead to poor boundaries, both with clients and supervisors/coworkers alike, with both groups expecting the employee to be available at any time of day.

Perhaps more compelling, advocates of traditional models worry that a loss of culture would ensue if more employees worked remotely. For workplaces seeking to foster a sense of collaboration and collegial camaraderie among employees, working remotely can pose a barrier to regular, long periods of overlapping time in which all employees on a team are physically present in the office, meaning fewer opportunities for organic, face-to-face conversations to occur. Indeed, without intentionality in crafting flexible work policies that encourage alternative forms of seamless communication such as instant messaging, videoconferencing, and placing a good old fashioned phone call, in addition to scheduling in-person meetings or planning sessions at the office, a once collaborative culture can become siloed. Advocates of non-traditional models counter this concern by noting that “[m]ost associates today collaborate through [instant messaging platforms, including] text, email, gchat, and a variety of other tools [recently including FaceTime and other video-conferencing technologies such as Zoom] . . . Since attorneys use various means to [communicate], it is unfair to use collaboration or [in-office] face-to-face interactions to justify a 9 a.m. start to the workday.”¹³

From a practical standpoint, the traditional model has other built-in advantages. Clients typically assume their attorneys will likely be available for meetings, conferences, and phone

¹² Jordan Rothman, “Partners Shouldn’t Expect Associates to Be in the Office at 9 Each Morning,” ABOVE THE LAW (Dec. 31, 2019), *available at* <https://abovethelaw.com/2019/12/partners-shouldnt-expect-associates-to-be-in-the-office-at-9-each-morning/>.

¹³ *Id.*

conferences during the traditional 9 to 5 workday. An alternative schedule may pose an obstacle for lawyers to be able to meet clients' communication expectations.¹⁴

The traditional schedule can also benefit certain employees' personality types. For example, many employees find they are better able to focus and produce work efficiently when surrounded by peers and supervisors.¹⁵ At the same time, supervisors have daily opportunities to interact with and observe employees. This allows employers the ability to more closely manage employees, including the ability to identify problems or work habits that need to be addressed or corrected.

One professor of law posits that

[i]n the context of any particular accommodation decision such concerns may be legitimate or they may be overstated . . . [Consider that] a supervisor presented with a request to work reduced hours, work on a flexible schedule, or work from home may perceive these accommodations as inherently inconsistent with work norms even in situations, where, from an objective perspective, they are unlikely to pose any cost to the employer. Such a view may in part be explained by the empirically documented effect of status quo allocations. Studies demonstrate that in a variety of contexts, from exchanges of goods to changes in the state of the world, individuals systematically favor maintaining their current situation over an equally valuable alternative. In effect, individuals exact a premium in negotiating for change and will ask more for giving up what they currently enjoy than they would pay to acquire it in the first place.

In the individual accommodation context this would mean that a supervisor will place undue value on maintaining existing work rules and structures. The supervisor may prefer having each worker perform all eight hours of work at the work site to working one hour from home even if all other aspects of the alternative arrangement are objectively equal. If so, cost effective accommodations that parties should ordinarily implement as a matter of rational choice may, in some situations, be denied ... Supervisors' decisions may be based on limited or inaccurate information, subtly influenced by bias toward working caregivers, or reflect an intractable desire to preserve the status quo.¹⁶

B. THE UNCONVENTIONAL MODEL: "FLEX" SCHEDULES AND TELEWORK

The unconventional model allows the employee to control the places where and/or times when he or she works:

¹⁴ Susan M. Heathfield, "The Pros and Cons of a Flexible Work Schedule," *The Balance Career* (July 31, 2019), available at <https://www.thebalancecareers.com/advantages-and-disadvantages-of-flexible-work-schedules-1917964>.

¹⁵ *Id.*

¹⁶ Rachel Arnow-Richman, "Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance," 42 *CONN. L. REV.* 1081, 1106-07 (May 2010) (internal citations omitted).

Flexible working time, also known as flextime, is the incorporation of one or more of a variety of arrangements that modify the hours and location of work. If the vast numbers of academic and popular sources praising flextime are believed, flextime is widely popular. Flextime has been praised as a necessity for the modern workplace. Private enterprise, government agencies, and U.S. Senate testimony have all hailed the benefits of a flexible workplace at one time or the other. Flextime systems have been credited with better retention of talent, improved customer satisfaction, improved morale, and higher profits. Workplace flexibility is perceived as a solution for workers trying to balance work and family obligations.¹⁷

The policy most commonly associated with workplaces falling into the unconventional category is what is known as “full-time flex,” which typically involves a 40-50 hour work week and “the ability [for the employee] to control when and where those hours are worked to accommodate family obligations”¹⁸ and non-family obligations alike. In addition to full-time flex, other flexible work policies include informal flexibility¹⁹ combined with the ability to request a formal alternate work schedule,²⁰ part-time scheduling,²¹ and working remotely part-time.^{22, 23, 24}

Proponents of the unconventional model say its recent rise in popularity is the result of “[t]he market’s failure to offer lawyers something other than 24/7 availability.”²⁵ Several innovative, non-traditional legal workplaces feature unconventional models, including

¹⁷ Robert C. Bird, “Article: Why Don’t More Employers Adopt Flexible Working Time?” 118 W. VA. L. REV. 327, 327 (Fall 2015) (internal citations omitted).

¹⁸ Joan C. Williams, Aaron Platt, and Jessica Lee, *Disruptive Innovation: New Models of Legal Practice*, 67 HASTINGS L.J. 1, 12, 16 (2015); available at http://repository.uchastings.edu/faculty_scholarship/1279.

¹⁹ Informal flexibility allows an employee to tend to personal/life obligations, such as a doctor’s appointment, during his or her set working hours without having to ask for time off.

²⁰ Formal alternate work schedules can vary from different work times (for example, 7 a.m.-3 p.m.); to four-day workweeks, in which employees work 10 hours per day; or working from home a few days per week.

²¹ This would be akin to the “reduced hours” policies many Big Law firms already have in place, in which an attorney’s billable hour expectations are reduced commensurate with the same percentage reduction in salary.

²² Roy Maurer, “Flexible Work Critical to Retention, Survey Finds,” SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Sep. 10, 2019), available at <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/flexible-work-critical-retention.aspx>.

²³ For purposes of this article, references to “flexible work,” “working flexible,” and “flexible work policies” all will be used interchangeably to refer to the collective group of flexible workplace policies discussed herein, including full-time flex, flexible/alternative scheduling, part-time scheduling, and working remotely part-time.

²⁴ As a result of COVID-19, many of us are now becoming experienced in workplace “alternatives” we never imagined. In the future, a product of this forced alternation may stimulate more flexibility in the traditionally rigid model, while at the same time serving to address supervisory concerns.

²⁵ Williams *et al.*, at p. 9.

secondment firms.²⁶ But flexible work policies are not unique only to new business models within the private practice of law—a continually-growing number of existing, traditional law firms continue to implement flexible work policies. Some unconventional legal firms are entirely virtual.²⁷ Unsurprisingly, those firms electing to go virtual are seeing significant reductions to their overhead costs and, as a result, net increases to their bottom-line profit margin.

However, this unconventional trend has some potential negative consequences. As mentioned above, the ability to collaborate with others and seek regular guidance from mentors can be more difficult and infrequent when compared with a traditional workplace environment. A flexible working environment can also create accountability issues resulting in losses for the employer or decreased morale.²⁸

“Work creep” can also become an issue with alternative work schedules in the legal industry. The goal of the alternative schedule is to allow employees to achieve a better work-life balance. However, demands from clients as well as the employer can create a barrier to the goal of having enough available time and hours with children, sick spouses, aging parents, or other personal obligations or interests.²⁹

Further, the perception of fairness across the workplace in allowing flextime schedules is important. Allowing some, but not all employees to work remotely or have alternative work schedules can lead to animosity between co-workers.³⁰ In addition, if employees perceive unfairness in the flexible work policies or the way such policies are applied, issues can arise regarding equal compensation, promotions, bonuses, and other concerns that likely will impact employee morale negatively.

²⁶ Secondment firms “place lawyers in-house, either on temporary assignment (the original meaning of ‘secondment’) or on a more permanent but part-time basis.” *Id.* at 26. Two primary business models have emerged within the Secondment firm umbrella, the Independent Contractor Secondment Model and the Employee Secondment Model. The former model focuses on “the desire of senior lawyers...to work more flexibly ... Typically they work full-time ‘flex,’ with time off as needed to attend to family matters or other interests.” The latter model features lawyers “with a wider range of experience ... [and who] work a wider range of hours, including many who work part-time.” *Id.* at 9.

²⁷ “Going virtual is just one way technology makes [the unconventional model] possible. The founder of [one such workplace] elaborated ‘[w]e don’t need a big legal library. We don’t need the IT infrastructure that a typical firm has. We don’t need to be located downtown, because we can access all of our client’s files, we can access calendars and e-mails via technology.’ ... Most [unconventional legal workplaces] use cloud-based technology tools, allowing them to create seamless communication networks among widely dispersed attorneys, outsourcing everything from administrative work to office management.” *Id.*, at p. 11.

²⁸ Lainie Peterson, “Negatives of Flexible Work Schedules,” *CHRON* (Oct. 16, 2018), *available at* <https://smallbusiness.chron.com/negatives-flexible-work-schedules-1236.html>.

²⁹ Susan M. Heathfield, “The Pros and Cons of a Flexible Work Schedule,” *The Balance Career* (July 31, 2019), *available at* <https://www.thebalancecareers.com/advantages-and-disadvantages-of-flexible-work-schedules-1917964>.

³⁰ *Id.*

C. WORKPLACE FLEXIBILITY AS A GROWING TREND AND RELEVANT LEGISLATION, GENERALLY

1. In North Carolina

In 2010, approximately 4% of North Carolina’s workforce worked from home; in 2018, that percentage had risen to 6%, a 50% growth rate.³¹ With respect to North Carolina’s legal profession specifically, some attorneys are focusing less on finding the magical formula to achieving the concept of “work-life” balance, and instead are shifting their focus toward flexibility.³² “‘Seeking balance is almost mythical,’ said Brad Evans, managing director at Ward and Smith in Raleigh. ‘Work, home, spirit, community, and health are not perfectly divided pie slices that even out.’”³³

Several law firms in North Carolina are implementing flexible work policies “to make it easier for attorneys to have a life outside of the office.”³⁴ For example, Ward and Smith in 2018

launched its ‘flexible workplace’ policy. Attorneys and staff can work from home, while traveling, or from an alternate location. At the same time, the firm underwent a technology upgrade and a security upgrade, making it ‘location agnostic.’ . . . ‘We all know that face time in the office is critical for developing relationships and mentoring. . . This policy allows our attorneys to work from home when they have sick family members, to stay in touch with clients while they accompany their children to sporting events, or even to extend their trips with family while remaining connected. We had one litigator take a long trip to France recently, and some folks were surprised to find out he wasn’t in his office.’ . . .The firm also has introduced a policy . . . allowing [attorneys] more flexibility in regards to where they work and on what schedule. They don’t have to track specific days allocated to paid time off.³⁵

In addition to Ward and Smith, Poyner Spruill has implemented several flexible work policies:

[Poyner Spruill] lets attorneys choose their work times, in and out of the office. ‘This is particularly nice for parents working around day care and school schedules,’ . . . ‘We are a mobile and connected society. Our attorneys need and

³¹ Liz Farmer, “Where the Mobile Workforce is Living,” Rockefeller Institute of Government (Jan. 16, 2020), available at <https://rockinst.org/issue-areas/fiscal-analysis/employees-working-from-home/>.

³² Bill Cresenzo, “Life is not a pie chart: Why flexibility might be the key to finding balance,” North Carolina Lawyers Weekly (Jan 9, 2020), available at <https://nclawyersweekly.com/2020/01/09/life-is-not-a-pie-chart-why-flexibility-might-be-the-key-to-finding-balance/>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

are encouraged to work remotely in order to care for family or take the opportunity to work in a less formal environment . . . This allows the greatest flexibility.’³⁶

David Redding, of Redding Jones Law in Charlotte, “advises attorneys to be a little less flexible in one important way, however: he lets clients know that he is open for business and communication from 7 a.m. to 5 p.m. during the week.”³⁷

At the Law Offices of James Scott Farrin in Durham, “lawyers can similarly work at any of the firms’ satellite offices or from home . . . ‘We provide the equipment necessary-laptops, phones, whatever they need . . . They work like they are at the office, and there is no difference, except when they need to see someone face-to-face.’”³⁸

2. *In the U.S.*

Although several pieces of employee- and family-friendly legislation have been proposed at the federal level with the goal of encourage workplace flexibility in mind, thus far none of significant magnitude have been enacted into law. For one, Congress proposed the FAMILY Act,³⁹ which if enacted, would have provided paid family leave. Another piece of legislation— which likewise has been introduced but not enacted into law— is called the Flexibility for Working Families Act, which

would authorize an employee to request from an employer ‘a temporary or permanent change in the employee’s terms or conditions of employment if the change relates to: (1) the number of hours the employee is required to work, (2) the times when the employee is required to work or be on call for work, (3) where the employee is required to work, or (4) the amount of notification the employee receives of work schedule assignments.’⁴⁰

Despite the absence of federally-enacted legislation mandating flexible work policies, workplaces across the U.S. are increasingly offering increased flexibility in time and place of work.

In 1985, only 12.4 percent of the [national] workforce had access to flexible work hours. In 1997, that number more than doubled to 27.6 percent. A 2016 survey of workers in the United States found that 43 percent spend at least ‘some time’ working remotely, up from 39 percent four years before. A 2015 survey found that

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See FAMILY Act, H.R. 1439, 114th Cong. (2015).

⁴⁰ Catherine Albiston and Lindsey Trimble O’Connor, “Just Leave,” 39 HARV. J.L. & GENDER 1, 56 (Winter 2016) (*citing* Flexibility for Working Families Act, S. 777, 114th Cong. (2015)).

80 percent of companies offer working arrangements that are, in some part, flexible.⁴¹

A second, more comprehensive piece of legislation, known as the Schedules that Work Act,

includes a similar right to ask for schedule adjustments. The Schedules that Work Act requires employers to grant those requested adjustments if the employee requests the schedule change (1) because of a serious health condition, (2) due to the employee's responsibilities as a caregiver, (3) to attend a career-related training or education program, or (4) for a reason related to a second job, unless the employer has a bona fide business reason for denying the request.⁴²

It should be noted that in the federal legislation recently enacted by the U.S. Congress in response to the COVID-19 pandemic, the Families First Coronavirus Response Act ("FFCRA") and the CARES Act, as well as in some existing federal law (i.e. the Americans with Disabilities Act and Title VII of the Civil Rights Act), pandemic-related work implications and working from home do have a few important intersections. While outside of the scope of this piece, employers and employees alike should be familiar with these implications.⁴³

3. GLOBAL TRENDS

Businesses around the globe are also recognizing that many highly qualified workers need to be given the flexibility to craft their desired work-life framework.

New findings suggest that businesses that do not have a flexible workspace risk losing out on top talent. Research conducted by leading flexible workspace provider, IWG, shows that 83% of people would choose a job which offered flexible working over a job that didn't, and almost a third (28%) of people value being able to choose their work location over an increase in holiday allowance. In light of these findings, it's unsurprising that 75% of the 15,000 respondents from 80 different countries around the world believe that flexible working has become the new normal. As a result, in the past ten years, 85% of businesses have introduced a flexible workspace policy.⁴⁴

In addition to the IWG study referenced above, the 2018 Global Talent Trends study conducted by Mercer

⁴¹ Rick Paulas, "The hidden dangers of flexible work hours," *The Week* (April 22, 2018), *available at* <https://theweek.com/articles/767007/hidden-dangers-flexible-work-hours> (internal citations omitted).

⁴² *Id.* (citing Schedules that Work Act, S. 1772, 114th Cong. § 3(a) (2015)).

⁴³ The Addendum to this article contains links to a plethora of resources through which one can learn about the various pandemic-related employment law implications.

⁴⁴ "Global Research Shows That Flexible Working Is Now A Deal Breaker In The War For Talent," *International Workplace Group* (March 13, 2019), *available at* <https://www.iwgplc.com/MediaCentre/PressRelease/flexible-working-is-now-a-deal-breaker-in-the-war-for-talent> (internal citations omitted).

collected input from 800 business executives and 1,800 HR leaders, as well as 5,000-plus employees across 21 industries and 44 countries around the world . . . Among the findings, Mercer identified three factors that employees and job candidates are looking for in a company [, one of which is] permanent workplace flexibility . . .

It's clear that the strict nine-to-five workday is outdated-- and it won't help employers attract or maintain today's top talent. The 2018 Global Talent Trends study found that 51% of employees wish their company offered more flexible work options. No matter the industry, flexibility is incredibly important to employees and job seekers across the nation. Companies that offer employees flexibility in the form of telecommuting, flexible schedules and unlimited PTO help employees maintain a positive work-life balance. Flexibility has also been shown to reduce workplace stress, boost mental well-being and encourage productivity.

The demand for flexible work environments continues to grow. A 2016 survey by FlexJobs found that working parents ranked workplace flexibility ahead of salary. A whopping 84% of working parents said work flexibility is the number one most important factor in a job, with work-life balance ranking in as a close second at 80%.⁴⁵

4. The U.K.: A Case Study

The United Kingdom passed The Flexible Working Regulations 2014 in June of 2014, mandating that employers consider the “flexible working application” of any long-term employee.

Since 2014, all employees in the UK (not just parents and [caregivers]), with at least 26 weeks continual service, have the legal right to request flexible working. This change in law . . . brought flexible working into the forefront for both employers and employees. With it, more industries have begun to accept flexible working, and many professional services industries are getting onboard.⁴⁶

Despite this legislation, the legal industry in the United Kingdom has attempted to cling to the traditional work model, much like the legal industry has in the United States. As one expert wrote from London,

Admittedly, the legal industry has been slow to catch on. In an industry where long-office hours are the norm and presenteeism is pretty much expected, breaking

⁴⁵ Alan Kohll, “What Employees Really Want At Work,” *Forbes* (July 10, 2018), *available at* <https://www.forbes.com/sites/alankohll/2018/07/10/what-employees-really-want-at-work/#99476685ad3b> (internal citations omitted).

⁴⁶ Karen Bailey, “Is lack of flexible working a barrier for women in the legal industry?” *WOMEN IN LAW SUMMIT* (Sep. 5, 2018), *available at* <https://www.womeninlawsummit.com/blog/is-lack-of-flexible-working-a-barrier-for-women-in-the-legal-industry> (internal citation omitted).

tradition will be more of a challenge. What we're seeing at the coalface, is that many firms' approaches to flexible working are restrictive. Many cap their flexible working policies to working from home 1 or 2 days a week. Rather than allowing employees the freedom to choose how, when, and where they work, the majority are being granted a piecemeal offering. For flexible working to really take off, we need a change in culture that has to come from the top. Only then will the [legal] industry be able to reap the benefits that flexible working has to offer.⁴⁷

II. THE BUSINESS CASE FOR FLEXIBLE WORK

A. INCREASED PRODUCTIVITY

“Numerous studies show that workers are often more productive at home. ‘They are productive during their normal commute times and often work past the end of the business day.’”⁴⁸

1. Reasons why flexible work boosts productivity

In general, more-flexible schedules work better for everyone. Flexible hours benefit both parents and non-parents, but in different ways. For parents with very young children, their work schedule can be tied to the baby's sleep schedule. Parents with older kids may need to work around inflexible school or activity schedules. This helps parents be more productive with the time they have, and helps them balance their work and lives easier.⁴⁹

Non-parents also use flexible working hours to be more productive. Some people do their best work from 7-9am, while non-morning people hit their stride at 10am. Workers with long commutes might try to shift their schedules to spend less time sitting in traffic, or work from home on certain days. Some people may have clients who are in different time zones, and it might make more sense for them to be online when those key accounts are most active.⁵⁰

About two-thirds of the workers said they are more productive working outside of a traditional office environment, citing fewer distractions and interruptions,

⁴⁷ *Id.*

⁴⁸ Terri Williams, “The pros and cons of flexible work policies,” THE ECONOMIST, available at <https://execed.economist.com/blog/industry-trends/pros-and-cons-flexible-work-policies>.

⁴⁹ Joan C. Williams and Marina Multhaup, “How Managers Can Be Fair About Flexibility for Parents and Non-Parents Alike,” HARVARD BUSINESS REVIEW (April 27, 2018), available at <https://hbr.org/2018/04/how-managers-can-be-fair-about-flexibility-for-parents-and-non-parents-alike>.

⁵⁰ *Id.*

reduced stress from not commuting, and minimal dealings with office politics as their main reasons.⁵¹

2. *The data support the premise that flexible work increases productivity*

One notable study was conducted in 2015 by Stanford University researcher Nicholas Bloom, who wanted to test whether the belief that workers slack off more when working from home was valid. Bloom and his crew studied the differences between the employees at a call center in China who worked from home, and those who worked in the office. They found that:

‘Home working led to a 13 percent performance increase, of which 9 percent was from working more minutes per shift (fewer breaks and sick days) and 4 percent from more calls per minute (attributed to a quieter and more convenient working environment).’⁵²

B. COMPETITIVE ADVANTAGE IN HIRING

“Having the flexibility to choose when to work your required hours is the benefit most prized by 28% of U.S. workers—more than paid family leave or working from home, the Pew Research Center says.”⁵³ That’s not to downplay the importance, which still is significant albeit less so than flexible time, to employees of flexible place of work policies as well. Indeed,

‘With record low unemployment, we’re seeing employers rethinking workplace policies that help both attract workers and retain employees,’ says Dr. Andrew Chamberlain, chief economist at Glassdoor. ‘Flexibility, whether for an employee’s hours or where they work, is something we see more employers considering as employees appreciate the ability to balance their work and life duties at their own discretion.’

In fact, Chamberlain says, companies should expect this to be an increasing priority for workers. ‘A Glassdoor study on Gen Z workers found flexible hours was a common aspect younger workers appreciated about their employers,’ he explains. . . ‘Offering flexible schedules shows candidates that work/life balance is a priority at the company and may sway their decision to accept an offer or not,’ he explains.

⁵¹ Roy Maurer, “Flexible Work Critical to Retention, Survey Finds,” SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Sep. 10, 2019), *available at* <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/flexible-work-critical-retention.aspx>.

⁵² Rick Paulas, “The hidden dangers of flexible work hours,” THE WEEK (April 22, 2018), *available at* <https://theweek.com/articles/767007/hidden-dangers-flexible-work-hours> (*quoting* Nichols Bloom, James Liang, John Roberts, and Zhichun Jenny Ying, “Does Working From Home Work? Evidence from A Chinese Experiment,” THE QUARTERLY JOURNAL OF ECONOMICS, pp. 165-218 (2014)).

⁵³ Sue Shellenbarger, “The Challenges that Working Mothers Still Face,” The Wall Street Journal (Jan. 3, 2020), *available at* <https://www.wsj.com/articles/the-challenges-that-working-mothers-still-face-11578067249>.

Companies with flexible work arrangements also benefit from a larger pool of applicants ... ‘This can open the door to non-traditional candidates, like working mothers... For instance, working parents may prefer to work earlier hours so they can sign off early to pick their child up from school.’⁵⁴

Regarding law firms and legal workplaces, specifically, the same trends apply:

‘We’re seeing employers think outside the box with the types of benefits they offer, and it’s paying off. Law firms and legal departments who are putting a larger focus on creative packages and nontraditional perks are able to attract strong candidates and differentiate themselves from competitors,’ said Amanda Ellis, senior vice president of Special Counsel[.] ‘Today’s top talent are looking at compensation and bonuses as a baseline but are ultimately being swayed by the full experience a company can offer.’⁵⁵

C. EMPLOYEE MORALE, HEALTH, RETENTION, AND TURNOVER

Seemingly gone are the days when dissatisfied employees will stay put in a job they dislike, simply biding time until retirement. And increasingly, employees are leaving behind the bureaucracy and politics of the face time-heavy culture of presenteeism for more flexible work. Indeed, today’s workforce is more mobile and transient than ever before. “By far the most consistent critique is that [the traditional model] fails to offer attorneys their desired trade-off between time and money.”⁵⁶ Many lawyers, if they feel too overwhelmed by the competing demands of juggling work and life pressures, will make the switch to a different legal workplace or transition into a non-legal or legal-adjacent job. Consider,

Surveys are finding that people would gladly leave their jobs for one with more flexibility . . . Research shows that forcing long hours, face time for the sake of face time, and late nights actually kills creativity and good thinking, and the ensuing stress, anxiety, and depression eat up health-care budgets.⁵⁷

The research shows, in addition, that this issue overlaps greatly with that of gender inequity in law firms:

The availability of flexible programs that are not stigmatized is critical to lowering the high attrition rates among female associates at large law firms. In a study of 1,557 law graduates, workplace flexibility was a significant factor in decreasing the

⁵⁴ Terri Williams, “The pros and cons of flexible work policies,” *THE ECONOMIST*, available at <https://execed.economist.com/blog/industry-trnedts/pros-and-cons-flexible-work-policies>.

⁵⁵ Jason Tashea, “More than half of law firms provide flexible work arrangements, says new report,” *AMERICAN BAR ASSOCIATION JOURNAL* (Jan. 16, 2019), available at <http://www.abajournal.com/news/article/half-of-firms-offer-flexible-work-arrangements-says-new-report> (internal citations omitted).

⁵⁶ J. C. Williams et al., at p. 12 (2015).

⁵⁷ Brigid Schulte, *OVERWHELMED: WORK, LOVE AND PLAY WHEN NO ONE HAS THE TIME*, p. 88 (2014) (citation omitted).

attrition rates among young female lawyers at law firms. Lawyers working in offices with more flexible schedules moved out of private practice twenty-eight percent more slowly than those without the flexibility.⁵⁸

Some say this shift in cultural sentiment is the result of an unprecedented number of women entering the workforce beginning in the 1960s, the vast majority of which nowadays are in fact part of the workforce, and often still continuing to put in just as much time homemaking and child-rearing as before they became working mothers. Others say it's the millennials. Neither would be wrong:

'Women don't want separation between work and life. They want integration,' says Anne Auerbach, the co-founder of the flexible work job listings site Werk, in an interview with *Forbes*. 'Flexibility is about compatibility between the needs of an employee and the objectives of an employer.'⁵⁹

It should be noted that "it's not just harried working mothers who are [demanding more] time for life. It's the millennials[.] . . . Not only does this generation expect time to both work and live well, they're willing to take their skills and walk or start their own ventures if they don't get it."⁶⁰

As more and more female attorneys entered the workforce over the decades, and at some point along the way in their legal careers had to confront the issue of whether and how to start a family while simultaneously enjoying an upward career trajectory proportional to that of their male colleagues, law firms had to rethink traditional structures and policies; and, for many firms, ultimately make the decision to change them. In order to retain the best and brightest attorneys, law firms had to find a way to provide a more attainable work-life balance. Beyond the intangible goodwill created when an employer adopts a seemingly pro-employee policy, consider the very tangible economic cost to the employer when women and people of color leave. One estimate of the financial cost to large law firms when women or minority lawyers leave before making partner is a whopping \$2 million--*per employee*.⁶¹

⁵⁸ Ivana Djak, "Current Developments 2014-2015: The Case for Not 'Accommodating' Women at Large Law Firms: De-Stigmatizing Flexible Work Programs," 28 *Geo. J. Legal Ethics* 521, 535 (Summer 2015).

⁵⁹ Rick Paulas, "The hidden dangers of flexible work hours," *THE WEEK* (April 22, 2018), available at <https://theweek.com/articles/767007/hidden-dangers-flexible-work-hours> (quoting Jenna Abdou, "Werk is Making Flexible Work a Reality – Here's How the Founders Made It Happen," *FORBES* (Oct. 30, 2017), available at <https://www.forbes.com/sites/jennaabdou/2017/10/30/werk-is-making-flexible-work-a-reality-heres-how-the-founders-made-it-happen/#3a5a30142ec5>.)

⁶⁰ Schulte, at p. 129.

⁶¹ "When senior associates leave large law firms before making partner, it costs approximately \$2 million per [departing associate]—when you figure in training and recruitment costs, both coming and going." Stephanie Francis Ward, "The financial costs for firms when women and minority lawyers leave," *AMERICAN BAR ASSOCIATION JOURNAL* (Dec. 30, 2019), available at <http://www.abajournal.com/news/article/asked-and-answered-podcast-monthly-episode-123> (internal citations omitted).

From the employer’s perspective, “full-time flex” policies can provide a competitive advantage in recruiting and retaining both male and female employees – particularly among the millennial-age workforce.

Millennials universally tend to care less than older generations about advancement than about work-life balance; to them, ‘time is often more important than money.’ A majority of college-educated Millennial men put family above career on their personal priority lists, and have begun to take on greater care responsibilities to go along with their generation’s more egalitarian views regarding the role of women. That explains why Millennial men (and women) ‘seek a supportive work culture that allows fathers as well as mothers to thrive in both their parenting and their careers.’⁶²

“[S]ome managers and organizations are reaping the benefits of nontraditional schedules. Research from Lotte Bailyn, MIT management professor and coauthor of *Beyond Work-Family Balance*, shows that when employees have the flexibility they need, they meet goals more easily, they’re absent or tardy less often, and their morale goes up.”⁶³

A recent article published by the Society for Human Resource Management emphasizes why flexible work is so critical to hiring and retaining talented employees:

Nearly a third of workers have sought out a new job because their current workplace didn’t offer flexible work opportunities, such as remote work or flexible scheduling, according to new research.

In addition to that figure, FlexJobs, a Boulder, Colo.-based jobs site for flexible work, said 16 percent of the 7,300 workers who responded to its annual survey said they are currently searching for a new job because of flexibility issues. Eighty percent (up from 75 percent in 2018) said that they would be more loyal to their employers if they had flexible work options.

The survey found that 52 percent of respondents have tried to negotiate flexible work arrangements with their companies. More than 25 percent said they would take a 10 percent to 20 percent pay cut in exchange for a flexible work arrangement.

‘In a tight labor market, companies cannot afford to ignore the value employees place on having flexible work options, but leaders also can’t dismiss the very real bottom-line impact offering flexibility has on their employee’s productivity and retention rates,’ said Sara Sutton, founder and CEO of FlexJobs. ‘The flexible job market is currently very robust, so flexible-job seekers are also feeling more empowered to seek jobs that are more compatible with their life.’

⁶² J. C. Williams *et al.*, at p. 17 (internal citations omitted).

⁶³ Amy Gallo, “Winning Support for Flexible Work,” HARVARD BUSINESS REVIEW GUIDE TO WORK-LIFE BALANCE, Ch. 10, p. 104 (2019).

...

The survey found that flexible-job seekers say work/life balance and salary are the top two factors when evaluating job prospects. Since 2013, work/life balance (75 percent), spending more time with family (45 percent), saving time (42 percent), and limiting stress from commuting (41 percent) have been the top four reported reasons people seek flexible work.

A majority—78 percent—said that flexible work would allow them to live a healthier life, and 86 percent said they would be less stressed.

‘Flexible work arrangements help people do their jobs by reducing various forms of stress, whether it’s commuting stress or balancing family obligations,’ said Chai Feldblum, a partner and director of workplace culture consulting at law firm Morgan Lewis in Washington, D.C. She is a former commissioner on the U.S. Equal Employment Opportunity Commission and co-director of the Workplace Flexibility 2010 public-policy initiative at Georgetown Law School.

...

The survey results show that flexible work options are not simply a perk for workers. Employers can realize big benefits when they incorporate work flexibility into the company’s strategy and operations—if the flexible arrangements are well-crafted.

‘We recognize the workplace has evolved, and digital transformation is resulting in the rise of remote teams,’ said Kristen Roby Dimlow, corporate vice president of HR at Microsoft.

‘Tomorrow’s office is everything from the corner coffee shop to a basement bedroom to an airplane 30,000 feet above the earth. We understand that fluid and flexible work environment is the way of the future, and we’re always looking for ways to invest in our people and empower our employees through technology tools that enable collaboration, communication and connection.’⁶⁴

D. BENEFITS OF FLEXIBLE TIME POLICIES TO CAREGIVING EMPLOYEES

Flexible time policies can be crucial for professionals and staff with caregiving responsibilities.⁶⁵ It may be important for such employees to have the flexibility to take care of a

⁶⁴ Roy Maurer, “Flexible Work Critical to Retention, Survey Finds,” SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Sep. 10, 2019), *available at* <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/flexible-work-critical-retention.aspx>.

⁶⁵ *See, e.g.*, Lynn Friss Feinberg, “Breaking New Ground: Supporting Employed Family Caregivers with Workplace Leave Policies,” AARP PUBLIC POLICY INSTITUTE (Sep. 2018), *available at*

child, parent, grandparent, spouse, partner, friend, or other relative. Traditional office practice may characterize this as “sick leave,” which may be earned on an hourly basis per pay period and qualified for paid leave.

Another way in which flextime may provide time for caregiving responsibilities is the “4 and forty” schedule: Four days per week during which an employee works forty hours. A “full time” schedule which allows three days away from expected office communication (except emergencies) may allow for caregiving employees to provide part-time aid for care receivers.

Certain private and nonprofit organizations as well as public agencies and schools must provide (unpaid) leave under the federal Family and Medical Leave Act (“FMLA”). Work hours and tenure are employee requirements. Several states provide for paid time off; others will begin such benefits in years to come. FMLA may also apply during transition into active military duty for parents, children, or spouses.

E. LEGAL LIABILITY

It should be noted at the outset of this section that it is intended to be merely a high-level overview of some, but certainly not an exhaustive list, of the legal risks facing both employers who do and employers who do not adopt voluntary flexible work policies. Regardless of the category to which a legal employer belongs, and definitely before implementing new or making changes to existing policies, he or she is encouraged to consult an employment law attorney and/or to conduct significant additional legal research⁶⁶ to ascertain a comprehensive, individualized risk assessment and cost-benefit analysis.

It also is important to note that, at least as far as North Carolina employers are concerned, there currently is no federal or State mandate to offer flexible time and place of work policies, beyond the minimal protection afforded under the Americans with Disabilities Act and the Family Medical Leave Act. Indeed, “courts have held that Title VII does not require parental leave to care for new children once the mother is no longer physically disabled, nor does it require employers to provide flexible schedules for workers’ caregiving responsibilities, even if employers are able to do so.”⁶⁷

<https://www.aarp.org/content/dam/aarp/ppi/2018/08/breaking-new-ground-supporting-employed-family-caregivers-with-workplace-leave-policies.pdf>.

⁶⁶ See, e.g., Heather Bennett Stanford, “Do You Want to be an Attorney or a Mother? Arguing for a Feminist Solution to the Problem of Double Binds in Employment and Family Responsibilities Discrimination,” 17 AM. U.J. GENDER SOC. POL’Y & L. 627 (Jan. 2009); Joan C. Williams and Stephanie Bornstein, “The Evolution of ‘FReD’: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias,” 59 HASTINGS L.J. 1311 (June 2008); Joan C. Williams, Stephanie Bronstein, Diana Reddy & Betsy A. Williams, “Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces,” 34 PEPP. L. REV. 393 (Jan. 2007); Ifat Matzner-Heruti, “Dare to Care: The Complicated Case of Working Fathers Alleging Sex and Parental Discrimination,” 23 J.L. & POL’Y 1 (Jan. 2014).

⁶⁷ Albiston and O’Connor, at p. 20 (internal citations omitted).

1. Risk to Employers Without Flexible Work Policies

Employers who reward—through promotion, raises, bonuses, type of work assigned, and the like—only those employees who adhere to an exacting culture of “butt-in-seat face-time,” in lieu of those employees who do not, may be doing so at their own peril. This is particularly true if the employees who are not rewarded within the “face-time” culture have familial obligations or other protected attributes preventing them from assimilating to the expectations of the traditional workplace culture.

In recent years, lawyers across the country have begun filing thousands of family responsibilities law actions in every state, in every industry, and at every level in organizations. They include cases... [in which employees] have been held back or demoted, had pay docked, or have been fired because of their perceived lack of commitment to the workplace. But as fathers who are more fully involved in family life find themselves passed over for promotion or stigmatized at work, and as both men and women begin caring more for aging relatives—which nearly half of all American workers expect to do in the coming years—family responsibilities discrimination [“FRD”] lawsuits climbed, mushrooming 400 percent from 2000 to 2010.⁶⁸

Joan C. Williams, a Distinguished Professor of law and the Founding Director of the Center for WorkLife Law at the University of California, Hastings School of Law manages a legal hotline and advises attorneys who are litigating FRD cases, which have increased significantly in the last two decades. Indeed, the following excerpt from a 2010 textbook published by Cornell University Press, edited by Kathleen Christensen and Barbara Schneider, ‘Workplace Flexibility – Realigning 20th-Century Jobs for a 21st-Century Workforce’ succinctly summarizes the evolution of the justiciability of FDR claims within Title VII causes of action, as well as the macro-level social framework within which FDR claims have evolved:

[T]he number of [FRD] lawsuits filed...has ballooned dramatically: a 2006 WorkLife Law study reported a nearly 400 percent increase in the number of FRD lawsuits filed between 1996 and 2005 as compared to the prior decade, 1986 to 1995.

Moreover, plaintiffs have a high, 50 percent success rate in FRD cases, and when they win, the potential for liability is substantial. Of the cases the Center for WorkLife Law has collected to date, the largest individual FRD verdict was \$11.65 million; the largest class action judgment was \$49 million; and, in over 125 cases, verdicts or settlements topped \$100,000.

⁶⁸ Schulte, at p. 73 (*citing* Joan Williams, distinguished professor, University of California Hastings College of the Law, director of the WorkLife Law center, statement to the EEOC, *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, available at www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm; Cynthia Thomas Calvert, “Family Responsibilities Discrimination: Litigation Update 2010,” The Center for WorkLife Law, available at www.worklifelaw.org/pubs/FRDupdate.pdf).

Most FRD cases are filed by women[,] ... [including] lawyers ... Regardless of where [FRD litigants] fall in the socioeconomic spectrum or social hierarchy, after bearing children, women hit the “maternal wall.”

This boom in FRD litigation comes as a surprise to many legal commentators. Until recently, the accepted wisdom among law professors was that work-family conflict was not litigable...

...One early case, *Trezza v. The Hartford, Inc.* (1998), broke new ground when a court rejected the defendant employer’s argument that it had not engaged in gender discrimination by failing to promote a woman lawyer, because in her stead it promoted a woman without children. The relevant comparison, the court asserted, was between the treatment of men with school-age children and women with school-age children. This lens showed that, of the forty-six occupants of the job in question, not one was the mother of a school-age child. *Trezza* taught plaintiffs alleging maternal wall discrimination not to compare *women to men* but *mothers to others*.

...

A...recent study showed that, when compared to non-mothers with the same qualifications, mothers were 79 percent less likely to be recommended for hire, viewed as less competent and committed, offered \$11,000 less in suggested salary for the same job, and held to higher performance and punctuality standards. Even if a mother is not an ideal worker—for example, because she can no longer be available all hours of every day—this does not mean that she is less competent when she works, or that she can legally be held to higher standards for promotion than fathers. Now that psychologists have begun to understand and document the maternal wall, even women living traditionally feminine biographies can challenge family responsibilities discrimination in the courts.

The fact that litigation has helped not only ideal-worker women but also mothers playing traditional roles was dramatized by a case decided by one of the more conservative circuits in the country, the Seventh Circuit, in the 2005 case of *Washington v. Illinois Department of Revenue*. The case involved a mother who filed a race discrimination complaint against her employer. Allegedly in retaliation for filing her complaint, her supervisor took away the flex (7 a.m. to 3 p.m.) schedule she had worked for years in order to be home in time to care for her son, who had Down Syndrome. At the trial level, a magistrate court granted summary judgment in favor of the employer, holding that changing Washington’s flex schedule did not amount to retaliation. The Seventh Circuit disagreed, reversing the decision and finding for Washington in an opinion written by conservative Judge Frank Easterbrook. Forcing Washington work 9-to-5 instead of 7-to-3 ‘was a materially adverse change *for her*, even though it would not have been for 99% of the staff,’ the Court held, with the ‘practical effect...[of] cut[ting] her wages by 25%, because it induced her to use leave for two hours per day.’

When the...U.S. Supreme Court agreed to review a different retaliation case, *Burlington Northern and Santa Fe Railway v. White* (2006), most knowledgeable advocates assumed that the standard set by the Seventh Circuit in *Washington v. Illinois* would be overturned. It was not; in fact, the Supreme Court ruled unanimously in favor of adopting the test for retaliation set out in *Washington v. Illinois* as the nationwide standard for what type of conduct amounts to retaliation in Title VII cases. Moreover, although the Supreme Court case did not involve FRD, allowing the Court to easily gloss over caregiving issues entirely, it chose not to do so. Instead, it addressed FRD explicitly, noting that ‘context matters’: ‘A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.’ Setting an objective ‘reasonable person’ standard, yet circumscribed within the context of the employee, the Supreme Court sent the message that, when it comes to retaliation, courts need to meet mothers in their current social roles, without holding them to the standard of constant availability traditionally expected of ideal workers.

The Supreme Court’s *Burlington Northern* decision may have astonished most legal commentators, yet it was the second decision in three years in which the conservative U.S. Supreme Court made a surprising decision that favored plaintiffs where family responsibilities discrimination was involved. In the 2003 case *Nevada Department of Human Resources v. Hibbs*, conservative Supreme Court Justice William Rehnquist wrote a majority opinion that limited the very federalism doctrine he had created. Rehnquist ruled that the federal Family and Medical Leave Act (FMLA) applied to state governments, in the case of a man seeking FMLA leave to care for his wife injured in a car accident. The Supreme Court, adopting the words of feminist law professor Nina Pillard, signaled that it takes maternal wall stereotyping very seriously, stating that ‘the fault line between work and family [is] precisely where sex-based overgeneralization has been and remains strongest.’

...

In short, the sharp increase in litigation over work-family issues holds the potential for two kinds of change. The first is to shift the national understanding of work-family conflict from being a problem of personal priorities and of individual women ‘opting out’ of the paid workforce toward being an issue of hostile and inappropriate workplace conditions that public policy has failed to address. The second change is to shift employers’ understanding of work-family conflict from being an issue they can voluntarily choose to address by offering employees benefits toward being a risk-management issue with the potential for significant legal liability.

2. Risk to Employers with Flexible Work Policies

It is not just employers who have no flexible work policies that face some degree of legal risk—employers with flexible work policies do, too, and should be careful to implement and apply flexible work policies in such a way that effectively manages such risk.

The most obvious source of regulation of flextime would be the Fair Labor Standards Act (FLSA). The most prominent features of the FLSA established a minimum wage, restricted child labor, and required employers to pay an overtime rate for work surpassing 40 hours in a given week. Flextime would be a natural outgrowth of the FLSA, but drafters in the 1930s could not possibly have predicted the modern service economy and family life that makes flextime so demanding. Drafters could also not have predicted the vast increase in female participation in the American workforce, and the associated needs of pregnancy, nursing, and child care that would accompany the influx of the two-working-parent household. As a result, the FLSA today does not address flexible schedules, and the Department of Labor leaves such scheduling to private employment agreements.

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

However, employers are vulnerable to indirect legal exposure arising from employees' strongly negative reaction to perceived mistreatment under flextime programs . . . [often as a result of] flextime initiatives [being] irrationally or unfairly implemented.⁶⁹

F. ANDREW BARNES: A CASE STUDY ON ONE TYPE OF FLEXIBLE SCHEDULE, THE 4-DAY WORKWEEK⁷⁰

What if there were one change companies could make to lessen their environmental impact, close the gender opportunity gap, improve employees' mental health, and increase productivity—and what if all it took was taking a day off?

⁶⁹ Robert C. Bird, "Article: Why Don't More Employers Adopt Flexible Working Time?" 118 W. VA. L. REV. 327, 350-52 (Fall 2015) (internal citations omitted).

⁷⁰ Emma Hinchliffe, "Andrew Barnes: The 4-Day Workweek Will Make Companies More Productive," FORTUNE MAGAZINE, p. 47 (Jan. 2020).

Andrew Barnes, the founder of a New Zealand estate-planning company, in 2018 introduced a four-day workweek for his 240 employees. After a carefully managed trial period, Barnes found employee engagement had improved by 40%. He's now made it his mission to get companies around the world to reimagine what they ask of their staffers.

...

The secret is rethinking how employees work during the four days of the week that they're still spending in the office. Barnes has found that workers will happily give up small talk and time spent on social media when the prize is an extra day away from their desks. And the benefits—to companies, economies, and societies—are enormous.

The system takes cars off the road during rush hour. Flexible work schedules help women stay on track to move into leadership positions, rather than dropping out of the workforce after having children. At Barnes's company, employees maintained their job performance and reported a 7% decrease in stress levels and a 24% jump in satisfaction with work/life balance. Barnes cites German autoworkers' 28-hour weeks—and a recent Microsoft Japan experiment that saw a four-day week boost sales by 40%—as examples of how the schedule can work across blue- and white-collar professions. 'We have picked an arbitrary five days a week, and we've stuck to it. But the world's changed,' Barnes said.

G. THE SNOWBALL EFFECT OF FLEXIBLE WORK?

Flexibility at the individual employee level can snowball into more global organizational flexibility, such that an organization could continue daily operations even in extreme cases such as war, natural disasters, adverse weather, disease outbreaks, and the like:

When hurricanes, snowstorms, flu outbreaks, and freak weather shut down the federal government and local businesses, the work goes on at the U.S. Patent and Trademark Office in Alexandria, Virginia. Two-thirds of the eleven thousand employees work remotely at least one day a week, Danette Campbell, who directs the telework program, told me. Remote workers examine 3.5 more patents than their colleagues who work in the office, PTO studies have found, and they save taxpayers \$22 million in avoided real estate and office costs every year. The attrition rate is lower because workers are happier. Roads aren't clogged because workers don't have to commute. And work goes on despite the weather.⁷¹

In addition to increased flexibility at the organizational level, one investigative journalist opines that if flexible work were enacted en masse, society overall would reap the benefit of rush hour traffic congestion disappearing:

⁷¹ Schulte, at p. 129 (internal citation omitted).

Alison Maitland, a British journalist and author of *Future Work*, predicts a coming revolution in work on par with the wholesale transformation that swept people off country farms and deposited them in urban factories in the industrial age. ‘If work can be done anytime, anywhere, and it’s no longer tied to putting in long hours of face time at set times at an office, rush hour disappears!’ she told me.⁷²

III. IN GENERAL, FLEXIBLE WORK CAN IMPROVE EMPLOYEES’ WORK-LIFE BALANCE

“[H]aving discretion as to when, where, and how much one works—is an important remedy to both chronic and acute time pressures and work-life conflicts, with potential health, well-being, and productivity benefits.”⁷³

A. INCREASED AUTONOMY AND CONTROL OVER WHEN, WHERE, AND HOW ONE BEST WORKS

The concept of and explanations for certain subgroups disappearing in large numbers from the workforce entirely, while not the subject of this article, have been the subject of much research that, at the very least, overlaps with some of the themes explored herein. For example,

Jane Leber Herr, an economist at the University of Chicago, analyzed national surveys of college graduates and found that fifteen years after graduating, nearly all the childless men and women were still working. But close to 30 percent of women with MBAs who had become mothers were out of the workforce, as were about one-quarter of the lawyers and those with master’s degrees who had become mothers. Around 15 percent of Ph.D. mothers were gone. The one outlier was mothers with medical degrees. Fully 94 percent were still on the job, largely because doctors [in private practice] have the power to control and predict their own schedules.⁷⁴

Ms. Herr’s research then begs the question: is “the power to control and predict” one’s work schedule the magic ingredient needed to live a balanced, fulfilling life both in and out of the office? That may be an oversimplification. Besides, do schedule predictability and control always go hand in hand?

Consider the case of one solo practitioner—save for court appearances, she has complete power and control over her schedule, yet she routinely checks and responds to e-mails at 3:00 a.m. Her workday is incredibly fragmented, comprised of a hundred little tasks spread throughout all her waking hours. Surely such a schedule would not be considered “predictable,” reinforcing the

⁷² *Id.*

⁷³ Erin L. Kelly and Phyllis Moen, “Rethinking the Clockwork of Work: Why Schedule Control May Pay Off at Work and at Home,” *ADVANCES IN DEVELOPING HUMAN RESOURCES*, U.S. Department of Health and Human Services (Jan. 15, 2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4295783/>.

⁷⁴ Schulte, at p. 81 (citing Jane Leber Herr and Catherine Wolfram, “Work Environment and ‘Opt-Out’ Rates at Motherhood Across High-Education Career Paths,” *NATIONAL BUREAU OF ECONOMIC RESEARCH*, working paper 14717, p. 17 (Feb. 2009), available at www.nber.org/papers/w14717.pdf).

point made by advocates for the traditional model that working the same hours each day, even if by employer mandate and not by one's own choice, makes life a little less chaotic. But what if that solo practitioner were to tell you that her personality type and work style make it not just conducive, but entirely preferable, for her to live an incredibly integrated life, one which would appear to the outside observer to have no boundaries, no stops and starts, no neat little compartments between work and non-work obligations? Although perhaps this integrated model is counterintuitive,

a raft of new research is finding that better work gets done when workers have more control over and predictability about their time and workflow, when managers focus on the mission of the job rather than the time in the chair and recognize that workers are more engaged, productive, and innovative when they have full lives at home and are refreshed with regular time off.⁷⁵

The counterpoint to the increased autonomy and discretion afforded to employees in workplaces with flexible work policies manifests itself in a direct correlation between increased flexibility and control over one's schedule, and the need for effective time management.⁷⁶ For these reasons, flexibility can be a double-edged sword if one lacks the skills and/or discipline necessary to effectively manage one's time in the absence of structured workday hours.

B. WORKPLACE FLEXIBILITY HELPS EMPLOYEES ACHIEVE "FLOW"

Discipline is more important now than it has ever been, since a number of different tasks must be prioritized in today's ever-changing work environment, even when one is not working remotely. "Studies have found that information workers [including lawyers] have so much coming at them, they switch tasks every three minutes, making the workday fragmented and incoherent."⁷⁷ Information overload can take the shape of many forms, not the least of which is managing one's e-mail inbox.

Jonathan Spira, author of *Overload!*, has spent the past twenty years studying information overwhelm.⁷⁸ He found that just reading and processing the daily

⁷⁵ *Id.*, at p 88.

⁷⁶ The study of effective time management practices and personality traits which do or do not lend themselves to same is a complex psychological and practical challenge. It, for these reasons, is beyond the scope of this article, but likely would lend itself to an in-depth analysis in the context of these issues.

⁷⁷ *Id.*, at p. 63 (internal citations omitted).

⁷⁸ For background on the concept of "information overwhelm," consider that:

'In 1976, there were 9,000 products in the average grocery store, and now it's ballooned to 40,000 products. And yet most of us can get almost all our shopping done in just 150 items, so you're having to ignore tens of thousands of items (sic) every time you go shopping'. . .By one calculation...we've created more information in the last 10 years than in all of human history before that . . . All of this is more information than the brain is configured to handle. The conscious mind can pay attention to three, maybe four, things at once. 'If you get much beyond that, you begin to exercise poorer judgment, you lose track of things and you lose your focus[.]'

onslaught of e-mails can occupy over half a worker's day. His surveys have discovered that two-thirds of workers feel they don't have enough time to get all their work done and 94 percent have at some point felt 'overwhelmed to the point of incapacitation.'⁷⁹

Emails, phone calls, and co-workers are just a few of the myriad interruptions workers must navigate on a daily basis—and for each one, “[i]t can take ten to twenty times the amount of the interruption time to return to the previous task: It can take five minutes after a mere thirty-second interruption to get back on track. Fully one-third of every worker's day . . . is . . . unnecessary interruptions.”⁸⁰

“It's hardly a wonder, then, with the pressure of long hours, putting in face time, and the constant interruptions of the modern workplace, [that] less than 10 percent of workers say they do their best thinking at work.”⁸¹ If a constant stream of interruptions throughout the workday is the antithesis to productivity, what then is the antidote? Flow, as some social psychologists would argue.

Flow is a timeless space, where one becomes absorbed in the challenge of the task at hand—the surgeon in the middle of a complex procedure, the artist caught up in the act of creation, [the lawyer consumed in legal research and writing for an appellate brief]. In flow, humans lose themselves and feel most at peace. It is a state that [Csikszentmihalyi] describes as greater than happiness. And it requires undivided attention and uninterrupted time.⁸²

An employee can shift time he or she otherwise would have spent commuting to and from work, for example, to catch up on familial obligations or other personal commitments or social engagements. “Also, for individuals who work in offices that are loud, lack windows, or where drive-by meetings⁸³ are common, working remotely can be a welcome respite. Plus, [such

Laura Shin, “10 Steps to Conquering Information Overload,” FORBES (Nov. 14, 2014), *available at* <https://www.forbes.com/sites/laurashin/2014/11/14/10-steps-to-conquering-information-overload/#40671f4c7b08> (internal citations omitted).

⁷⁹ Schulte, at p. 63 (internal citations omitted).

⁸⁰ *Id.*, at p. 64.

⁸¹ *Id.*, at pp. 266-67 (citing Judy Martin, “Employee Brain on Stress Can Quash Creativity and Competitive Edge,” FORBES (Sep. 5, 2012), *available at* www.forbes.com/sites/work-in-progress/2012/09/05/employee-brain-on-stress-can-quash-creativity-competitive-edge/).

⁸² *Id.*, at p. 66.

⁸³ Consider one researcher's take on the concept of drive-by meetings, with this context:

Half the workers surveyed in 2008 felt there were too many tasks to complete in a typical work week. I began to work with these companies and found out, it's not so much that they had too much to do, but with all the interruptions they had, they could not get to all the tasks they had to do.

Because of unnecessary, unwanted, and completely unproductive interruptions, between 40 and 60 percent of their time was completely wasted.

individuals are] more likely to get more done.”⁸⁴ For some, one’s surroundings can have a significant effect on how they feel. Working remotely in a serene, beautiful setting can reinvigorate how an employee is feeling about competing life and work demands.

IV. FLEXIBLE WORK POLICIES MAY NOT MAKE SENSE FOR ALL PRACTICES OR PEOPLE

Assuming that working remotely “is conducive to [a lawyer’s] work style and [] tasks, take advantage of that option.”⁸⁵ Some would say that assuming one’s work tasks and style are conducive to working flexibly would be a significant assumption to make. Indeed, “while flexible work allows many employees to do their jobs better, it’s not feasible for everyone. ‘It’s not true to say that flexible work is perfect for everyone and that flexible work arrangements by themselves will result in happier, more-productive employees,’ Feldblum said.”⁸⁶

What kinds of flexibility are feasible will depend on the workplace and the job. Obviously, a cashier cannot telecommute and a trial lawyer can’t get home like clockwork every day at 3 p.m. But a cashier can job share, and a lawyer can telecommute or take chunks of time off once the case has settled. Given the broad array of flexible work options, from flex-time (control over when you work) to remote work to job sharing (where two people seamlessly split a single job), managers can typically offer a variety of options to accommodate different workers’ needs.⁸⁷

Flexible work in the practice of law may be largely, if not entirely, dependent on which area or areas of law an attorney practices. For example, one attorney’s domestic violence practice is heavily court-based and may not lend itself, in whole or in part, to flexibility in when or where she works. Contrast this attorney’s experience with that of her colleague, whose practice is more

...

Think about the way our offices are set up. In an open floor plan, with low cubicles, it’s easy for someone to walk by and ask, ‘Got a minute?’ right when you’re about to finish writing up a big project. And you both know that minute is never just a minute.

The flow is constant. On any day, people can drop by and talk about a variety of unnecessary things...It’s just about destroyed our ability to concentrate.

Brigid Schulte, “Work interruptions can cost you 6 hours a day. An efficiency expert explains how to avoid them,” THE WASHINGTON POST (June 1, 2015), available at <https://www.washingtonpost.com/news/inspired-life/wp/2015/06/01/interruptions-at-work-can-cost-you-up-to-6-hours-a-day-heres-how-to-avoid-them/>.

⁸⁴ Elizabeth Grace Saunders, “How to Get the Most out of a Day Off,” HARVARD BUSINESS REVIEW GUIDE TO WORK-LIFE BALANCE, Ch. 9, p. 99 (2019).

⁸⁵ *Id.*, at p. 98.

⁸⁶ Roy Maurer, “Flexible Work Critical to Retention, Survey Finds,” SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Sep. 10, 2019), available at <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/flexible-work-critical-retention.aspx>.

⁸⁷ Joan C. Williams and Marina Multhaup, “How Managers Can Be Fair About Flexibility for Parents and Non-Parents Alike,” Harvard Business Review (April 27, 2018), available at <https://hbr.org/2018/04/how-managers-can-be-fair-about-flexibility-for-parents-and-non-parents-alike>.

transactional in nature and rarely, if ever, involves court appearances. If her employer were to implement flexible time or place of work policies, it may not seem as though such a policy can fairly be applied to both her and her colleague. This example is seen by some as part of a larger concern to flexible work policies—simply because one employer adopts a flexible work policy does not mean that the employer’s clients, opposing attorneys, vendors, or jurisdictions before whom the employer’s attorneys appear do, too.

As an attorney whose practice is primarily court-based, it can seem difficult to find “work-life” balance. Even when law offices implement flex-time options for their employees, a trial lawyer may think they cannot take advantage of the same opportunities as their transactional counterparts. After all, you must be in court when your case is set and sometimes have very little flexibility as to when it’s set. That may be a concern for employers who want to implement flextime as an option. If it cannot be applied fairly across the board, they may consider a more traditional policy. However, there are ways to implement flexibility into one’s schedule with the support of a flex-time policy, even when you must be in court on a frequent basis. One just has to be a little more strategic. Having an employer who gives you the flexibility to figure that out is huge!

For one, trial attorneys who find themselves in court often can incorporate flexibility when they have office days. Even those of us who find ourselves in court day after day usually have some office hours and times when we are not in court. We can take advantage of flex-time policies then. For instance, it is possible that one attorney prepares better in their office at their desk while another attorney may prepare better at home, away from the distractions of the office. One employee’s best thinking may be done in the morning, and yet another’s, in the evening. Allowing for these flexible arrangements can lead to creative and better crafted arguments for our clients and cases.

It also allows professionals to complete all the necessary tasks associated with their personal lives, while still contributing in an effective and talented way to their firm. This opens the door to a larger talent pool, many of whom want to work but cannot because they have been held captive by traditional forms of employment that do not align with their personal responsibilities. With fresh thinking and an open mind to figure out the logistics, employers can implement a policy, or better yet, a culture of flexibility, where an attorney has the freedom to decide what works best for them. Overall, this should contribute to a more satisfied professional, which ultimately helps both the attorney and the firm.

Another way trial attorneys can find flexibility, with the support of their employers, is to utilize mental health days. In order to do this, a firm has to have a policy which allows for employees to take off time when they need it—no questions asked—trusting that they are not missing deadlines, meetings, or hearing dates when they are scheduled to be there. By having a policy that allows for employees to schedule their earned time off without having to explain the reasons behind taking that time (taking into full account the functionality of the office), attorneys have the freedom to recharge when they most desperately need it, so they can continue to show up for the people they’re fighting for at work and the people they are supporting at home (even if that is one’s self). The practice of law, and especially trial work, is designed to be adversarial. Couple that with the intensity of some of the subject matters that are being argued and an attorney’s

personal life, and you have a recipe for high levels of stress or worse. The option to take time when you need it helps ameliorate negative consequences created by those factors.

On a related note, certain employees may not want, and indeed should not, take advantage of an employer's flexible work policies. Employers should not force these employees to do so. Examples include those whose personality types are overly extroverted and derive their energy from interacting with others. Another example is that, due to generational differences or a lack of comfort in navigating technology remotely, some may find remote work disorienting and uncomfortable. The seemingly best practice for employers who have flexible work policies is to allow the employee to decide whether to take advantage of such policies and, if so, for setting his or her own alternative work schedule (with the consent of the employer).

V. BEST PRACTICES WHEN IMPLEMENTING FLEXIBLE WORK POLICIES

'It's up to employers to put [flexible work policies] in place in a very thoughtful and strategic manner.' [For starters, employers can accomplish by doing the following:]

[1] Note the positive effects of offering flexible work arrangements. 'Do not presume that because you haven't offered them in the past, they won't work for you; they might. If some managers assert that it won't work, take that as the start of the discussion, not the end.'"

[2] Conduct a thorough assessment of all the jobs in your workplace to figure out which ones are feasible for flexible work.

[3] Develop performance outcome metrics for the entire workforce. 'Use these to hold people accountable for not meeting expectations, keeping in mind that you don't want to only apply stricter expectations to people working in a flexible work arrangement. Employees should know that they are going to be held to the same metrics as everyone else doing the work, so they have the incentive to make the arrangement work well.'

[4] Train managers on how to work with remote employees and other flexible workers.⁸⁸

⁸⁸ Roy Maurer, "Flexible Work Critical to Retention, Survey Finds," SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Sep. 10, 2019), available at <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/flexible-work-critical-retention.aspx>.

A. AVOID ONE-OFF POLICIES AND THE “FLEXIBILITY STIGMA”⁸⁹

Recent research suggests that what Big Law offers—one-off individual accommodation policies—are not effective. Typically, the people who use them suffer the worst of worlds—they’re stigmatized, but find themselves working full time for part-time pay. What [unconventional model firms or companies] offer... is what leading researchers now agree is a more promising formula: they hard-bake work-life balance into the business model. [Unconventional model firms or companies] offer attorneys two very different types of alternative schedules. The first is genuine part-time work that can be done from home. This is popular both with lawyers who self-identify as stay-at-home parents and with those who have second careers [.] . . . The second is full-time flex: 40 to 50 hours a week (but no more), worked from home, with completely flexible hours and the ability to (sic) show up for dinner and vacations with your family.⁹⁰

Although technology is making it easier, faster, and more efficient to work from anywhere, at any time—even at home between playdates and dinner—the power of [assumptions about who or what measures up to the notion of the “Ideal Worker”] keeps everyone stuck on their butts in their chairs at the office. Researchers at the University of California at Davis’s graduate school of management and the London Business School found that, regardless of the quality of their work, people who work remotely . . . are less likely to be seen as responsible and dedicated and more likely to get lower performance evaluations, smaller raises, and fewer promotions than their face-time warrior, ideal worker colleagues.⁹¹

⁸⁹ Numerous studies have shown how workplace practices, interactions and social meanings stigmatize taking leave. These practices include norms around face time, constant availability, and total commitment to the job, all of which are common in professional settings. Workers who are unable or unwilling to adhere to these norms are perceived to be uncommitted or incompetent. These perceptions can have devastating consequences for workers. Workers who take leave or use employer-provided flexible work arrangements to attend to family caregiving are more likely to be passed over for promotions, given less desirable work assignments, and paid less than otherwise comparable workers who have not taken leave or who have used flexible work arrangements for purposes other than family caregiving. Taking leave can also put workers at risk of losing their jobs. These norms are so ubiquitous that workers who simply request leave or a flexible work accommodation for family caregiving are viewed more negatively than workers who do not make such requests.

Albiston and O’Connor, at p. 34 (internal citations omitted).

⁹⁰ Joan C. Williams, “Law Firms’ Grueling Hours are Turning Defectors Into Competitors,” HARVARD BUSINESS REVIEW (Aug. 25, 2015), available at <https://hbr.org/2015/08/law-firms-grueling-hours-are-turning-defectors-into-competitors>.

⁹¹ Schulte, at p. 87 (citing Kimberly Eslbach and Daniel Cable, “Why Showing Your Face At Work Matters,” MIT SLOAN MANAGEMENT REVIEW (June 19, 2012), available at <http://sloanreview.mit.edu/the-magazine/2012-summer/53407/why-showing-your-face-at-work-matters/>).

B. IMPLEMENT FLEXIBLE WORK POLICIES SET CLEAR ELIGIBILITY STANDARDS BUT THAT ARE REASON-NEUTRAL

Employers must set clear and consistent eligibility standards for employees to meet and maintain to ensure a productive and fair work-from-home arrangement. Factors to weigh in setting these standards are the employee's position and duties, work skills, years of service and performance history. Based on the employer, and the requested work-from-home arrangement, employers may consider other objective factors. Even if an employee meets the basic eligibility requirements, the employer must then evaluate, on a case-by-case basis, the nature and length of the work-from-home arrangement and its impact on the company. Managers should be educated on the eligibility factors to avoid confusion and prevent and perception that employees are being treated differently for impermissible reasons.⁹²

Indeed, the best practice is for an employer not to consider the underlying reason behind an employee's request for an alternative or flexible schedule. Unless the employee's reasons for requesting flexible work are part of the specific criteria for determining eligibility and such reasons truly do not matter to the employer, then why should the employer know? It would be human nature for a supervisor to evaluate a request for alternative/flexible work arrangements relative to other such requests he or she has evaluated, and in doing so, it would be difficult, if not impossible, to make a value judgment about which reason is most compelling. Whether such value judgment and bias would manifest itself into an arbitrary, unfair application of the policy is another matter, but to avoid the risk altogether, the best practice is to ensure that the employer's decision-making process is completely reason-neutral:

[W]hile the data is clear that parents are more likely to face bias at work, sometimes we also hear about a different problem: that people *without* children find that their managers are more understanding of working parents' need for flexibility, while expecting childless or unmarried staff to pick up the slack because they 'have no life.' Indeed, research has found that women without children work the longest hours of any group.

How can managers set and enforce flexibility policies that are fair to everyone? [The 'simple answer' is that] ... if you have a work-from-home policy, it should be reason-neutral. It's generally not a good idea to have to judge different people's 'reasons' for working from home. This leads to uncomfortable territory: does sick baby trump dying grandparent? Instead, when people work from home, just have them say 'I'm working from home.' Don't make people explain why.⁹³

⁹² Employment, Labor & Benefits at Mintz Levin, "Six Considerations for a Successful Work-From-Home Arrangement," THE NATIONAL LAW REVIEW (Dec. 2018), available at <https://www.natlawreview.com/article/six-considerations-successful-work-home-arrangement>.

⁹³ Joan C. Williams and Marina Multhaup, "How Managers Can Be Fair About Flexibility for Parents and Non-Parents Alike," HARVARD BUSINESS REVIEW (April 27, 2018), available at <https://hbr.org/2018/04/how-managers-can-be-fair-about-flexibility-for-parents-and-non-parents-alike>.

C. DISTINGUISH BETWEEN VOLUNTARY FLEXIBLE WORK ARRANGEMENTS AND REASONABLE ACCOMMODATIONS

Employers should be careful that any work-from-home policies are treated separately from such arrangements that are required by an employee's health condition as a 'reasonable accommodation' under the Americans with Disabilities Act (ADA). Employees should understand that the voluntary work-from-home arrangement is not a legal requirement or entitlement, but rather an incentive offered by the employer. Alternatively, if an employee requests a work-from-home arrangement due to a health issue, they may be entitled to it under the ADA-even if they do not meet the company's eligibility standards under the voluntary work-from-home policy.⁹⁴

D. MODEL COMPACT BETWEEN EMPLOYER AND EMPLOYEE WHEN WORKING FROM HOME

The National Conference of Womens Bar Associations in 2007 published some recommended practices that law firms offering flexible work--and attorneys taking advantage of it-- both would do well to keep in mind if they decide to enact flexible work policies, to include the ones below:⁹⁵

“For law firms, a flexible hours policy and its effective implementation should address key components:

1. Communicated Firmwide – the policy should be in writing and its existence and the process by which it can be utilized communicated to all attorneys;
2. Open to All Attorneys – a meaningful policy is available to both men and women attorneys including partners, of counsel and associates;
3. Compensation and Advancement – attorneys working [reduced] hour arrangements are entitled to proportionate salaries, bonuses and benefits as well as promotions to partnership based on the same criteria as other attorneys, taking into account the percentage of hours worked each year;
4. Professional Development – interesting and challenging work is key to retention of attorneys, and opportunities to work on high-profile cases or take advantage of leadership opportunities should be accorded equally to flextime attorneys; and
5. Respect – a firm should respect flextime arrangements and value these attorneys in the same manner as all others for their contributions to the firm with no inappropriate stigma

⁹⁴ Employment, Labor & Benefits at Mintz Levin, “Six Considerations for a Successful Work-From-Home Arrangement,” THE NATIONAL LAW REVIEW (Dec. 2018), available at <https://www.natlawreview.com/article/six-considerations-successful-work-home-arrangement>.

⁹⁵ Excerpted from E. Lynn Grayson, “Flexible Hours Policies: A Business Imperative for Law Firms,” NATIONAL CONFERENCE OF WOMENS BAR ASSOCIATIONS NEWSLETTER, p. 8 (Winter 2007), available at https://jenner.com/system/assets/publications/960/original/Grayson_Winter_2007.pdf?1314019996.

attached to an alternative work arrangement including the absence of any unwarranted ‘face time’ obligations.

For flextime attorneys, a commitment also is necessary to provide every opportunity for an alternative work arrangement to succeed and be viewed as a success by your law firm:

1. Good Legal Work – all attorneys, including flextime ones, need to produce high-quality work product meeting client demands to be someone a firm values and wants to retain;
2. Be Flexible – flextime and full-time attorneys may be called upon to address critical client concerns at any given time or day, and therefore, flextime attorneys must be open to managing the unexpected, whether they are in or out of the office and/or have meaningful arrangements in place to handle such client situations;
3. Firm Contributions – attorneys seeking to balance their professional and personal lives often consider eliminating or greatly reducing their contributions to the firm but to the contrary, should take every opportunity that works for them to participate in firm governance including new attorney recruiting efforts;
4. Professional Development – a meaningful career in law requires something more than billing hours, including a commitment to non-billable, pro bono and community service – flextime attorneys should conduct this work in a proportionate manner to their . . . scheduling keeping in mind personal interests and their firm’s expectations; and,
5. Support – flextime attorneys need to develop a support system in the office and at home that allows them to manage the unexpected – this should include human resources (other attorneys, spouses, partners, caregivers) as well as appropriate technology ([cell phone], laptop, [access to] fax machines, etc.).”

E. ENSURE FLEXIBLE WORK ARRANGEMENT WILL NOT HINDER DEVELOPMENT OF AN EFFECTIVE ATTORNEY-CLIENT RELATIONSHIP

Body language can be missed in telephone meetings with clients. This can prevent lawyers from effectively evaluating the credibility of their client. It likewise can hinder the client from assessing the lawyer’s genuineness, empathy, and compassion. Matter-of-fact statements may be interpreted more harshly when a client is not present to see the lawyer’s concern for his or her problem. One possible mitigator to this concern is to be sure that lawyers interacting virtually with clients speak words of affirmation; for example, lawyers can preface difficult advice with statements such as “I know you cannot see me right now and you may think I am not concerned about your situation, but . . .” or “I know this may sound more abrupt than I intend for it to since we are not together for you to see my body language and facial expressions, but I need to ensure that I clearly explain the law to you.”

Misunderstandings in the attorney-client relationship also may be more likely to occur when the two parties are communicating through a mechanism other than in-person, face-to-face communication. Clients for whom English is not their first language, for example, may not

understand legal advice as clearly when they can't see a lawyer to read his or her lips while also listening to the advice. Even clients for whom English is their first language may not understand complicated legal jargon as well over the phone as opposed to in person. With an ever-increasing amount of the population replacing land-line phones with cell phones, there also exists the possibility of a bad connection or momentary disruptions to clear reception. People, on both ends of the line, also must contend with background noise, further impeding one or both parties' ability to fully hear and understand what each person is saying. At worst, this could result in a Bar complaint or malpractice claim if clients do not get the intended result or misunderstand material aspects of the attorney's advice. One possible solution to this concern is to be very clear when providing advice on the phone and to follow-up telephonic communications with an e-mail, text, or other form of written communication, so that you can confirm in writing that both parties have the same understanding about the content of the telephonic conversation.

F. TECHNOLOGY AND CYBERSECURITY CONSIDERATIONS

Another factor to consider is that lawyers taking advantage of a flexible work policy will need access to up-to-date technology, both hardware and software, necessary to perform all the same functions at home. For most law firms with adequate financial resources, this would not pose a problem. This could, however, be cost-prohibitive to non-profit legal workplaces. Before an employer elects to offer a policy firm-wide, it first should evaluate the incremental cost of enabling each additional attorney to perform flexible work in order to ensure that its budget can accommodate such an endeavor.

Where in the past there [have] been concerns over the practicalities of flexible working, using new technology such as cloud computing and video conferencing, businesses and employees can remotely [communicate] in a seamless manner. This means employees can work effectively without the need to be office based. Technology and the flexibility are also helping to meet the needs of clients who want a more on-demand service, where the need to visit a brick and mortar establishment are eliminated or at least reduced.⁹⁶

With any conversation about technology comes the attendant obligation to ensure that the confidentiality of work product and communications is preserved, regardless of the technology a lawyer may be using to work, and regardless of where and when such work is performed.⁹⁷

G. SET CLEAR BOUNDARIES AND EXPECTATIONS FOR BEING IN TOUCH

Flexible schedules have many upsides, but they can also have downsides. They can make managers nervous-- what if I really need to get in touch with my staff and I can't? What if a work emergency happens? They can also make employees feel

⁹⁶ Karen Bailey, "Is lack of flexible working a barrier for women in the legal industry?" WOMEN IN LAW SUMMIT (Sep. 5, 2018), available at <https://www.womeninlawsummit.com/blog/is-lack-of-flexible-working-a-barrier-for-women-in-the-legal-industry>.

⁹⁷ The NCBA Center for Practice Management (CPM) has numerous helpful resources on this topic, including how to ensure privacy and security when using video-conferencing technology. Access the full panoply of pandemic-related CPM resources here: <https://cpm.ncbar.org/>.

like they need to be ‘always on’ and constantly checking email. To deal with this, managers need to put a system in place for when employees need to be immediately responsive.

Establish clear boundaries and procedures so employees know when they are expected to be available and when it’s okay for them to work their preferred hours. Make sure everyone is aware of, and [physically] signs onto, the rules.

For example, if your employee works 8am-4pm but you prefer to work 10am-6pm, you could tell the employee that when you email them after they are done working they are not expected to reply to it until the next day, unless you text them with something urgent. This will give both of you peace of mind: the employee can sign off and enjoy their life without having to worry they are missing important work updates from you, and you can shoot emails to your employee and cross things off your to-do list without worrying about bugging them when they’re off work.

This is also a good policy to use for weekends. Telling employees that they don’t need to respond to weekend emails unless they are specifically called can give your employees much-needed rest time and can also keep you assured that if something urgent comes up, you can get ahold of them.⁹⁸

H. PREVENTING LOSS OF OFFICE CULTURE

‘One of the most common objections is the loss of ‘water cooler’ conversations...there are ways to combat this, however.

‘If companies build a culture of instant messaging tools,⁹⁹ texting, phone conversations and video chat as a way to keep in contact, those conversations may well be more productive than just passing someone in the hall on the way to get another cup of coffee.’

In addition, [employers can encourage flexible workers] to come to the office for some types of team meetings, like project kickoffs or planning sessions.¹⁰⁰

CONCLUSION

Is flexible work right for your law firm or legal workplace as a long-term solution extending beyond the inevitability of such arrangements as necessitated by the COVID-19 pandemic? The answer is more nuanced than a conclusory there-is-one-right-answer approach. It

⁹⁸ Joan C. Williams and Marina Multhaup, “How Managers Can Be Fair About Flexibility for Parents and Non-Parents Alike,” *HARVARD BUSINESS REVIEW* (April 27, 2018), available at <https://hbr.org/2018/04/how-managers-can-be-fair-about-flexibility-for-parents-and-non-parents-alike>.

⁹⁹ Slack, Google Groups, or Skype for Business (the successor software to Microsoft Lync), for example.

¹⁰⁰ Terri Williams, “The pros and cons of flexible work policies,” *The Economist*, available at <https://execed.economist.com/blog/industry-trends/pros-and-cons-flexible-work-policies>.

depends on the type of job and tasks an employee is required to complete in a typical workday. It also depends on the type of worker he or she is. Whether an effective flexible work policy will work for your organization depends on several factors, including (1) whether jobs exist within the workplace such that independent tasks can be performed remotely; (2) individual employees seeking to take advantage of a flexible work policy should first self-reflect to evaluate whether their personality and work style would be a good fit for an alternative work schedule; and (3) whether the workplace's specific areas of practice lend themselves to remote work and, if not, can a flexible work policy be tailored to such practice areas?

One thing, however, seems clear. The business case and data are undeniable and, for that reason alone, legal workplaces should at least consider whether to implement a flexible work policy.

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*The preceding article was researched, written and reviewed as part of the work of the NCBA Professional Vitality Committee ("PVC"). The lead author was **Christina D. Cress**, Nichols, Choi & Lee, PLLC, Raleigh, NC. Please direct comments and suggestions to [Erna Womble](#), Committee Chair, and [Holly Morris](#), Communities Manager. See more of the [PVC's compendium](#) of articles and blog posts at (<https://ncbar.org/members/committees/professional-vitality/>).*

ADDENDUM: RESOURCES FOR WORKING FROM HOME

- 1) Orders of the North Carolina Supreme Court and North Carolina State Bar Guidance
 - a. [“Professional Responsibility in a Pandemic”](#) by Suzanne Lever and Brian Oten
 - b. North Carolina Supreme Court Latest News - <https://www.nccourts.gov/courts/supreme-court#latest-news-7737>
- 2) NCBA WFH and Pandemic-Related Resources
 - a. [“Task Management with Microsoft To Do”](#) by Catherine Sanders Reach (March 24, 2020)
 - b. [“COVID-19: Awareness, Response, and Workplace Plans/Policies \(Part 1\)”](#) by Catherine Sanders Reach (March 16, 2020)
 - c. [“COVID-19: Law Firm Operations \(Part 2\)”](#) by Catherine Sanders Reach (March 16, 2020)
 - d. Free On Demand CLE Course and Informational Webinar Series - https://ncbar.org/covid-19/cle?utm_source=NCBA+e-bar+newsletter&utm_campaign=f3d2b828ef-EMAIL_CAMPAIGN_2020_04_14_07_41&utm_medium=email&utm_term=0_5b877a9583-f3d2b828ef-69881743
- 3) LinkedIn’s mini-courses on all things WFH
 - a. [“The value of working remotely”](#) (1 hour)
 - b. [“Time Management: Working from Home”](#) (1 hour, 25 minutes)
 - c. [“Gaining a productive mindset”](#) (1 hour)
 - d. [“Remote workers are the future of business”](#) (36 minutes)
 - e. [“Managing people at a distance”](#) (56 minutes)
 - f. [“Welcome to better virtual meetings”](#) (32 minutes)
 - g. [“Stay connected with Zoom meetings”](#) (45 minutes)
 - h. [“Learning WebEx”](#) (44 minutes)
 - i. [“Learning Skype”](#) (1 hour, 4 minutes)
 - j. [“Microsoft Teams Tips and Tricks”](#) (1 hour)
- 4) Advice on WFH best practices, hacks, as well as a few relatable pragmatism/opinion pieces
 - a. New York Times – [“How to Work From Home, if You’ve Never Done it Before”](#) (March 12, 2020)
 - b. Harvard Business Review – [“A Guide to Managing Your \(Newly\) Remote Workers”](#) (March 18, 2020)
 - c. Forbes – [“What You Need To Know To Start Working From Home”](#) (March 6, 2020)
 - d. NPR – [“8 Tips To Make Working From Home Work For You”](#) (March 15, 2020)
 - e. Time – [“5 Tips for Staying Productive and Mentally Healthy While You’re Working From Home”](#) (March 12, 2020)
 - f. Forbes – [“Five Crucial Tips for Working From Home”](#) (March 7, 2020)

- g. New York Post – [“Here’s how to cope if you need to work from home”](#) (March 15, 2020)
 - h. UC Berkeley – [“Strategic plan for working at home: Stay connected”](#) (March 14, 2020)
 - i. Harvard Business Review – [“Are You and Your Team Ready to Work from Home?”](#) (March 13, 2020)
 - j. Bloomberg – [“Tips from Experts—Our Co-Workers in Asia—About Working From Home”](#) (March 15, 2020)
 - k. LinkedIn – [“Remote Work isn’t About the Future of Work It’s about the Future of Living”](#) (March 9, 2020)
 - l. The Atlantic – [“The Coronavirus Is Creating a Huge, Stressful Experiment in Working From Home”](#) (March 13, 2020)
 - m. Forbes – [“How To Work From Home: The Best Tools”](#) (March 12, 2020)
 - n. The Hill – [“Will coronavirus challenge the work-from-home debate?”](#) (March 10, 2020)
 - o. Above the Law – [“Working From Home”](#) (Feb. 15, 2019)
 - p. Time – [“The Coronavirus Is Making Us See That It’s Hard to Make Remote Work Actually Work”](#) (March 13, 2020)
 - q. Good Morning America – [“Working from home amid coronavirus? Here are the best tips to be productive”](#) (March 12, 2020)
 - r. Newsweek – [“How to Work from Home Effectively During the Coronavirus Outbreak Without Going Totally Crazy”](#) (March 16, 2020)
 - s. Above the Law – [“Legal Publishers Roll Out COVID-19 Resources, Toolkits, Alerts, Advice \(Some Even Free\)”](#) (March 20, 2020)
 - t. Harvard Business Review – [“15 Questions About Remote Work, Answered”](#) (March 16, 2020)
 - u. Raleigh News & Observer – [“The post-coronavirus world could see more employees working from home, analysis says”](#) (April 7, 2020)
- 5) Staying Mentally and Physically Well While WFH
- a. American Bar Association – [“COVID-19 Mental Health Resources”](#)
 - b. Forbes – [“When Home Becomes The Workplace: Mental Health and Remote Work”](#) (March 17, 2020)
 - c. NPR – [“Virtual Happy Hour Anyone? Working From Home But Keeping Connected”](#) (March 15, 2020)
 - d. CBS – [“Working from home during coronavirus? Here’s how to stay health”](#) (March 22, 2020)
 - e. CNBC – [“5 tips NASA astronauts use when living in ‘confinement’ in space to stay happy and productive”](#) (March 23, 2020)
 - f. Forbes – [“15 Ways To Fight Boredom and Anxiety Amidst the Coronavirus Pandemic”](#) (March 17, 2020)
 - g. North Carolina Lawyer Assistance Program –
 - i. <https://www.nclap.org/lawyers/>
 - ii. https://www.rei.com/blog/news/mixing-up-wfh-routine?cm_mmc=email_com_gm-_-20200402_ADM_WFHRoutineADM--040220-_-

[cta_wth_button&ev36=6130010&rmid=20200402_ADM_WFHRoutineADM&rrid=2889768&ev11=1&mi_u=2889768](https://www.rmplusonline.com/article.cfm?id=11357¬ice=E3DB63B4-5056-8058-36A061A0DE9CEFC9&permit=E055948A-5056-8058-36902D12A71E8846)

- h. Psychology Today – [“7 Things You Can Do During the Pandemic – Strategies for navigating times of uncertainty.”](#) (March 27, 2020)
 - i. Penn Master of Applied Positive Psychology Alumni Association – [“Strategies to Thrive in Uncertain Times – Free Webinars”](#)
- 6) General COVID-19 Resources and COVID-19 Employment Law Implications
- a. <https://www.rmplusonline.com/article.cfm?id=11357¬ice=E3DB63B4-5056-8058-36A061A0DE9CEFC9&permit=E055948A-5056-8058-36902D12A71E8846>
 - b. <https://price.house.gov/covid-19-resources>
 - c. <https://www.dol.gov/agencies/whd/pandemic>
 - d. <https://www.dol.gov/newsroom/releases/whd/whd20200401>
 - e. <https://www.dol.gov/newsroom/releases/whd/whd20200324>
 - f. <https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/fmla-leave-expansion-and-emergency-paid-sick-leave-policy-coronavirus.aspx>
 - g. DocuSign 101: Live QA with a DocuSign Expert - <https://www.docusign.com/live-webinar/docusign-101>