

## CHAPTER ONE

### LEGISLATIVE MOMENTUM ON WORK-LIFE BALANCE

In July 2022, Zaid Khan posted a TikTok video<sup>1</sup> that quickly went viral.<sup>2</sup> In the video, he explains that he “recently learned about [the] term . . . ‘quiet quitting,’” which refers to “not outright quitting your job, but . . . quitting the idea of going above and beyond.”<sup>3</sup> “[Y]our worth as a person is not defined by your labor,” he concludes.<sup>4</sup> The video struck a chord, prompting a flurry of media coverage analyzing the phenomenon of quiet quitting and what it says about work culture and Generation Z.<sup>5</sup>

But quiet quitting is nothing new. On the contrary, as one commentator put it, “[w]hat the kids are now calling ‘quiet quitting’ was, in previous and simpler decades, simply known as ‘having a job.’”<sup>6</sup> Still, it was the newest in a series of viral work-related trends that have dominated the public discourse since the beginning of the COVID-19 pandemic. Before quiet quitting, there was also antiwork,<sup>7</sup> the Great Resignation,<sup>8</sup> a resurgence of union organizing,<sup>9</sup> and a lasting discussion of the challenges faced by workers with caretaking responsibilities.<sup>10</sup>

These trends are nebulous and multidimensional. Unlike an organized movement, the precise contours, complaints, or goals of viral messages are difficult to pin down, even when they coalesce around similar

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<sup>1</sup> Zaid Khan (@zaidleppelin), *On Quiet Quitting #workreform*, TIKTOK (July 25, 2022), <https://www.tiktok.com/@zaidleppelin/video/7124414185282391342> [<https://perma.cc/XU7X-BAFR>].

<sup>2</sup> Anuz Thapa, *How “Quiet Quitting” Became the Next Phase of the Great Resignation*, CNBC (Sept. 2, 2022, 5:06 PM), <https://www.cnbc.com/2022/09/02/how-quiet-quitting-became-the-next-phase-of-the-great-resignation.html> [<https://perma.cc/FU6T-4XYG>].

<sup>3</sup> Khan, *supra* note 1.

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

<sup>5</sup> See, e.g., Perisha Kudhail, *Quiet Quitting: The Workplace Trend Taking over TikTok*, BBC (Aug. 31, 2022), <https://www.bbc.com/news/business-62638908> [<https://perma.cc/5JRE-34LZ>]; Derek Thompson, *Quiet Quitting Is a Fake Trend*, THE ATLANTIC (Sept. 16, 2022), <https://www.theatlantic.com/newsletters/archive/2022/09/quiet-quitting-trend-employee-disengagement/671436> [<https://perma.cc/F3VB-WYMT>].

<sup>6</sup> Thompson, *supra* note 5.

<sup>7</sup> Oliver Whang, *Hating Your Job Is Cool. But Is It a Labor Movement?*, N.Y. TIMES MAG. (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/magazine/antiwork-reddit.html> [<https://perma.cc/4H35-HU6W>].

<sup>8</sup> Hannah Grabenstein, *Why a Third of American Workers Changed Jobs During the Great Resignation*, PBS (Sept. 22, 2022, 12:00 PM), <https://www.pbs.org/newshour/economy/1-in-3-americans-who-switched-jobs-during-the-great-resignation-say-they-did-it-for-better-pay> [<https://perma.cc/TSF5-N3KM>].

<sup>9</sup> Weekend Edition Sunday, *The Pandemic Could Be Leading to a Golden Age for Unions*, NPR, at 00:45 (Oct. 17, 2021, 7:54 AM), <https://www.npr.org/2021/10/17/1046850192/the-pandemic-could-be-leading-to-a-golden-age-for-unions> [<https://perma.cc/A8QV-WARD>].

<sup>10</sup> Misty L. Heggeness & Jason M. Fields, *Parents Juggle Work and Child Care During Pandemic: Working Moms Bear Brunt of Home Schooling While Working During COVID-19*, U.S. CENSUS BUREAU (Aug. 18, 2020), <https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html> [<https://perma.cc/49PD-8LYX>].

themes. But one common thread that runs throughout all five trends suggests a heightened interest in restructuring American employment laws to achieve better work-life balance. Scholars and activists have repeatedly called for reforms with this objective in mind, yet the basic work-life framework in America has remained relatively constant — and effectively nonexistent — for nearly a century, despite dramatic social and technological changes during that period.<sup>11</sup> In recent years, some state and local policymakers have successfully passed laws that better support work-life balance.<sup>12</sup> The viral trends during the pandemic indicate that this effort is welcome and suggest that federal policymakers, too, should take seriously the call for baseline structures that empower workers to lead well-rounded lives.

This Chapter will explore the pandemic-era trends and some recent work-life policy developments. To that end, section A will provide background on what we might think of as the current work-life baseline at the federal level, as well as some of the critiques it has inspired. Section B will describe each of the recent trends and how they reflect a need to revise the basic work-life framework. Finally, section C will consider how state and local legislatures have responded to calls for better balance and will touch upon where we should go from here.

#### A. Foundations of Work-Life Balance

“Work-life balance” is not a legal phenomenon. It is more aptly characterized as a cultural, sociological, economic, and psychological issue. In general, work-life balance is “the relationship between work and non-working time.”<sup>13</sup> But it is difficult to define exactly how that balance is to be understood and measured.<sup>14</sup> For example, “good work-life balance” could be assessed subjectively (in terms of the individual worker’s impressions of their work-life balance) or absolutely (in terms of whether the worker’s time is balanced equally between work and nonwork activities).<sup>15</sup> Typically, though, the phrase is intended in the subjective sense, referring to individuals’ impressions of satisfaction, conflict, and/or autonomy regarding their work and nonwork roles,<sup>16</sup> which can be “linked” in a variety of ways.<sup>17</sup>

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<sup>11</sup> See *infra* section A, pp. 1605–13.

<sup>12</sup> See *infra* section C, pp. 1621–27.

<sup>13</sup> Clare Kelliher et al., *All of Work? All of Life? Reconceptualising Work-Life Balance for the 21st Century*, 29 HUMAN RESOURCES MANAGEMENT JOURNAL 97, 97 (2019).

<sup>14</sup> Natalie Reiter, *Work Life Balance: What DO You Mean?*, 43 JOURNAL OF APPLIED BEHAVIORAL SCIENCE 273, 274 (2007).

<sup>15</sup> See *id.* at 278 tbl.1.

<sup>16</sup> See Thomas Kalliath & Paula Brough, *Work-Life Balance: A Review of the Meaning of the Balance Construct*, 14 JOURNAL OF MANAGEMENT & ORGANIZATION 323, 324–25 (2008).

<sup>17</sup> Jeffrey R. Edwards & Nancy P. Rothbard, *Mechanisms Linking Work and Family: Clarifying the Relationship Between Work and Family Constructs*, 25 ACADÉMICA DE GESTÃO DE EMPRESAS 178, 178–79 (2000).

The subjective experience of work-life balance is heavily affected by nonlegal factors, like identity or market features. For example, parents are particularly likely to feel dissatisfied with their work-life balance,<sup>18</sup> people of different genders may experience work-life balance differently,<sup>19</sup> and younger generations of American workers value work-life balance more highly than older generations.<sup>20</sup> In the United States, race- and gender-based biases,<sup>21</sup> the precarity of work,<sup>22</sup> an insufficient social safety net,<sup>23</sup> and the relative lack of economic mobility<sup>24</sup> all motivate overworking in an attempt to achieve economic security — a drive that is perhaps enhanced by the famous “Protestant work ethic,” which holds that hard work is a moral good.<sup>25</sup>

Whether measured subjectively or objectively, poor work-life balance carries personal and collective risks. For example, studies suggest that there are both mental<sup>26</sup> and physical<sup>27</sup> health hazards that accompany overwork. Likewise, researchers have found that productivity suffers when employees work excessively long hours<sup>28</sup> — and that productivity is not necessarily lost when employers experiment with compressed or flexible schedules.<sup>29</sup> Overworked employees can also

<sup>18</sup> Jennifer Reid Keene & Jill Quadagno, *Predictors of Perceived Work-Family Balance: Gender Difference or Gender Similarity?*, 47 SOCIO. PERSPS. 1, 2–3 (2004).

<sup>19</sup> *Id.* at 3–5.

<sup>20</sup> *E.g.*, Karen Holcombe Ehrhart et al., *Web-Based Recruitment in the Millennial Generation: Work-Life Balance, Website Usability, and Organizational Attraction*, 21 EUR. J. WORK & ORGANIZATIONAL PSYCH. 850, 853 (2012).

<sup>21</sup> Kimberly Seals Allers, *Rethinking Work-Life Balance for Women of Color*, SLATE (Mar. 5, 2018, 10:00 AM), <https://slate.com/human-interest/2018/03/for-women-of-color-work-life-balance-is-a-different-kind-of-problem.html> [<https://perma.cc/YPK8-EP4G>].

<sup>22</sup> JAMIE K. MCCALLUM, *WORKED OVER: HOW ROUND-THE-CLOCK WORK IS KILLING THE AMERICAN DREAM* 38–39 (2020).

<sup>23</sup> *See, e.g.*, PAMELA LOPREST & DEMETRA NIGHTINGALE, *URB. INST.*, *THE NATURE OF WORK AND THE SOCIAL SAFETY NET* 13–15 (2018); MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 225 (2020).

<sup>24</sup> Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398, 398 (2017).

<sup>25</sup> MCCALLUM, *supra* note 22, at 53–55; *see also* DEVON PRICE, *LAZINESS DOES NOT EXIST* 24 (2021).

<sup>26</sup> *E.g.*, Michael R. Frone, *Work-Family Conflict and Employee Psychiatric Disorders: The National Comorbidity Survey*, 85 J. APPLIED PSYCH. 888, 888 (2000).

<sup>27</sup> Frank Pega et al., *Global, Regional, and National Burdens of Ischemic Heart Disease and Stroke Attributable to Exposure to Long Working Hours for 194 Countries, 2000–2016: A Systematic Analysis from the WHO/ILO Joint Estimates of the Work-Related Burden of Disease and Injury*, 154 ENV'T INT'L 1, 13 (2021); Kelly D. Chandler, *Work-Family Conflict Is a Public Health Concern*, 2 PUB. HEALTH PRAC. 1, 1 (2021).

<sup>28</sup> Sarah Green Carmichael, *The Research Is Clear: Long Hours Backfire for People and for Companies*, HARV. BUS. REV. (Aug. 19, 2015), <https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies> [<https://perma.cc/GP2T-LMEQ>].

<sup>29</sup> *See* Jose Maria Barrero et al., *Why Working from Home Will Stick* 4 (Becker Friedman Inst., Working Paper No. 2020–174, 2021), [https://bfi.uchicago.edu/wp-content/uploads/2020/12/BFI\\_](https://bfi.uchicago.edu/wp-content/uploads/2020/12/BFI_)

become prone to mistakes,<sup>30</sup> and researchers have shown that family<sup>31</sup> and community<sup>32</sup> life suffers when work-life balance is poor.

Responding to these concerns, many countries have sought to address work overload and work-life conflict through policy. Relative to those in the United States, workers in Europe spend fewer hours working<sup>33</sup> and enjoy greater paid leave.<sup>34</sup> Denmark, for example, touts the fact that Danish workers are entitled to five weeks of paid vacation each year and generally conduct their work within the confines of the official workweek, which is thirty-seven hours.<sup>35</sup> Other countries have experimented with policy interventions such as limiting work-related correspondence outside of working hours<sup>36</sup> and creating maximum hour caps for workweeks.<sup>37</sup> Perhaps unsurprisingly, then, workers in many of these countries enjoy better work-life balance than U.S. workers.<sup>38</sup>

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WP\_2020174.pdf [https://perma.cc/J8UC-AGW3]; Prithwiraj Choudhury et al., *Work-from-Anywhere: The Productivity Effects of Geographic Flexibility*, 42 STRATEGIC MGMT. J. 655, 655 (2021); see also Carmichael, *supra* note 28.

<sup>30</sup> E.g., Claire C. Caruso, *Negative Impacts of Shiftwork and Long Work Hours*, 39 REHAB. NURSING 16, 18 (2014).

<sup>31</sup> E.g., Erin L. Kelly et al., *Getting There from Here: Research on the Effects of Work-Family Initiatives on Work-Family Conflict and Business Outcomes*, 2 ACAD. MGMT. ANNALS 305, 320 (2008); Emily Fitzgibbons Shafer et al., *Partners' Overwork and Individuals' Wellbeing and Experienced Relationship Quality*, 21 CMTY., WORK & FAM. 410, 410 (2018).

<sup>32</sup> See Claire C. Caruso, *Possible Broad Impacts of Long Work Hours*, 44 INDUS. HEALTH 531, 533–34 (2006); Anna North, *Long Hours Make Bad Neighbors*, VOX (Dec. 3, 2021, 11:00 AM), https://www.vox.com/the-goods/22810409/work-hours-loneliness-volunteering-overwork-community [https://perma.cc/3NM4-D4NL] (“Part of being a member of a community is coordinating your time with others,” Daniel Schneider, a professor of public policy at the Harvard Kennedy School, told Vox. With the rise of precarious and unpredictable work in today’s economy, many people simply can’t do that.”).

<sup>33</sup> Alexander Bick et al., *Hours Worked in Europe and the United States: New Data, New Answers*, 121 SCANDINAVIAN J. ECON. 1381, 1381 (2019).

<sup>34</sup> Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave [https://perma.cc/R8FL-UJL7].

<sup>35</sup> *Work-Life Balance*, MINISTRY FOREIGN AFFS. DEN., https://denmark.dk/society-and-business/work-life-balance [https://perma.cc/RH8X-BFMR]. Despite this relatively shorter week and longer vacation time, though, Danes are apparently more productive than American workers. ORG. FOR ECON. COOP. & DEV. [OECD], OECD COMPENDIUM OF PRODUCTIVITY INDICATORS 2021: CROSS-COUNTRY COMPARISONS OF LABOUR PRODUCTIVITY LEVELS 7 (2021).

<sup>36</sup> See Melody Burke, *The Right to Disconnect: Emerging Issues and Ways to Overcome Them*, ONLABOR (Mar. 30, 2022), https://onlabor.org/the-right-to-disconnect-emerging-issues-and-ways-to-overcome-them [https://perma.cc/M75S-A99T].

<sup>37</sup> MCCALLUM, *supra* note 22, at 10 (“More than one hundred countries have a legally mandated maximum length of the workweek — [but] not the United States.”).

<sup>38</sup> The OECD Better Life Index measures “work-life balance” based on indicators of daily time “devoted to leisure and personal care” and the proportion of employees “working very long hours.” *Work-Life Balance*, OECD BETTER LIFE INDEX, https://www.oecdbetterlifeindex.org/topics/work-life-balance [https://perma.cc/Q4BP-HG5X]; see also Kristen Doerer, *U.S. Has a Lousy Work-Life Balance*, PBS (July 3, 2015, 5:38 PM), https://www.pbs.org/newshour/economy/u-s-lousy-work-life-balance [https://perma.cc/A54J-4ESL] (“While the U.S. ranks high in housing, income and wealth, it ranks abysmally low on work-life balance — 29th among the 36 advanced nations surveyed.”).

This Chapter is not a comparative legal analysis, but these other countries' successes illustrate how the law can help establish better work-life balance by defining baseline norms.<sup>39</sup> Labor and employment law may not be able to fully address all of the features that bear upon workers' subjective experiences of balance, but it serves an important signaling or expressive function,<sup>40</sup> which can gradually effect social change.<sup>41</sup> Thus, revising federal law to give workers more autonomy over their time could move the country toward better work-life balance.

*I. America's (Austere) Work-Life Legal Framework? —* Two U.S. federal laws stand out as prime candidates for reform: the Fair Labor Standards Act of 1938<sup>42</sup> (FLSA) and the Family and Medical Leave Act of 1993<sup>43</sup> (FMLA). Layered on top of these laws are numerous regulations as well as state, local, and private policies, but these two laws provide a useful entry point into what might be considered the baseline national expectations around working and nonworking time.

The FLSA is the federal wage-and-hour law. It sets the federal hourly minimum wage (originally \$0.25<sup>44</sup> and currently \$7.25<sup>45</sup>) and regulates overtime work for covered employees.<sup>46</sup> Once an employee covered by the Act — a nonexempt worker — hits forty hours of work within the designated one-week period, they must be compensated at a rate of pay that is at least 1.5 times their regular rate.<sup>47</sup> Importantly, the FLSA does not set minimum or maximum total working hours,<sup>48</sup> and it carves out a variety of exceptions for agricultural workers, executive and professional workers, and others.<sup>49</sup> These exempt workers do not benefit from the FLSA's time-and-one-half pay provisions.

Alongside the FLSA's basic wage-and-hour framework, the FMLA establishes a job-protected leave program.<sup>50</sup> Generally, the FMLA provides qualifying workers with up to twelve weeks of unpaid leave a year

<sup>39</sup> See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2722–25 (2008), for a discussion of how employment law can serve to set workers' expectations about whether certain workplace norms are just or problematic.

<sup>40</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

<sup>41</sup> See generally Michael Waldman et al., *How Does Legal Change Happen? Perspectives from the Academy*, in LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS 143–55 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015) (indicating how legal efforts can facilitate social change).

<sup>42</sup> 29 U.S.C. §§ 201–219.

<sup>43</sup> *Id.* §§ 2601–2654.

<sup>44</sup> GERALD MAYER, BENJAMIN COLLINS & DAVID H. BRADLEY, CONG. RSCH. SERV., R42713, *THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW I* (2013).

<sup>45</sup> 29 U.S.C. § 206(a)(1).

<sup>46</sup> *Id.* § 207(a)(1).

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

<sup>48</sup> Charlotte Alexander et al., *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 5 (2015); *Overtime Pay*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/overtime> [https://perma.cc/BEY8-UY9H].

<sup>49</sup> 29 U.S.C. § 213(a).

<sup>50</sup> See *id.* § 2612.

for purposes of caring for a newborn, foster, or adopted child, or for caring for themselves or a family member with a “serious health condition.”<sup>51</sup> To be eligible for FMLA leave, an employee must have worked for their employer for at least twelve months and at least 1,250 hours during the prior twelve-month period;<sup>52</sup> the Act applies only to employers of a certain size.<sup>53</sup>

Both the FMLA and the FLSA were motivated at least in part by work-life balance concerns. The FLSA was signed into law on June 25, 1938<sup>54</sup> following decades of labor organizing related to minimum-wage and maximum-hour paradigms. Throughout the 1800s, workers had advocated to shorten the standard workday from ten or more hours to eight.<sup>55</sup> The year 1886, in particular, saw over a thousand strikes and lockouts — involving hundreds of thousands of workers — directed toward that end.<sup>56</sup> The eight-hour movement professed the slogan “[e]ight hours for work, eight hours for rest, and eight hours for what we will,”<sup>57</sup> reflecting an “enduring and cherished dream of the American labor movement”<sup>58</sup> to endow workers with more time off for leisure, family, and community activities.<sup>59</sup> After gradually adopting eight-hour day policies for federal employees and then for various industries,<sup>60</sup> Congress eventually passed the FLSA at the tail end of the Great Depression.<sup>61</sup> The law aimed to address unemployment by spreading work over a greater number of workers, while also better protecting employees’ access to leisure time.<sup>62</sup>

The FMLA was adopted over fifty years after the FLSA in an effort to ensure that American workers would “no longer have to choose between the job they need and the family they love.”<sup>63</sup> The Women’s

<sup>51</sup> See *id.* § 2612(a)(1).

<sup>52</sup> See *id.* § 2611(2)(A).

<sup>53</sup> See *id.* § 2611(2)(B)(ii). For a more detailed discussion of the FMLA’s eligibility requirements and benefits, see Juan C. Flores, Comment, *12 Months, 12 Weeks, 1250 Hours, 75 Miles, and 50 Employees: Why the Numbers of the FMLA Don’t Add Up for New Parents of Color and Low-Wage Workers*, 54 U.S.F. L. REV. 313, 317–18 (2020).

<sup>54</sup> Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T LAB., <https://www.dol.gov/general/aboutdol/history/flsa1938> [<https://perma.cc/3VH8-65VW>].

<sup>55</sup> Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 11 (2001).

<sup>56</sup> *Id.* at 12.

<sup>57</sup> Michael J. Goldberg, *Law, Labor, and the Mainstream Press: Labor Day Commentaries on Labor and Employment Law, 1882–1935*, 15 LAB. LAW. 93, 119 n.147 (1999).

<sup>58</sup> *Id.* at 119–20.

<sup>59</sup> Matthew Dimick, *Better than Basic Income? Liberty, Equality, and the Regulation of Working Time*, 50 IND. L. REV. 473, 482–83 (2017).

<sup>60</sup> Miller, *supra* note 55, at 15–16.

<sup>61</sup> Grossman, *supra* note 54.

<sup>62</sup> Dimick, *supra* note 59, at 483.

<sup>63</sup> Statement on Signing the Family and Medical Leave Act of 1993, 1 PUB. PAPERS 50, 50 (Feb. 5, 1993) (statement of President William J. Clinton); see also Kelly McDonald Garrison et al.

Legal Defense Fund, now the National Partnership for Women and Families, drafted the legislation that would eventually become the FMLA in 1984, and spent the next nine years advocating for its passage.<sup>64</sup> As “the first time that the United States federal government acknowledged and attempted to promote ‘work-family policy’ through legislation,”<sup>65</sup> the law sought to alleviate work-family conflict,<sup>66</sup> which had become particularly visible following rapid increases in workforce participation by women.<sup>67</sup>

Combined, the two laws set a starkly limited baseline regarding working time and time off from work. Under the FLSA, there is ultimately neither a cap nor a minimum on the number of hours that an employer may require, nor are there substantial limitations on how employers can manage employees’ schedules. This lack of regulation has led to a proliferation of “just-in-time” scheduling practices that impose unpredictability and other burdens on workers.<sup>68</sup> Furthermore, a significant fraction of the workforce is exempt from FLSA coverage.<sup>69</sup> And because the FMLA guarantees only unpaid leave — and guarantees it

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eds., *The Family and Medical Leave Act & Parental Leave Policies*, 21 GEO. J. GENDER & L. 333, 338 (2020) (quoting Paul Richter & Gebe Martinez, *Clinton Signs Family Leave Bill into Law*, L.A. TIMES, Feb. 6, 1993, at A22).

<sup>64</sup> *History of the FMLA*, NAT’L P’SHIP FOR WOMEN & FAMS., <https://www.nationalpartnership.org/our-work/economic-justice/family-medical-leave-act/history-of-the-fmla.html> [<https://perma.cc/9XKD-QT7E>].

<sup>65</sup> Garrison et al., *supra* note 63, at 338.

<sup>66</sup> DONNA R. LENHOFF & LISSA BELL, NAT’L P’SHIP FOR WOMEN & FAMS., GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES: FAMILY AND MEDICAL LEAVE AS A CASE STUDY 1–2.

<sup>67</sup> See Maxine Eichner, *Families, Human Dignity, and State Support for Caretaking: Why the United States’ Failure to Ameliorate the Work-Family Conflict Is a Dereliction of the Government’s Basic Responsibilities*, 88 N.C. L. REV. 1593, 1597 (2010). One hundred years ago, women participated in the paid labor force at a rate of only about twenty percent. Carol Boyd Leon, *The Life of American Workers in 1915*, BUREAU LAB. STAT. (Feb. 2016), <https://www.bls.gov/opub/mlr/2016/article/the-life-of-american-workers-in-1915.htm> [<https://perma.cc/H6Y2-H5DZ>]. Married women generally did not participate in the paid workforce, although workforce participation for married women varied by race; for example, Black women were twice as likely as white women to continue working after marriage. Janet L. Yellen, *The History of Women’s Work and Wages and How It Has Created Success for Us All*, BROOKINGS INST. (May 2020), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all> [<https://perma.cc/PCA2-293W>]. “The participation rate for prime working-age women peaked in the late 1990s and currently stands at about 76 percent.” *Id.*

<sup>68</sup> Alexander et al., *supra* note 48, at 4–5 (“Though the FLSA guarantees a minimum wage for all hours worked and requires overtime pay for more than forty work hours per week, it does not establish minimum hours requirements or regulate employers’ scheduling practices.” *Id.* at 5.); see also Sara Sternberg Greene, *Working to Fail*, 27 DUKE J. GENDER L. & POL’Y 167, 172 (2020).

<sup>69</sup> The increase in the proportion of the workforce engaged in “white-collar” occupations over recent decades, see Ian D. Wyatt & Daniel E. Hecker, *Occupational Changes During the 20th Century*, MONTHLY LAB. REV., Mar. 2006, at 37, means that the FLSA’s “executive, administrative, and professional employee” exception is “now relevant for a considerably higher share of the workforce” than originally anticipated, DAVID H. BRADLEY, CONG. RSCH. SERV., R45007, OVERTIME EXEMPTIONS IN THE FAIR LABOR STANDARDS ACT FOR EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES 3 (2017).

only for qualifying health and caretaking purposes — there is no presumption of compensated leave time. In short, to the extent that the United States has a vision for work-life balance at all, it is quite spartan.

2. *Existing Critiques and Changing Times.* — Commentators have long identified assumptions embedded in this rather minimalist work-life structure that are based on outdated patterns of workforce participation and family structure. These entrenched patterns systematically disadvantage certain categories of workers — including women, single parents, individuals with disabilities, and low-wage workers — and make it difficult for today’s workforce to participate in non-market-work activities like caretaking or civic and community engagement.

One recurring critique is that American workplaces assume a certain “ideal worker.” For much of the twentieth century, most families were structured such that a man could work for pay while his wife provided hours of unpaid homemaking labor, which served to preserve her husband’s time for work.<sup>70</sup> A gendered “ideal worker” assumption resulted in the emergence of what Professor Michelle Travis has called the “full-time face-time norm,” meaning a “judicial presumption that work itself is defined by very long hours, rigid schedules, and uninterrupted, in-person performance at a centralized workspace.”<sup>71</sup> The norm historically disadvantaged women and people with disabilities, whose needs and socially defined responsibilities may make it difficult to be present in a centralized workplace for long hours.<sup>72</sup>

This expectation is at odds with the realities of today’s workforce. Starting with the economic boom after the Second World War and continuing through social movements promoting equal opportunity, labor force participation among women increased dramatically<sup>73</sup> and the typical household structure shifted. In 1940, two years after the passage of the FLSA, over seventy-five percent of households were structured around a married couple, compared to only forty-eight percent in 2010.<sup>74</sup> The percentage of single-parent households has more than doubled, and the percentage of single-person households has more than tripled.<sup>75</sup> High rates of single-parent and single-person households mean that many more workers today are simultaneously responsible for household and caretaking duties that historically might have been handled by a “homemaker” partner.

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<sup>70</sup> Eichner, *supra* note 67, at 1596.

<sup>71</sup> Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL’Y 203, 204 (2021).

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

<sup>73</sup> See Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, MONTHLY LAB. REV., May 2002, at 18. Women also now make up a significant percentage of lawyers, doctors, professors, and managers, professions in which they were historically underrepresented. Yellen, *supra* note 67.

<sup>74</sup> See LINDA A. JACOBSEN ET AL., POPULATION REFERENCE BUREAU, HOUSEHOLD CHANGE IN THE UNITED STATES 3 (2012).

<sup>75</sup> *See id.*



In addition, despite the FLSA's introduction of a "standard" work-week, the decades since its passage have witnessed a bifurcation in working hours. In the United States, the proportion of workers in professional, managerial, and service occupations has risen, with a simultaneous drop-off in the proportion of laborers.<sup>76</sup> For "exempt" white-collar professionals, working hours have increased,<sup>77</sup> giving rise to complaints of "[o]verwhelming workloads."<sup>78</sup> These employees "tend to have especially long hours" because those "[e]xtra hours are essentially free to the employer."<sup>79</sup> Exempt employees' workloads have also been exacerbated by the advent of technology like email and smartphones, which have contributed to the evolution of an "always on" culture.<sup>80</sup>

For nonexempt workers, the opposite problem increasingly exists: many people are unable to obtain the number of hours of work (and the concomitant income) that they desire.<sup>81</sup> The number of part-time workers — a group dominated by women — has been increasing for years,<sup>82</sup> and these workers experience a dual penalty of lower wages and fewer benefits when compared to equivalent full-time employees.<sup>83</sup> Involuntary part-time work is imposed particularly frequently on people of color,<sup>84</sup> who are also disproportionately subject to unpredictable work schedules<sup>85</sup> that make planning for non-paid-work activities surpassingly difficult.<sup>86</sup> Finally, technological advancement means that many workers face some amount of threat of displacement via automation.<sup>87</sup>

Taking time away from work has also become more difficult. Since the 1970s, employers have decreased paid leave benefits.<sup>88</sup> At the same time, the minimum wage has fallen increasingly out of step with rising inflation and cost of living. Real wages of those at the bottom of the income distribution have been stagnant for the last forty years, even

<sup>76</sup> Wyatt & Hecker, *supra* note 69, at 37.

<sup>77</sup> Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHL-KENT L. REV. 157, 157 (1994).

<sup>78</sup> Nantiya Ruan & Nancy Reichman, *Hours Equity Is the New Pay Equity*, 59 VILL. L. REV. 35, 51 (2014).

<sup>79</sup> Schor, *supra* note 77, at 170.

<sup>80</sup> See Matthew Kitchen, *How to Disconnect from 'Always On' Work Culture*, WALL ST. J. (Oct. 5, 2018, 7:49 AM), <https://www.wsj.com/articles/how-to-disconnect-from-always-on-work-culture-1538740171> [<https://perma.cc/54DL-6BFB>].

<sup>81</sup> See Ruan & Reichman, *supra* note 78, at 51.

<sup>82</sup> *Id.* at 35–36, 49, 53.

<sup>83</sup> LONNIE GOLDEN, ECON. POL'Y INST., PART-TIME WORKERS PAY A BIG-TIME PENALTY 1 (2020).

<sup>84</sup> LONNIE GOLDEN & JAESEUNG KIM, CTR. FOR L. & SOC. POL'Y, THE INVOLUNTARY PART-TIME WORK AND UNDEREMPLOYMENT PROBLEM IN THE U.S. 17 tbl.1, 20 (2020).

<sup>85</sup> DANIEL SCHNEIDER & KRISTEN HARKNETT, IT'S ABOUT TIME: HOW WORK SCHEDULE INSTABILITY MATTERS FOR WORKERS, FAMILIES, AND RACIAL INEQUALITY 2–4 (2019).

<sup>86</sup> Ruan & Reichman, *supra* note 78, at 38–39.

<sup>87</sup> See generally Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254 (2018).

<sup>88</sup> See, e.g., MCCALLUM, *supra* note 22, at 34.

while those at the top have seen notable gains.<sup>89</sup> Among low-wage employees, Black and Latino workers as well as women are overrepresented relative to their respective shares of the total workforce.<sup>90</sup>

The inadequacy of the minimum wage and the lack of a “minimum hour guarantee” mean that many lower-income workers cannot take advantage of the leave time established by the FMLA, which is unpaid.<sup>91</sup> Further, the FMLA’s qualifying factors serve to exclude many poor women and women of color, who are more likely to work for smaller employers or to experience work disruptions that might disqualify them from coverage.<sup>92</sup> For those who do qualify, the FMLA is a constrained benefit that typically does not extend to the everyday challenges of caretaking.<sup>93</sup>

In sum, Congress adopted what we might think of as our foundational law related to work-life balance in 1938, and little has changed about the basic structure of that law. Yet in the nearly ninety years that have passed since then, the American workforce and economic landscape have changed dramatically. Accordingly, scholars and advocates have raised recurring concerns about excessive,<sup>94</sup> insufficient,<sup>95</sup> and unpredictable<sup>96</sup> working hours and lack of access to leave time.<sup>97</sup> These issues make it difficult for many workers today to accommodate non-work civic, community, and caretaking responsibilities, leaving one to wonder whether there is a larger role for law to play in supporting work-life balance.

### B. Trends of the Pandemic Era

Against this backdrop, it is perhaps unsurprising that the challenges of the COVID-19 pandemic motivated extensive discussion of American work-life norms. Though by no means an exhaustive survey of employment- and labor-related topics of conversation during the pandemic, this section identifies five trends that stand out for the

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<sup>89</sup> SARAH A. DONOVAN & DAVID H. BRADLEY, CONG. RSCH. SERV., R45090, REAL WAGE TRENDS, 1979 TO 2019, at 2 (2020); see also Juliana Menasce Horowitz et al., *Most Americans Say There Is Too Much Economic Inequality in the U.S., But Fewer than Half Call It a Top Priority*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality> [<https://perma.cc/UMF7-293W>].

<sup>90</sup> MARTHA ROSS & NICOLE BATEMAN, BROOKINGS METRO. POL’Y PROGRAM, MEET THE LOW-WAGE WORKFORCE 9 (2019).

<sup>91</sup> Garrison et al., *supra* note 63, at 354.

<sup>92</sup> *Id.* at 355.

<sup>93</sup> See *supra* notes 50–53 and accompanying text.

<sup>94</sup> E.g., Marion Crain, “Where Have All the Cowboys Gone?” *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1939–40 (1999) (arguing that “rising work hours have created ‘role overload,’” *id.* at 1939, that has gone unaddressed thanks to policymakers inaccurately viewing “home” and “work” as “separate spheres,” *id.* at 1898).

<sup>95</sup> See, e.g., MCCALLUM, *supra* note 22, at 40–41.

<sup>96</sup> E.g., Ruan & Reichman, *supra* note 78, at 38–39.

<sup>97</sup> E.g., Jennifer Bennett Shinall, Essay, *Paid Sick Leave’s Payoff*, 75 VAND. L. REV. 1879, 1881–82 (2022).

impressions they made in popular media. Concerns about work-life balance seem to animate all five trends.

*I. Caregiving.* — Over the past three years, there has been widespread reporting on the stresses of caregiving for children during the pandemic.<sup>98</sup> When pandemic shutdowns commenced in March 2020, students were sent home from school en masse and childcare options contracted.<sup>99</sup> Even once they reopened, schools and childcare services were prone to frequent disruptions as various COVID-19 surges required closures and shifts to remote formats.<sup>100</sup> And COVID-19 vaccinations for young children were slow to become available, requiring families with small kids to exercise special caution for longer than those without small kids.<sup>101</sup>

By the end of the first two years of the pandemic, two-thirds of working parents had “parental burnout,” meaning that their ability to function had been reduced by chronic stress and exhaustion.<sup>102</sup> In fact, by January 2022, parents were at least as stressed as they had been at the beginning of the pandemic.<sup>103</sup> Thanks to the many challenges of pandemic parenting — “exhaustion from the competing pressures of working from home and juggling childcare responsibilities, struggles

<sup>98</sup> This section focuses on caregiving related to children, but elder care is also an important facet of the caregiving crisis. “Most older Americans who need help with the so-called activities of daily living . . . rely on unpaid family caregivers.” Paula Span, *Family Caregivers Feel the Pandemic’s Weight*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/05/21/health/coronavirus-home-caregivers-elderly.html> [<https://perma.cc/2A4D-RXJN>]; see also Jesse Archer et al., *Caregiving in Quarantine: Evaluating the Impact of the Covid-19 Pandemic on Adult Child Informal Caregivers of a Parent*, 7 GERONTOLOGY & GERIATRIC MED. 1, 1 (2021). About one in five Americans provides care to an adult with “health or functional needs,” and the percentage of people caring for someone with Alzheimer’s disease or dementia has increased in recent years. NAT’L ALL. FOR CAREGIVING, CAREGIVING IN THE U.S. 4–5 (2020), <https://www.caregiving.org/research/caregiving-in-the-us/caregiving-in-the-us-2020> [<https://perma.cc/MGL4-4NM2>].

<sup>99</sup> See Laura Santhanam, “*This Is Not Working.*” *Parents Juggling Jobs and Child Care Under COVID-19 See No Good Solutions*, PBS (July 23, 2020, 4:15 PM), <https://www.pbs.org/news-hour/health/this-is-not-working-parents-juggling-jobs-and-child-care-under-covid-19-see-no-good-solutions> [<https://perma.cc/HXS7-D9QH>].

<sup>100</sup> Jennifer Liu, “*People Are Feeling the Pain*”: *Parents Struggle with School Reopenings, Closures as Covid Spikes*, CNBC (Jan. 7, 2022, 1:46 PM), <https://www.cnbc.com/2022/01/07/working-parents-struggle-with-school-rules-closures-while-covid-rages.html> [<https://perma.cc/V94V-TXLF>]; Anya Kamenetz, *Parents and Caregivers of Young Children Say They’ve Hit Pandemic Rock Bottom*, NPR (Jan. 20, 2022, 9:47 AM), <https://www.npr.org/2022/01/20/1074182352/unvaccinated-young-kids-child-care-parents-omicron-disruptions> [<https://perma.cc/F3RP-8BEF>].

<sup>101</sup> Alison Green, *Your Co-workers with Kids Are Not OK*, SLATE (Feb. 14, 2022, 5:50 AM), <https://slate.com/human-interest/2022/02/working-kids-pandemic-stress-mothers-struggling.html> [<https://perma.cc/Z23V-TCMB>].

<sup>102</sup> Wyatt Grantham-Philips, “*Overwhelming*” *Exhaustion: COVID Leaves 66% of Working Parents Burnt Out, Study Suggests*, USA TODAY (May 7, 2022, 5:02 PM), <https://www.usatoday.com/story/life/health-wellness/2022/05/07/covid-19-pandemic-parents-burnout/9688676002> [<https://perma.cc/3JQT-EDKU>].

<sup>103</sup> Melinda Wenner Moyer, *Latest COVID Surge Pushes Parents to Next-Level Stress*, SCI. AM. (Jan. 19, 2022), <https://www.scientificamerican.com/article/latest-covid-surge-pushes-parents-to-next-level-stress1> [<https://perma.cc/SCH7-P74E>].

with returning to the office but not finding consistent childcare, and reevaluating their overall work-life balance” — parents were also more likely than nonparents to quit their jobs.<sup>104</sup> Such negative effects were widespread, as parents of children under the age of eighteen make up one-third of the American workforce.<sup>105</sup>

These stringent childcare burdens disproportionately impacted certain demographic groups.<sup>106</sup> Women and people of color head most single-parent households,<sup>107</sup> so they experience the unique challenge of single-handedly providing both financial support and daily care to children more frequently than white men. In two-parent households where both parents worked, mothers in heterosexual relationships tended to take on more childcare responsibilities throughout the pandemic.<sup>108</sup> And when schools reopened in September 2020, a much higher number of women than men dropped out of the workforce.<sup>109</sup> Though these patterns in caretaking have long existed,<sup>110</sup> the pandemic threw them once again into sharp relief.

2. *The Great Resignation.* — A little over a year into the pandemic, a second major work-related trend hit the headlines. Coined in May 2021 by Professor Anthony Klotz of Texas A&M University’s Mays Business School,<sup>111</sup> the term “Great Resignation” refers to the uncommonly high rates of workers quitting their jobs observed beginning in

<sup>104</sup> Aaron De Smet et al., *Married to the Job No More: Craving Flexibility, Parents Are Quitting to Get It*, MCKINSEY & CO. (Dec. 3, 2021), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/married-to-the-job-no-more-craving-flexibility-parents-are-quitting-to-get-it> [https://perma.cc/UCP8-H36T].

<sup>105</sup> Santhanam, *supra* note 99.

<sup>106</sup> Anya Kamenetz, *The Help that Never Came*, THE ATLANTIC (Aug. 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/covid-parenting-mom-dad-divide-work/671188> [https://perma.cc/HBC6-SS3E].

<sup>107</sup> See Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), <https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents> [https://perma.cc/DV2P-NYSM]. The most recent census statistics show that women head eighty percent of one-parent households. Press Release, U.S. Census Bureau, Census Bureau Releases New Estimates on America’s Families and Living Arrangements (Nov. 17, 2022), <https://www.census.gov/newsroom/press-releases/2022/americas-families-and-living-arrangements.html> [https://perma.cc/2L5P-STLR].

<sup>108</sup> Moyer, *supra* note 103; see Katherine Schaeffer, *Working Moms in the U.S. Have Faced Challenges on Multiple Fronts During the Pandemic*, PEW RSCH. CTR. (May 6, 2022), <https://www.pewresearch.org/fact-tank/2022/05/06/working-moms-in-the-u-s-have-faced-challenges-on-multiple-fronts-during-the-pandemic> [https://perma.cc/9FV5-9YVM]; Patricia Cohen & Tiffany Hsu, *Pandemic Could Scar a Generation of Working Mothers*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women.html> [https://perma.cc/G8UY-5VMM].

<sup>109</sup> Soo Youn, *Quitting Was Her Only Option. She Is One of 865,000 Women to Leave the Workforce Last Month*, THE LILY (Oct. 7, 2020), <https://www.thelily.com/quitting-was-her-only-option-she-is-one-of-865000-women-to-leave-the-workforce-last-month> [https://perma.cc/FS6M-BTCJ].

<sup>110</sup> E.g., LEILA SCHOCHET, CTR. FOR AM. PROGRESS, THE CHILD CARE CRISIS IS KEEPING WOMEN OUT OF THE WORKFORCE 1–2 (2019).

<sup>111</sup> Whang, *supra* note 7.

early 2021.<sup>112</sup> Over the course of that year, more than 40 million people left their jobs,<sup>113</sup> with the number of quits in a month hitting a twenty-year high of 4.5 million during November 2021.<sup>114</sup> Though some of these workers did not return to the workforce — for example, due to retirement — many simply switched jobs, often in response to offers of higher pay or better benefits.<sup>115</sup> Resignations were particularly high in the hospitality, professional services, and retail industries.<sup>116</sup>

To be fair, these resignation trends were not entirely new. Even before the pandemic began, there had been increasing rates of quitting and retirement.<sup>117</sup> But Klotz believes that the pandemic brought about significant and fundamental changes in people’s expectations about work.<sup>118</sup> The proliferation of remote work as well as experimentation with flexible working hours and four-day workweeks gave workers “more flexibility and control over [their] lives, and more autonomy and freedom.”<sup>119</sup> Experiencing these freedoms may have made workers hesitant to return to more restricted and traditional work environments.

3. *Antiwork*. — Concurrent with the Great Resignation, there was also widespread discussion of the concept of “antiwork.” Prior to the pandemic lockdowns, the r/antiwork subreddit — a topic page on the social media platform Reddit — had approximately 100,000 followers.<sup>120</sup> Today, the subreddit has over 2.4 million subscribers; the majority subscribed during a period of rapid growth in engagement and

<sup>112</sup> Amy Fontinelle, *What Is the Great Resignation? Causes, Statistics, and Trends*, INVESTOPEDIA (Nov. 30, 2022), <https://www.investopedia.com/the-great-resignation-5199074> [<https://perma.cc/C3J4-FV4B>].

<sup>113</sup> Emma Goldberg, *All of Those Quitters? They’re at Work.*, N.Y. TIMES (May 13, 2022), <https://www.nytimes.com/2022/05/13/business/great-resignation-jobs.html> [<https://perma.cc/VX2A-67WF>].

<sup>114</sup> *Number of Quits at All-Time High in November 2021*, BUREAU LAB. STAT. (Jan. 6, 2022), <https://www.bls.gov/opub/ted/2022/number-of-quits-at-all-time-high-in-november-2021.htm> [<https://perma.cc/PYN3-PMXE>].

<sup>115</sup> Goldberg, *supra* note 113; Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, PEW RSCH. CTR. (Mar. 9, 2022), <https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected> [<https://perma.cc/4CB7-G5EX>].

<sup>116</sup> *Job Openings and Labor Turnover — March 2022*, BUREAU LAB. STAT., at tbl.4 (May 3, 2022, 10:00 AM), [https://www.bls.gov/news.release/archives/jolts\\_o5032022.pdf](https://www.bls.gov/news.release/archives/jolts_o5032022.pdf) [<https://perma.cc/A2W5-GXJL>].

<sup>117</sup> Kate Morgan, *Why Workers Just Won’t Stop Quitting*, BBC (Aug. 18, 2022), <https://www.bbc.com/worklife/article/20220817-why-workers-just-wont-stop-quitting> [<https://perma.cc/F9LS-Z53Z>].

<sup>118</sup> See Michelle Fox, *The Great Resignation Has Changed the Workplace for Good. “We’re Not Going Back,” Says the Expert Who Coined the Term*, CNBC (May 10, 2022, 2:20 PM), <https://www.cnbc.com/2022/05/10/the-great-resignation-has-changed-the-workplace-for-good.html> [<https://perma.cc/DT5U-N44N>].

<sup>119</sup> *Id.*

<sup>120</sup> Brian O’Connor, *The Rise of the Anti-work Movement*, BBC (Jan. 27, 2022), <https://www.bbc.com/worklife/article/20220126-the-rise-of-the-anti-work-movement> [<https://perma.cc/VA7Q-RHKD>].

coverage in 2021.<sup>121</sup> Some of these subscribers may have been attracted to the forum as a source of solidarity and support in dealing with abusive employers: the subreddit famously features posts of screenshotted conversations between employees and their bosses in which the supervisors make aggressive and insensitive demands of their employees.<sup>122</sup>

But the subreddit is more than an opportunity to complain about poor treatment in the workplace. Created in 2013, the subreddit describes itself as being for “for those who want to end work, are curious about ending work, want to get the most out of a work-free life, want more information on anti-work ideas and want personal help with their own jobs/work-related struggles.”<sup>123</sup> With a tagline of “Unemployment for all, not just the rich!,” the subreddit is also a gathering place for discussion of socialist and anarchist critiques of capitalism.<sup>124</sup> Its library lists Bob Black’s *The Abolition of Work*, David Graeber’s *On the Phenomenon of Bullshit Jobs*, and Bertrand Russell’s *In Praise of Idleness* as “Essential Reads,”<sup>125</sup> indicating the community’s interest in a more fundamental restructuring of work.<sup>126</sup>

4. *Union Boom.* — In 2019, only about one in ten employed Americans was a member of a union.<sup>127</sup> But on the eve of the 2020 election, then-candidate Joe Biden promised to be “the most pro-union president you’ve ever seen.”<sup>128</sup> Although his Administration has since

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<sup>121</sup> *R/Antiwork Stats*, SUBREDDIT STATS, <https://subredditstats.com/r/antiwork> [<https://perma.cc/4SEL-S79T>].

<sup>122</sup> See Brenna Ehrlich, *Do These Viral Stories About Shitty Bosses Signal an Anti-work Revolution?*, ROLLING STONE (Oct. 20, 2021), <https://www.rollingstone.com/culture/culture-news/anti-work-subreddit-1244507> [<https://perma.cc/P4X7-FR6P>]. One post, for example, shows an exchange in which a boss tells their employee to “[s]top being a victim” after the worker requests to take a scheduled day off to mourn the death of a parent. Whang, *supra* note 7.

<sup>123</sup> *R/Antiwork: Unemployment for All, Not Just the Rich!*, REDDIT, <https://www.reddit.com/r/antiwork> [<https://perma.cc/92U3-MAPN>].

<sup>124</sup> *Id.*; O’Connor, *supra* note 120.

<sup>125</sup> *The Anti-work Library*, REDDIT, <https://www.reddit.com/r/antiwork/wiki/library> [<https://perma.cc/4QPW-X9J7>].

<sup>126</sup> Members of the subreddit community have also engaged in organized activity. In December 2021, “idlers” responded to Kellogg’s announcement that it would break off negotiations and hire nonunion workers by flooding the company’s application portal. O’Connor, *supra* note 120. Earlier that fall, members of the subreddit helped organize a Black Friday boycott. Lexi McMenamin, *This Antiwork Subreddit Is Watching the Great Resignation*, TEEN VOGUE (Nov. 9, 2021), <https://www.teenvogue.com/story/reddit-antiwork-viral> [<https://perma.cc/97VK-W2K2>].

<sup>127</sup> Abigail Johnson Hess, *Biden Promises to Be “the Most Pro-union President” — And Union Members in Congress Are Optimistic*, CNBC (Dec. 2, 2020, 10:05 PM), <https://www.cnbc.com/2020/12/01/biden-promises-to-be-the-most-pro-union-president-and-rep.html> [<https://perma.cc/H65Y-HWEZ>].

<sup>128</sup> *The Latest: Trump Predicts He’ll “So Easily” Win Michigan*, AP NEWS (Nov. 3, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-district-of-columbia-elections-3f42f2ddb730a8dff916b54be74672ao> [<https://perma.cc/48T8-DP54>].

struggled to deliver on union-related legislation,<sup>129</sup> the COVID-19 pandemic seems to have driven a resurgence in union organizing. High-profile union battles at Starbucks, Amazon, and Google have made headlines, and the National Labor Relations Board (NLRB) has received an influx of union representation petitions and unfair labor practice complaints.<sup>130</sup>

At the same time, the Biden Administration has tried to facilitate an environment that is supportive of labor organizing. The President installed a new, more progressive General Counsel at the NLRB and has made a point of meeting with labor leaders throughout his time in office.<sup>131</sup> These actions created a “clear opportunity for labor,” according to Professor Ariel Avgar.<sup>132</sup> The combined factors have brought about the highest popular opinion rating regarding unions in half a century: over seventy percent of Americans approve of labor unions.<sup>133</sup>

5. *Quiet Quitting*. — In contrast to the literal quitting of the Great Resignation, “quiet quitting” is something of a misnomer. Rather than involving actual resignation, quiet quitting is the “newly coined term for when workers only do the job that they’re being paid to do, without taking on any extra duties, or participating in extracurriculars at work.”<sup>134</sup> The term began circulating last summer, leading to a spate of quiet-quitting-related articles throughout the fall.<sup>135</sup>

The contrasting responses to the trend were striking. On one hand, some evaluations expressed concern that the quiet-quitting rate was high — at least fifty percent, according to Gallup<sup>136</sup> — and could get worse. Those responses equated quiet quitting with disengagement,

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<sup>129</sup> See Ahiza García-Hodges, *Biden’s Vow to Be “Most Pro-union President” Tested in First Year*, NBC NEWS (Jan. 20, 2022, 6:15 PM), <https://www.nbcnews.com/business/economy/bidens-vow-union-president-tested-first-year-rcna12791> [https://perma.cc/L4Q8-G7ZJ]. The Protecting the Right to Organize Act (PRO Act), H.R. 842, 117th Cong. (2021) (as passed by House of Representatives, Mar. 9, 2021), successfully passed the House before dying in the Senate. See Don Gonyea, *House Democrats Pass Bill that Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), <https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts> [https://perma.cc/SD3W-659C].

<sup>130</sup> Jennifer Elias & Amelia Lucas, *Employees Everywhere Are Organizing. Here’s Why It’s Happening Now*, CNBC (May 7, 2022, 12:05 PM), <https://www.cnbc.com/2022/05/07/why-is-there-a-union-boom.html> [https://perma.cc/92FW-FGBY].

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

<sup>132</sup> García-Hodges, *supra* note 129.

<sup>133</sup> Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx> [https://perma.cc/Y5LL-HJTC].

<sup>134</sup> Tayo Bero, Opinion, “*Quiet Quitting?*” *Everything About This So-Called Trend Is Nonsense*, THE GUARDIAN (Sept. 8, 2022, 6:14 AM), <https://www.theguardian.com/commentisfree/2022/sep/08/quiet-quitting-not-real-work-culture> [https://perma.cc/DG24-GG3U].

<sup>135</sup> See, e.g., Chinmay G. Pandit, *Understanding the Noise Around Quiet Quitting*, ONLABOR (Oct. 11, 2022), <https://onlabor.org/understanding-the-noise-around-quiet-quitting> [https://perma.cc/6C3B-XZSJ].

<sup>136</sup> Jim Harter, *Is Quiet Quitting Real?*, GALLUP (Sept. 6, 2022), <https://www.gallup.com/workplace/398306/quiet-quitting-real.aspx> [https://perma.cc/J6LZ-DZW2].

noting that the rate of disengaged workers is rising and the rate of workplace satisfaction is decreasing.<sup>137</sup> But quiet-quitting proponents point out that the name makes the phenomenon seem more concerning than it actually is: they explain that quiet quitting simply means doing the job that you are paid for, rather than conducting extra work for free.<sup>138</sup> On that view, quiet quitting is about “shift[ing] away from ‘hustle-culture mentality’ and toward clearer boundaries between work and life.”<sup>139</sup>

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Far more could be said about the preceding trends. Each one unquestionably contains numerous dimensions, demands, and cultural signals. Importantly, though, longstanding critiques about work-life balance in the United States stand out as particularly visible in the data and trends observed during the pandemic.

For example, coverage of the caretaking struggles for single parents and working parents who shoulder a disproportionate share of the caregiving responsibilities once again illustrated how “[r]igid mandatory work hours and the expectation of continuous, uninterrupted employment combine with the length of the work week to squeeze out caregiving and family time.”<sup>140</sup> During the pandemic, many parents struggled to obtain flexibility and leave time to address caretaking responsibilities.<sup>141</sup> The incompatible time demands resulted in their performance of both caregiving and paid work duties suffering, and some parents left the workforce entirely<sup>142</sup> — an option realistic only for those parents able to rely on savings or an alternate source of income.

Long, rigid work hours can also “diminish[] civic and community involvement,”<sup>143</sup> perhaps helping to explain why there were many people whose work-related frustrations during the pandemic were motivated by a desire for more flexibility and free time. In surveys that asked about priorities in the search for a new job, for example, approximately two-thirds of Great Resignation workers cited “work-life

<sup>137</sup> *Id.*

<sup>138</sup> Jason Lalljee, *Meet a Gen Z Remote Worker Who Told Her Boss She Was Quiet Quitting for the Sake of Her Health: “I Need to Do My Role as Defined, But Also Not Apologize for Who I Am,”* INSIDER (Oct. 9, 2022, 7:15 AM), <https://www.businessinsider.com/gen-z-quiet-quitting-great-resignation-disability-adhd-labor-burnout-2022-10> [<https://perma.cc/TF7Q-VB5C>].

<sup>139</sup> Pandit, *supra* note 135.

<sup>140</sup> Crain, *supra* note 94, at 1948.

<sup>141</sup> See, e.g., Alaina Harwood, *Caregiver Discrimination in the Wake of the COVID-19 Pandemic*, 33 HASTINGS J. ON GENDER & L. 79, 87 (2022).

<sup>142</sup> Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1, 6–9 (2021).

<sup>143</sup> Crain, *supra* note 94, at 1948; see also SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 6 (2020) (discussing connection between worker power and healthy democracy).



balance.”<sup>144</sup> Anecdotal evidence supports the suggestion that what these workers sought was greater free time for life activities besides work: in an interview with *NPR* during the emergence of the Great Resignation, software developer Jonathan Caballero explained the pandemic “changed [his] mindset,” giving him a greater appreciation for free time.<sup>145</sup> He went on to look for a new job that offered more flexibility.<sup>146</sup>

Likewise, the recent union boom seems at least partly motivated by a desire for greater flexibility and balance. Former NLRB Chairman and current Georgetown Law Professor Mark Pearce characterizes the pandemic as a “catalyst” for workers to think critically about “the relationship between employers with workers” and ask themselves: “[I]s there another way to work and live?”<sup>147</sup> That questioning motivated many workers to engage in union organizing to address the imbalance of power between employers and employees, which currently enables employers to establish conditions that force personal, familial, and community needs to yield to work tasks. Unionized workers are demanding “better working conditions, more sick pay and more flexible schedules”<sup>148</sup> to facilitate increased autonomy and balance in their lives.

Quiet quitting similarly seems tied in part to a desire to have more space for nonwork activities. As some quiet quitters have observed, the “trend” is really more of a countertrend against employers taking advantage of workers by failing to hire enough employees or piling new tasks on existing employees.<sup>149</sup> (Contrary to the arguments of those who think quiet quitting is “being content with mediocrity” or the path to nonadvancement,<sup>150</sup> extra tasks do not necessarily help advance the careers of those who perform them.<sup>151</sup>) By refusing to take on extra work, quiet quitters are taking a stand against employers’ attempts to increase corporate profits at the expense of employees’ lives outside of work.

Finally, commentators have speculated that the *r/antiwork* forum’s dramatic rise in popularity during the second year of the pandemic related to a shift in popular mentality about work. People seem to be

<sup>144</sup> Fox, *supra* note 118.

<sup>145</sup> Andrea Hsu, *As the Pandemic Recedes, Millions of Workers Are Saying “I Quit,”* *NPR* (June 24, 2021, 6:01 AM), <https://www.npr.org/2021/06/24/1007914455/as-the-pandemic-recedes-millions-of-workers-are-saying-i-quit> [<https://perma.cc/5ZC2-AW83>].

<sup>146</sup> *See id.*

<sup>147</sup> Elias & Lucas, *supra* note 130.

<sup>148</sup> *E.g.*, Lauren Kaori Gurley et al., *Rail Union Rejects Contract as Strike Threatens U.S. Economy Before Holidays*, *WASH. POST* (Nov. 21, 2022, 9:55 AM), <https://www.washingtonpost.com/business/2022/11/21/rail-union-strike-white-house> [<https://perma.cc/8YAK-W825>].

<sup>149</sup> *See* Lalljee, *supra* note 138.

<sup>150</sup> Kudhail, *supra* note 5.

<sup>151</sup> Indeed, they can have the opposite result. As one example, women take on most of the office housework — like planning parties and taking notes in meetings — yet those tasks typically don’t advance their careers. Kami Rieck, *Women and People of Color Can’t Afford to “Quiet Quit,”* *WASH. POST* (Sept. 6, 2022, 10:35 AM), [https://www.washingtonpost.com/business/women-and-people-of-color-cant-afford-to-quiet-quit/2022/09/05/1707431e-2d28-11ed-bcc6-0874b26ae296\\_story.html](https://www.washingtonpost.com/business/women-and-people-of-color-cant-afford-to-quiet-quit/2022/09/05/1707431e-2d28-11ed-bcc6-0874b26ae296_story.html) [<https://perma.cc/AB2L-HUZE>].

wondering whether the United States is “entirely too obsessed with work” and whether employment should be restructured to ensure that workers have more time for other meaningful endeavors.<sup>152</sup> Sociologist David Frayne ties these questions to the pandemic, explaining that traumatic events can encourage people to reevaluate values and goals.<sup>153</sup>

At bottom, the American baseline for work-life balance seems to fall far short of supporting a fulfilling and well-rounded life for many workers. But this result is not foreordained. The pandemic also underscored how various basic benefits could go a long way toward supporting better work-life balance.

### C. *Work-Life Developments and the Future*

The viral trends of the pandemic both echo and encourage recent legislative efforts to better support work-life balance. Starting prior to the pandemic and accelerating with the increased attention on work-life balance during the past three years, state and local governments have passed paid leave and fair workweek laws.<sup>154</sup> These statutory developments represent important progress toward a future in which workers experience greater balance, and similar action at the federal level is long overdue. Yet such changes need not be the ceiling for innovation. Congress should enshrine paid leave and schedule predictability, but it should also finally deliver a modern vision for work-life balance.

Expanded access to paid leave is a crucial cornerstone of improving work-life balance in the United States,<sup>155</sup> since so many workers currently lack realistic access to time off for personal and family needs.<sup>156</sup> Recently, Congress came close to implementing a federal paid leave program: the House of Representatives “passed four weeks of paid family and medical leave that would have covered all workers in the country”<sup>157</sup> as part of the Build Back Better Act.<sup>158</sup> Unfortunately, those provisions were not included in the Inflation Reduction Act of 2022,<sup>159</sup>

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<sup>152</sup> Farhad Manjoo, Opinion, *Even with a Dream Job, You Can Be Antiwork*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/opinion/work-resignations-covid.html> [<https://perma.cc/WPG6-A9MB>].

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

<sup>154</sup> *E.g.*, COLO. REV. STAT. § 8-13.3-401 (2020); DEL. CODE ANN. tit. 19, § 3701-3724 (2022); N.M. STAT. ANN. § 50-17-1 (2021); BERKELEY, CAL., MUN. CODE ch. 13.102 (2022); L.A., CAL., ADMIN. CODE ch. XCIII, art. 5, §§ 185-188 (2022).

<sup>155</sup> *See* Garrison et al., *supra* note 63, at 354-56.

<sup>156</sup> *Id.* at 354.

<sup>157</sup> STATEMENT: Senate Fails to Deliver for Women and Working Families with the Inflation Reduction Act, BETTER BALANCE (July 28, 2022), <https://www.abetterbalance.org/statement-senate-fails-to-deliver-for-women-and-working-families-with-the-inflation-reduction-act> [<https://perma.cc/3DG6-HK2N>]; *see also* Lorie Konish, *As More States Take Up Paid Family Leave, Here's Where the Push for a National Policy Stands*, CNBC (May 16, 2022, 9:37 AM), <https://www.cnbc.com/2022/05/16/as-states-take-up-paid-family-leave-heres-where-congress-stands.html> [<https://perma.cc/X5P2-JK42>].

<sup>158</sup> H.R. 5376, 117th Cong. (2021) (as passed by House of Representatives, Nov. 19, 2021).

<sup>159</sup> H.R. 5376, 117th Cong. (2022) (enacted).

which replaced the Build Back Better Act after negotiations over the earlier bill stalled in the Senate.<sup>160</sup> Congress did include paid sick and family leave in the Families First Coronavirus Response Act,<sup>161</sup> but that law was passed as a pandemic measure and has since expired.<sup>162</sup>

Other proposals for sick and family leave will likely continue to be considered,<sup>163</sup> but the timeline for federal action on permanent paid leave remains murky. In the meantime, some state and local governments have tried to fill the gap for their constituents. While several states already had paid sick<sup>164</sup> and family<sup>165</sup> leave policies in place prior to the pandemic, there was a fresh surge of legislative activity around the issue of paid leave soon after the pandemic started.<sup>166</sup> Some of these laws aimed at short-term leave to address illnesses or emergencies,<sup>167</sup> while others targeted longer-term leave for purposes of caretaking or extended medical conditions.<sup>168</sup> These kinds of laws have

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<sup>160</sup> Christopher Hickey, *Not the Year for Women and Parents: Child Care Provisions Were Cut from the Inflation Reduction Act. It's Not the First Time.*, CNN (Aug. 12, 2022, 5:51 PM), <https://www.cnn.com/2022/08/12/politics/inflation-reduction-children-families/index.html> [https://perma.cc/MH6Y-3BMM]. Even if the Build Back Better Act had passed, though, the United States would have remained an outlier on paid family and medical leave: average paid maternity leave globally is twenty-nine weeks. Claire Cain Miller, *The World "Has Found a Way to Do This": The U.S. Lags on Paid Leave*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html> [https://perma.cc/P3UE-5WGX]; see also SARAH A. DONOVAN, CONG. RSCH. SERV., R44835, PAID FAMILY AND MEDICAL LEAVE IN THE UNITED STATES (2022) (describing status of paid family and medical leave in the United States).

<sup>161</sup> Pub. L. No. 116-127, 134 Stat. 177 (2020).

<sup>162</sup> *Id.* §§ 3102, 5109.

<sup>163</sup> *E.g.*, FAMILY Act, S. 248, H.R. 804, 117th Cong. (2021). The FAMILY Act has been introduced in every Congress since 2013. Rosa DeLauro, *Paid Leave: If It's Good Enough for Members of Congress, It's Good Enough for the American People*, MS. MAG. (Nov. 4, 2021), <https://msmagazine.com/2021/11/04/paid-leave-congress-build-back-better> [https://perma.cc/5FCY-5HFD].

<sup>164</sup> *State Family and Medical Leave Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 9, 2022), <https://www.ncsl.org/labor-and-employment/state-family-and-medical-leave-laws> [https://perma.cc/94VN-6WUM].

<sup>165</sup> *Paid Family Leave Resources*, NAT'L CONF. ST. LEGISLATURES (July 21, 2020), <https://www.ncsl.org/labor-and-employment/paid-family-leave-resources> [https://perma.cc/C2ST-2NMY].

<sup>166</sup> See sources cited *supra* note 154; *Local Paid Sick Leave Momentum Continues in Bloomington, MN and San Francisco, CA*, BETTER BALANCE (June 23, 2022), <https://www.abetterbalance.org/local-paid-sick-leave-momentum-continues-in-bloomington-mn-and-san-francisco-ca> [https://perma.cc/YK6N-XWQ2].

<sup>167</sup> *E.g.*, S. 208, 102d Gen. Assemb. (Ill. 2023); BLOOMINGTON, MINN., ORDINANCE no. 2022-31 (July 1, 2023). San Francisco, California, also passed a permanent "public health emergency leave" ballot initiative by a wide margin, "reflect[ing] deep support for paid sick leave, including the need to provide additional time off during public health emergencies like COVID-19." *Local Paid Sick Leave Momentum Continues in Bloomington, MN and San Francisco, CA*, *supra* note 166.

<sup>168</sup> *E.g.*, COLO. REV. STAT. § 8-13.3-501 (2022).

measurable effects on family income,<sup>169</sup> public health,<sup>170</sup> and workforce participation.<sup>171</sup>

Similarly, state and local governments have acted to stabilize workers' schedules through "fair workweek" laws,<sup>172</sup> which supplement the FLSA's laissez-faire approach to the regulation of scheduling. As Professors Charlotte Alexander, Anna Haley-Lock, and Nantiya Ruan explain, "inadequate, variable, and unpredictable"<sup>173</sup> schedules create a wealth of problems for workers — from threatening access to employment and public benefits, to imposing substantial last-minute transportation and childcare costs, to interfering with education and secondary employment.<sup>174</sup> These challenges can be partially alleviated by "call-in" and "send-home" pay policies, which guarantee some minimum payment for workers who are called in to work on short notice or excused from work before the end of a scheduled shift.<sup>175</sup> Other policy interventions related to schedule stabilization include "right-to-request" rules prohibiting retaliation against employees requesting a change in schedule or a flexible schedule<sup>176</sup> and mandating advance notice of schedules that provide workers with enough time to create a plan for managing competing obligations.<sup>177</sup>

"Predictive scheduling" or "fair workweek" laws began to proliferate in the last decade,<sup>178</sup> corresponding to the data-driven emergence of just-in-time scheduling.<sup>179</sup> But widespread discussion of the primacy of work over other dimensions of people's lives during the pandemic has facilitated continued momentum behind the movement for schedule stabilization. New fair workweek ordinances have been adopted in major

<sup>169</sup> E.g., Alexandra Boyle Stanczyk, *Does Paid Family Leave Improve Household Economic Security Following a Birth? Evidence from California*, 93 SOC. SERV. REV. 262, 262 (2019).

<sup>170</sup> E.g., Stefan Pichler et al., *COVID-19 Emergency Sick Leave Has Helped Flatten the Curve in the United States*, 39 HEALTH AFFS. 2197, 2197 (2020).

<sup>171</sup> E.g., Arijit Nandi et al., *The Impact of Parental and Medical Leave Policies on Socioeconomic and Health Outcomes in OECD Countries: A Systematic Review of the Empirical Literature*, 96 MILBANK Q. 434, 435 (2018).

<sup>172</sup> Rebecca Rainey & Austin R. Ramsey, *Punching In: Labor Agency Revisits Predictive Scheduling Policy*, BLOOMBERG L. (Oct. 11, 2022, 5:40 AM), <https://news.bloomberglaw.com/daily-labor-report/punching-in-labor-agency-revisits-predictive-scheduling-policy-28> [<https://perma.cc/ACR7-H8BT>] ("In the absence of a national rule, at least seven cities and one state have implemented laws requiring businesses to give workers notice of their work schedule . . .").

<sup>173</sup> Alexander et al., *supra* note 48, at 11.

<sup>174</sup> *Id.* at 11–13. In essence, these laws serve to shift business costs from the employer by imposing significant additional personal costs on employees. *Id.* at 4.

<sup>175</sup> *Id.* at 19–20.

<sup>176</sup> E.g., Robert C. Bird, *Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform*, 37 BERKELEY J. EMP. & LAB. L. 1, 28 (2016).

<sup>177</sup> Alexander et al., *supra* note 48, at 37.

<sup>178</sup> Stephanie Wykstra, *The Movement to Make Workers' Schedules More Humane*, VOX (Nov. 5, 2019, 2:06 PM) <https://www.vox.com/future-perfect/2019/10/15/20910297/fair-workweek-laws-unpredictable-scheduling-retail-restaurants> [<https://perma.cc/35JA-VG9F>].

<sup>179</sup> *Shift Change: "Just-in-Time" Scheduling Creates Chaos for Workers*, NBC NEWS (May 10, 2014, 7:04 AM), <https://www.nbcnews.com/feature/in-plain-sight/shift-change-just-in-time-scheduling-creates-chaos-workers-n95881> [<https://perma.cc/TPJ6-EQEV>].

cities in recent months,<sup>180</sup> and New York City took an enforcement action under its Fair Workweek Law that resulted in a \$20 million settlement by Chipotle Mexican Grill, Inc. last year.<sup>181</sup>

Schedule stability and paid time off both support balance by enabling workers to better organize their lives and respond to health and caretaking concerns. But a patchwork of state laws is insufficient to set a more reasonable national baseline around work-life balance, so federal action is still needed.<sup>182</sup> And Congress should not stop there. Rather, the federal legislature should take the reckoning brought about by the pandemic as an opportunity to consider other legal updates that would facilitate work-life balance.

For one, scholars and activists have repeatedly critiqued the FLSA's "white-collar" exemption.<sup>183</sup> In adopting the FLSA, lawmakers had hoped to eliminate "unnecessarily long hours which wear out part of the working population while they keep the rest from having work to do."<sup>184</sup> But because managerial and professional positions were exempted, the work-spreading function of the FLSA has failed to extend to these roles.<sup>185</sup> Subsequent occupational developments and regulatory actions have both expanded the number of workers who fall into the white-collar exemption<sup>186</sup> and permitted employers to pile more hours onto their existing workforces.<sup>187</sup> Those patterns help to explain why trends

<sup>180</sup> BERKELEY, CAL., MUN. CODE ch. 13.102 (2022); L.A., CAL., ADMIN. CODE ch. XCIII, art. 5, §§ 185–188 (2022).

<sup>181</sup> Press Release, Eric Adams, Mayor, New York City, Mayor Adams, Department of Consumer and Worker Protection Announce Settlement with Chipotle Mexican Grill, Securing \$20 Million for Approximately 13,000 Workers (Aug. 9, 2022), <https://www.nyc.gov/office-of-the-mayor/news/581-22/mayor-adams-department-consumer-worker-protection-settlement-chipotle-mexican> [https://perma.cc/6RBN-CZ5E].

<sup>182</sup> Members of Congress have previously proposed the Schedules That Work Act, H.R. 6670, 117th Cong. (2022); and the Part-Time Worker Bill of Rights Act, S. 3641, 117th Cong. (2022). These two bills would aim to expand protections for part-time workers and limit the effects of unpredictable shift scheduling.

<sup>183</sup> See, e.g., Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 140 (1993); Schor, *supra* note 77, at 170–71.

<sup>184</sup> Grossman, *supra* note 54.

<sup>185</sup> Professor Deborah Malamud observes that at the time the FLSA was under development, male white-collar workers "would have found shorter hours . . . inconsistent with the status they sought to maintain in their own and their employers' eyes." Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2224 (1998). But even around the time of the Great Depression and the adoption of the FLSA, political economists and sociologists observed that this class-oriented approach to work was flawed. Scholars noted that the assumptions built into that approach did not necessarily bear out in reality through things like wages or social mobility; rather, they seemed to largely reflect "deeply held cultural distinctions between different types of workers." *Id.* at 2232.

<sup>186</sup> U.S. GEN. ACCT. OFF., FAIR LABOR STANDARDS ACT: WHITE COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 2 (1999); see also Wyatt & Hecker, *supra* note 69, at 36 chart 1 (indicating significant increases in proportional employment in professional and managerial occupations between 1910 and 2000).

<sup>187</sup> Schor, *supra* note 77, at 170 (arguing that the "absence of a financial disincentive for long hours" for salaried employees is an "important reason that employers expect and/or enforce long hours from [such employees]").

like quiet quitting and antiwork resonated with a large number of workers and why many workers sought out new jobs with better hours during the pandemic.

Recent updates to the white-collar exemptions have been limited in scope. The Department of Labor raised the salary minimum to qualify for the exemption in 2019,<sup>188</sup> and the Department is currently working on another update.<sup>189</sup> While raising the salary minimum is a necessary step to cut back overuse of the exemption, many highly paid managers and professionals will remain exempt. As a result, overwork and inequitable access in fields like technology, medicine, and law are likely to remain pervasive issues.<sup>190</sup> Yet commentators point out that many managerial and professional workers' tasks are amenable to the same workspreading function that animated the FLSA's nonexempt rules,<sup>191</sup> so it should be possible to cap total working hours or impose overtime rules for all but the most senior "key personnel."<sup>192</sup>

Recent scholarship and activism also revive the call for a shorter workweek.<sup>193</sup> Prior to the adoption of the FLSA, then-Senator Hugo Black introduced a thirty-hour workweek bill backed by the American Federation of Labor.<sup>194</sup> Two years before that, John Maynard Keynes famously predicted that technological advancement would eventually permit adoption of a fifteen-hour workweek.<sup>195</sup> Echoing those earlier suggestions, the viral trends of the pandemic invite policymakers to reconsider the proportion of their lives that workers should dedicate to paid labor.

Appropos of its title, the Thirty-Two Hour Workweek Act<sup>196</sup> takes up the invitation, suggesting shortening the standard week by eight hours

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<sup>188</sup> See generally Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230 (Sept. 27, 2019) (codified at 29 C.F.R. 541).

<sup>189</sup> Allen Smith, *No Proposed Overtime Rule Issued Yet*, SHRM (Nov. 10, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/no-proposed-overtime-rule-issued-yet.aspx> [<https://perma.cc/2LL5-E6V8>].

<sup>190</sup> See Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 68–72 (2005) (discussing patterns of overwork in technology, medicine, and law, as well as how overwork patterns are consistent across both white-collar and blue-collar workers).

<sup>191</sup> See, e.g., DeChiara, *supra* note 183, at 155–60 (explaining that many white-collar jobs have become more routinized and simplified and that recent recessions have seen high numbers of professionals laid off).

<sup>192</sup> See Scott D. Miller, *Work/Life Balance and the White-Collar Employee Under the FLSA*, 7 EMP. RTS. & EMP. POL'Y J. 5, 46, 49 (2003).

<sup>193</sup> E.g., 4 DAY WK. GLOB., <https://www.4dayweek.com> [<https://perma.cc/8BG5-H8JG>]; MCCALLUM, *supra* note 22, at 208–09; Jeannette Cox, *Work Hours and Disability Justice*, 111 GEO. L.J. 1, 29 (2022).

<sup>194</sup> Schor, *supra* note 77, at 163.

<sup>195</sup> John Maynard Keynes, *Economic Possibilities for Our Grandchildren*, in ESSAYS IN PERSUASION 321, 321–22, 328–29 (3d ed. 2010). Today, profound technological changes have arrived, but failure to consider adequately how to distribute the benefits has resulted in increasing income inequality rather than decreasing hours of work. See Estlund, *supra* note 87, at 315.

<sup>196</sup> H.R. 1332, 118th Cong. (2023).

so that overtime pay provisions kick in after thirty-two hours rather than forty.<sup>197</sup> Similar legislation was introduced last year in California.<sup>198</sup> Although working out the details of implementing such a change remains a formidable barrier to passage, a shorter workweek could facilitate more equitable sharing of caretaking and housework responsibilities between dual-earning partners.<sup>199</sup> For single-parent households, it could help alleviate strain around finding childcare when school activities fall below forty hours a week.<sup>200</sup> And for all workers, a shorter workweek would increase availability of time for leisure<sup>201</sup> and civic<sup>202</sup> activities.

Finally, revitalizing federal labor law could result in better work-life balance. Historical patterns indicate that the progress toward a shorter workweek achieved during the twentieth century was correlated with higher levels of labor organizing.<sup>203</sup> When organizing related to working hours stagnated toward the end of the century as a result of waning labor power, worktime began creeping up again.<sup>204</sup> Given these observed trends, updating labor laws to facilitate greater union participation<sup>205</sup> seems likely to improve work-life balance, which is a recognized goal for organizers.<sup>206</sup> Stronger labor unions have another benefit as well: they provide important opportunities for workers to participate in political dialogue and civic activities, thus strengthening the democratic system.<sup>207</sup>

These various changes cannot fully solve the American work-life balance problem, which has emerged from a complex combination of

<sup>197</sup> *Id.*

<sup>198</sup> Jason Kandel, *What to Know: Two Bills Propose Shortening the Workweek to 4 Days*, NBC L.A. (Apr. 15, 2022, 6:38 AM), <https://www.nbclosangeles.com/news/local/what-to-know-two-bills-propose-shortening-the-workweek-to-4-days> [<https://perma.cc/S6AT-EVQZ>].

<sup>199</sup> See Schor, *supra* note 77, at 165.

<sup>200</sup> See Joe Pinsker, *The Curse of America's Illogical School-Day Schedule*, THE ATLANTIC (Sept. 19, 2018), <https://www.theatlantic.com/education/archive/2018/09/school-day-sleep-workday/570658> [<https://perma.cc/ZHJ3-QEJJ>], for a discussion of the mismatch between typical work schedules and typical school schedules.

<sup>201</sup> See Bryan Lufkin & Jessica Mudditt, *The Case for a Shorter Workweek*, BBC (Aug. 24, 2021), <https://www.bbc.com/worklife/article/20210819-the-case-for-a-shorter-workweek> [<https://perma.cc/ZRX5-ZN3G>].

<sup>202</sup> See Caruso, *supra* note 32, at 534; Crain, *supra* note 94, at 1948.

<sup>203</sup> MCCALLUM, *supra* note 22, at 33–35.

<sup>204</sup> See *id.*; JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 72–73, 76–78 (1992).

<sup>205</sup> For an overview of a number of proposals toward this end, see BLOCK & SACHS, *supra* note 143, at 1–8.

<sup>206</sup> See *Improving Work-Life Balance*, AFL-CIO, <https://aflcio.org/what-unions-do/empower-workers/work-life-balance> [<https://perma.cc/RG7B-4D5L>].

<sup>207</sup> See ALEXANDER HERTEL-FERNANDEZ, *ECON. POL'Y INST., POWER AND POLITICS IN THE U.S. WORKPLACE 2* (2020) (“Without other places to build civic skills, engage in political discussions, or learn about opportunities to participate in politics, . . . [w]eaker workplace voice has left us with a weaker democracy.”).

factors.<sup>208</sup> But setting the baseline expectation that workers should have paid time off, predictable scheduling, a shorter workweek, and ready access to labor organizing would go a long way toward enabling workers to plan for and enjoy important life activities outside of work. Equally importantly, it would be an investment in the collective and the political system. At a moment when the country is facing a crisis of democracy,<sup>209</sup> members of the American public need time to genuinely engage in community and democratic discussion. In the wake of the pandemic, policymakers should not miss the opportunity to think critically about how to set a new work-life balance baseline that will serve these crucial interests.

### *Conclusion*

The past three years have been marked by widespread discussion about the role of work in employees' lives. As the various trends during the pandemic reveal, many American workers are discontent with the balance their lives currently permit. Whether for family, community, or civic reasons, people desire more flexibility and more time away from work. Recently, some state and local governments have taken it upon themselves to help stabilize workers' schedules and provide access to paid time off. Federal policymakers should follow suit — and in the process, Congress should deliver a vision of work-life balance for the modern economy.

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<sup>208</sup> For example, while this Chapter has focused on interventions related to working time, increasing wages is a critical component of addressing America's work-life balance problem. Sonali Kolhatkar, *What About Work-Life Balance for Low-Wage Women of Color?*, YES! MAG. (Oct. 4, 2021), <https://www.yesmagazine.org/social-justice/2021/10/04/work-life-balance-low-wage-women-of-color> [<https://perma.cc/LEK7-YM3F>].

<sup>209</sup> See, e.g., Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 642 (2019) (comparing current economic inequality to the Gilded Age and noting that, at that time, "[n]ot unlike today, American democracy itself seemed to be at risk," as "[w]orkers' lack of basic workplace rights, combined with the disproportionate political power exercised by a few megabusinesses and the wealthy more generally, struck many as incompatible with a republican form of government").