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Working While Mothering During the Pandemic and Beyond

Nicole Buonocore Porter*

Abstract

Although combining work and family has never been easy for women, working while mothering during the pandemic was close to impossible. When COVID-19 caused most workplaces to shut down, many women were laid off. But many women were forced to work from home alongside their children, who could not attend daycare or school. Mothers tried valiantly to combine a full day's work on top of caring for young children and helping school-aged children with remote school. But many found this balance difficult, leading to women's lowest workforce participation rate in over forty years. And even women who did not quit nevertheless suffered workplace consequences from logging many fewer work hours than before the pandemic. The exact magnitude of this toll, in terms of costs and careers, will not be known for years, if ever. This Article explores the challenges working mothers faced during the pandemic and sketches an outline of what solutions might have mitigated the difficulties during the pandemic and could make a difference in the lives of working mothers moving forward.

* Distinguished University Professor and Professor of Law, University of Toledo College of Law. I would like to thank the University of Idaho for inviting me to their symposium that prompted me to put some of these thoughts into writing. I would also like to thank Alia Kadri, a former student whose research paper in the fall of 2020 helped with Section II.A.5 on working from home as a possible accommodation for individuals with disabilities. Thank you to the University of Toledo College of Law for summer research support. And as always, thanks to Bryan Lammon, for everything.

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INTRODUCTION

One of the many consequences of the COVID-19 pandemic is that unemployment skyrocketed. Not surprisingly, the effect of this unemployment fell most harshly on our most vulnerable populations—lower-income workers, women, people of color,¹ immigrants, individuals with disabilities,² and workers in the

1. See Lindsay F. Wiley & Samuel R. Bagenstos, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, 52 ARIZ. ST. L.J. 1235, 1236 (2020) (noting that low-wage workers who are disproportionately women and people of color suffered the most during the pandemic).

2. See Lisa Schur et al., *COVID-19 and Employment Losses for Workers with Disabilities: An Intersectional Approach* 1, 4–5, 12 (Ctr. for Women & Work, Working Paper No. 2021-2, 2021), <https://perma.cc/4Y83-FHDR>

gig economy. The topic of this Article is the effect of the pandemic on women, specifically, women with children.

Even before the pandemic, there has always been a gender gap between men and women, both with respect to workforce participation rates and with respect to pay. In 2020, women still earned eighty-three cents on the dollar compared to men.³ And before the pandemic, women's participation in the workforce was 60.3 percent, much lower than men's.⁴ Scholars have devoted hundreds of articles to explaining *why* these gaps remain. A couple of explanations I will not be addressing include occupational segregation and discrimination by employers, although we know both of these things significantly contribute to the gender gap.⁵

But if you asked most people what causes both the gap in workforce participation and the pay gap, they would likely tell you it's because women *choose* to devote more time to caregiving.⁶ That "choice," however, is often a constrained one.⁷ It's constrained because of gender norms—in most heterosexual relationships, women are still the ones expected to stay at home or if working, to continue to be the primary caregiver.⁸ And that

(discussing statistics about decreased employment levels for individuals of different demographic groups, including race, sex, disability).

3. Tom Starnier, *How the Pandemic is Affecting Women's Progress to Pay Equity*, HUM. RES. EXEC. (Mar. 24, 2021), <https://perma.cc/ND5S-NLSD>.

4. Simeon Djankov et al., *COVID-19 Widens the Gender Gap in Labor Force Participation*, PETERSON INST. FOR INT'L ECON., (Mar. 8, 2021, 9:15 AM), <https://perma.cc/FBX4-GTDD>.

5. See generally Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990). See Nicole Buonocore Porter, *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*, 8 FIU L. REV. 447, 453–58 (2013) [hereinafter *Blame Game*] (discussing women's "choice" to pursue certain jobs).

6. See, e.g., Gary Siniscalco et al., *The Pay Gap, the Glass Ceiling, and Pay Bias: Moving Forward Fifty Years After the Equal Pay Act*, 29 ABA J. LAB. & EMP. L. 395, 408–09 (2014) (arguing that much of the pay gap is attributed to women's choices regarding caregiving, career interruptions, reduced hours, etc.).

7. *Blame Game*, *supra* note 5, at 450.

8. See generally JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 31 (Harv. Univ. Press 2010). See Tammy Katsabian, *The Telework Virus: How the COVID-19 Pandemic Has Affected Telework and Exposed Its Implications for Privacy and Equality* 30–33 (Sept. 1, 2020) (unpublished manuscript) (<https://perma.cc/LWR7-5ZFL>) (noting that

choice is also constrained because of the difficulty many women have when they do try to balance work and family.⁹ This difficulty in managing work and family plagues both low-income mothers¹⁰ and women in high-status jobs that have demanding time norms, often including significant facetime expectations.¹¹

But even though women's workforce participation was lower than men's before the pandemic, it had been increasing (slowly) over the past several decades. It went from 55.7 percent in 1987 to 60.3 percent right before the pandemic.¹² And then came COVID-19. By January 2021, the US female labor force participation rate had fallen below 56 percent, the lowest since 1987.¹³ This impact is mostly felt by low-income women and women with children, especially young children.¹⁴ As one article stated: "We've lost a generation of progress there."¹⁵

today's stereotypical division of labor began in the nineteenth century); *Id.* at 30 ("In the United States, women spend almost twice as much time as men on child care and household tasks."); Caitlyn Collins et al., *COVID-19 and the Gender Gap in Work Hours*, 28 GENDER WORK & ORG. 101, 102 (2020) ("The care work involved in childrearing has historically fallen to mothers.").

9. See generally *Blame Game*, *supra* note 5. See also Katsabian, *supra* note 8, at 31–32 (arguing that blaming women for choosing care work over the workplace ignores that the gender wage gap makes it financially sensible for the lower-wage earner—often the woman—to sacrifice professional opportunities for the family).

10. Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 788–90 (2010) [hereinafter *Synergistic Solutions*].

11. See *id.* at 781–87 (describing the struggles many women face in trying to manage family and demanding workplace requirements); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005) (discussing what Travis calls the "full-time face-time norm" or employers' default preferences for "full-time positions, unlimited hours, rigid work schedules, an uninterrupted work life, and performance of work at a central location").

12. Djankov et al., *supra* note 4.

13. *Id.*

14. Kim Ira & Richard Feloni, *5 of America's Largest Public Companies Leading the Way for Women in the Workplace*, JUST CAPITAL (Apr. 1, 2021), <https://perma.cc/3LQY-FZJB>.

15. Jessica Dickler, *Equal Pay Day Highlights \$1 Million Salary Shortfall for Some Women Amid Covid*, CNBC (Mar. 24, 2021, 12:36 PM), <https://perma.cc/RMD5-QS6R>. Interestingly, however, the pay gap has actually narrowed by a very small margin because lower-income workers were more likely to lose their jobs during the pandemic.

This Article will explore the effects of the pandemic on working mothers and will sketch some brief ideas of reforms that might have made a difference during the pandemic and could make a difference moving forward. This Article proceeds in two additional parts. Part I presents the evidence that the pandemic has exacerbated the gender gap between men and women and explores the causes of that exacerbation. Part II discusses some possible reforms, both small and large, that might turn things around in the short term, and possibly avoid the future marginalization of working mothers in the future.

I. COVID-19 EXACERBATED GENDER INEQUALITY

This part first discusses the reason women’s workforce participation declined precipitously during the pandemic. It then turns to the fact that, even if women with children did not leave the workforce completely, the pandemic likely contributed to them working fewer hours than before the pandemic, which has significant consequences for their short-term and long-term career prospects.¹⁶

A. Increase in Women Leaving the Workforce

As noted above, women’s workforce participation at the beginning of 2021 was the lowest it had been in over thirty years.¹⁷ A significant cause of this decrease in women’s workforce participation is the fact that millions of low-income women were laid off during the pandemic because their jobs were eliminated.¹⁸ There are significant racial and other intersectional effects of these layoffs.¹⁹ But this Article’s focus is on women who leave “voluntarily” because balancing work and family has become impossible, or at a minimum, very difficult.

16. See Collins et al., *supra* note 8, at 109 (“The trends indicate that the pandemic is exacerbating gender inequality.”).

17. See *supra* note 4 and accompanying text.

18. See Wiley & Bagenstos, *supra* note 1, at 1261–62 (finding that low-wage workers, especially those with young children, suffered the highest unemployment rates); Caitlin Mullen, *More Parents Citing Child Care Issues as They Leave Workforce*, BIZWOMEN (Mar. 1, 2021), <https://perma.cc/4PZH-XG3W> (reporting that layoffs, furloughs, and lack of childcare were the three most frequent reasons people were not working).

19. Schur et al., *supra* note 2, at 1.

1. Women Who Could Not Work from Home

For women whose jobs cannot be performed from home, the early days of the pandemic were extremely difficult because virtually all daycares and schools were closed.²⁰ Without any backup care, many mothers were forced to quit their jobs.²¹ And even once daycares began reopening, the costs of operation skyrocketed, which led to significantly increased daycare fees being passed along to the parents.²² Many lower-income mothers decided that between the increased expense of daycare and the increased risk of exposure working outside of the home, continuing to work was not worth the costs.²³ Also contributing to this problem is that many lower-income workers rely on family for caregiving (usually the children’s grandparents) and those options were foreclosed during the pandemic.²⁴

2. Women Who Could Work from Home

For the “lucky” mothers who were able to work from home, attempting to balance their jobs and their caregiving responsibilities was extremely difficult. For many parents, there were space issues.²⁵ Imagine two parents working from home

20. See Mullen, *supra* note 18 (identifying the problems with the childcare industry during the pandemic).

21. See 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://perma.cc/WBJ2-GRT2> (“19.6% of working-age adults said the reason they were not working was because COVID-19 disrupted their childcare arrangements Of those not working, women ages 25–44 are almost three times as likely as men to not be working due to childcare demands.”).

22. See Mullen, *supra* note 18 (discussing the higher rates for childcare caused by increased operation costs due to COVID-19).

23. See Wiley & Bagenstos, *supra* note 1, at 1276–77 (noting that women held some of the most dangerous jobs, such as home health care and meat processing); Katsabian, *supra* note 8, at 31 (“The group that is most vulnerable [during the pandemic] and that could not shift to telework is non-college-educated female workers with young children . . .”).

24. See Mullen, *supra* note 18 (stating that 56 percent of parents who normally would rely on grandparents for caregiving were not able to during the pandemic).

25. See Katsabian, *supra* note 8, at 28–29 (explaining that a worker needs a “spare room that can function as a quiet working space,” which is not feasible for many families).

along with two school-age children in remote school, all in a two-bedroom apartment in New York City, the average size of which is 700 square feet.²⁶ I know many parents who could only get the quiet needed to work by going into the bathroom.

But even when space was not an issue, time was. Parents of young children who could not attend daycare still needed care. And school-aged children often needed help navigating a brand-new remote school environment.²⁷ Many parents were trying to put in a full day of work in between the early morning hours, naptime, and post-bedtime hours.²⁸ This was obviously very stressful. For many women, this struggle wasn't worth it, and they quit their jobs.²⁹ Obviously, low-income and single mothers might not have had the luxury of quitting.

B. Workplace Consequences of Reduced Hours

Even for the mothers who did not quit their jobs, they still suffered negative workplace consequences, and it remains to be

26. See *Average NYC Apartment SQFT—How Much is Enough?*, PLATINUM PROPS. (Jan. 27, 2018), <https://perma.cc/2FFL-565G> (describing the average size of a New York City apartment); Katsabian, *supra* note 8, at 28–29 (discussing the problems with working from home with insufficient space to have a quiet working area).

27. See Katsabian, *supra* note 8, at 33 (noting that the closure of schools has intensified the duties and responsibilities of women with children).

28. See Bobbi Thomason & Heather Williams, *What Will Work-Life Balance Look Like After the Pandemic?*, HARV. BUS. REV. (Apr. 16, 2020), <https://perma.cc/8HNV-8PJU> (discussing the struggle of trying to juggle caring for a toddler and conference calls by working in the early mornings and after children's bedtimes); Heggeness & Fields, *supra* note 21 (stating that parents who kept working during the pandemic had limited options and were often forced to adjust their work hours to non-business hours to accommodate their childcare obligations).

29. See Amanda Robert, *ABA's Practice Group Puts Focus on Members' Needs, Well-Being*, ABA J. (Feb. 22, 2021, 4:51 PM), <https://perma.cc/YC9S-NH3T> (stating that many lawyers, especially those with small children, were more likely to consider part time work because of the demands of child care and work disruptions); Katsabian, *supra* note 8, at 33–37, 50–51 (explaining that women were more likely to drop out of the labor market during the pandemic); Heggeness & Fields, *supra* note 21 (“As the weeks wore on, the percent of mothers age 25 to 44 not working due to COVID-19 related childcare issues grew by 4.8 percentage points, compared to no increase for similar men.”).

seen the full magnitude of those consequences.³⁰ The cause of these negative workplace consequences is the fact that, during the pandemic, many working mothers were forced to reduce the number of hours they normally work.³¹ In dual-earner families, if both parents were working from home, one would assume that they would equally share in the work of caring for the children, helping with remote school, and all of the other tasks that are required for managing a household.³² But studies indicate that the opposite is true.³³ In fact, during the pandemic, women reduced their hours up to 4.5 times more than men even when both were working from home.³⁴

This reduction in hours will certainly cause workplace consequences in the short term and likely in the long term.³⁵ Depending on the job, these mothers might be disciplined for not

30. See Katsabian, *supra* note 8, at 37 (stating female teleworkers who are also primary caregivers “may face long-term employment penalties as their male colleagues disproportionately benefit from merit-based opportunities and pay raises because their productivity remained high during the pandemic”).

31. See *id.* at 34–35 (“[F]emale workers all around the world have reported that family responsibilities have prevented them from devoting the required time to remote work.”).

32. See Collins et al., *supra* note 8, at 102–03 (noting that men were ignoring household tasks during the pandemic and that mothers reduced their hours more than fathers).

33. See *id.* at 107 (“[F]athers’ predicted work hours did not fall below 40 hours per week, indicating that while the pandemic had a major toll on all aspects of society, most fathers in heterosexual, dual-earner households continued to put in a full work week.”). *But see* Heggeness & Fields, *supra* note 21 (“While one study found that dads increased their childcare role during the pandemic, it also showed moms spent the most time in caring for children.”).

34. See Collins et al., *supra* note 8, at 103 (“[G]ender inequality in parents’ work hours has worsened during the pandemic amongst mothers and fathers with young children, even among those who were able to telecommute.”); Katsabian, *supra* note 8, at 36–37 (referencing a decline in research productivity for female academics compared to their male counterparts because women often have to divide their time at home between care work and research).

35. See Katsabian, *supra* note 8, at 32 (“[T]elework during the pandemic is playing an important role in duplicating in the public sphere of the workplace gender inequalities and biased perceptions of women from the private sphere.”).

meeting their employer's hour and productivity expectations.³⁶ They might not receive a bonus or a raise, increasing the long-term earnings gap between men and women.³⁷ They might be taken off of high-profile projects, or be denied future promotions.³⁸ In other words, many of them will be put on the "mommy track," which, once on, is difficult to get off.³⁹

II. WHAT CAN BE DONE? REFORMS SMALL AND LARGE

Now that the problem has been exposed, I turn to possible solutions. My goal with suggesting these proposals is threefold: (1) to help working mothers now during this current pandemic;⁴⁰ (2) to put protections in place that would help if we experience another pandemic in the future; and most importantly (3) to help all working parents better balance work and family going forward.

36. See Collins et al., *supra* note 8, at 103 (finding that women who worked fewer hours during the pandemic may be penalized by inflexible employers).

37. See *id.* (suggesting that women who worked less during the pandemic may miss out on opportunities and greater compensation compared to men who did not work less); Thomason & Williams, *supra* note 28 (suggesting that workers who need fewer hours because of childcare or home schooling may experience a setback in their future compensation).

38. See Robert, *supra* note 29 (stating that many women lawyers with children and care duties believe they have been passed up for opportunities because of their decreased hours during the pandemic); Thomason & Williams, *supra* note 28 (discussing how working and parenting during the pandemic will likely lead some mothers to suffer in performance reviews).

39. See Thomason & Williams, *supra* note 28 (arguing that when mothers shift to part time arrangements, they never fully recover their professional standing or compensation); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1179–80 (1991) (noting that once women take time off for childrearing, they often return to dead-end jobs).

40. At the time of this writing in May 2021, it appears that we are nearing the end of the pandemic. But the short-term future for working mothers is dependent on whether schools will open full time in the fall, and whether the parents will feel comfortable sending their kids to school. If schools do reopen, hopefully parents' work lives will be able to return to some semblance of normal. But it's possible that there could be future outbreaks, and schools might need to close down periodically, which will be difficult for those working mothers.

A. Partial Solutions

1. Subsidized Daycare/Preschool

There have been many proposals over the years for government-subsidized daycare or (at a minimum) government-subsidized preschool starting at age three.⁴¹ During the pandemic, those suggestions have been renewed or broadened.⁴² Subsidized daycare would certainly help lower-income workers who often have difficulty affording quality childcare. Affordable daycare was especially hard to find during the pandemic.⁴³ And yet, those parents whose jobs cannot be done at home desperately needed affordable daycare if they had any hope of keeping their jobs. If daycares were readily available and affordable (or free), many of the lower-income women who lost their jobs because they couldn't afford the increased costs of daycare might have been able to keep their jobs.

Of course, this suggested reform is not a complete panacea. First, during the early days of the pandemic, the only daycares that were open were reserved for frontline workers.⁴⁴ There were many essential workers (grocery store employees, etc.) who would not have had access to these daycares. Second, because daycare is usually reserved for ages newborn to five, subsidized daycare would not have helped those parents who had school-aged children having to remote learn from their homes. Third, it also would not have helped the parents who were (understandably) too concerned about exposure to COVID-19 to

41. See *Synergistic Solutions*, *supra* note 10, at 840–44 (citing Debbie Kaminer, *The Child Care Crisis and the Work-Family Conflict: Policy Rationale for Federal Legislation*, 28 BERKELEY J. EMP. & LAB. L. 495 (2007)); Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561 (2005).

42. See, e.g., Ruqaiyah Yearby & Seema Mohapatra, *Structural Discrimination In COVID-19 Workplace Protections*, HEALTH AFF. BLOG (May 29, 2020), <https://perma.cc/C5JT-WWMA> (suggesting childcare support for essential workers).

43. Mullen, *supra* note 18.

44. See Julie Kashen, *States Are Stepping Up with Emergency Child Care Solutions for Frontline Essential Personnel in Response to COVID-19*, CENTURY FOUND. (Apr. 30, 2020), <https://perma.cc/A223-MVDW> (noting that only 15 percent of daycares nationwide remained open in the early days of the pandemic, specifically to care for the children of frontline workers).

send their kids to daycare. Fourth, moving forward, subsidized daycare does not help in those situations where kids are sick and cannot attend daycare. And finally, subsidized daycare does not help those parents with school-aged children, who still need care after school and who will sometimes be unable to attend school for a variety of reasons (e.g., sick, routine medical appointments, snow days, etc.).⁴⁵

2. Incentivize Men to Take Leave

As discussed above, even when two parents were working from home during the pandemic, mothers took on a disproportionate share of caregiving and home-schooling.⁴⁶ One obvious response to this fact is that we should change our entrenched gender norms that cause mothers to do more care work than fathers. Some scholars have made this argument, criticizing attempts to get employers to change when men are not taking on an equal share of the care work.⁴⁷ For instance, Professor Michael Selmi has stated: “[W]hy should the public expect employers to change their practices to accommodate the demands of family life when men fail to do so?”⁴⁸ Of course, we cannot directly regulate relationships within the family.⁴⁹

Instead, some have suggested that the way to break down these gender norms is to incentivize men to take leave when their children are born (or adopted).⁵⁰ The most common

45. See *Synergistic Solutions*, *supra* note 10, at 782 (discussing all of the reasons that parents sometimes need to miss work to care for their children).

46. See Collins et al., *supra* note 8 (referencing disparities between parental responsibilities).

47. See generally Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 U. ST. THOMAS L.J. 573 (2007) [hereinafter *The Work-Family Conflict*] (arguing that society should stop blaming employers and should be working towards getting men to take more leave and take on more caregiving responsibilities).

48. *Id.* at 576.

49. See Nicole Buonocore Porter, *Embracing Caregiving and Respecting Choice: An Essay on the Debate Over Changing Gender Norms*, 41 SW. L. REV. 1, 26 (2011) [hereinafter *Embracing Caregiving*] (identifying family dynamics and workplace flexibility as two factors that influence how much emphasis women put on family, but acknowledging that “we can more easily change the latter than the former”); Katsabian, *supra* note 8, at 50 (noting that some causes of gender inequality are private and therefore difficult to change).

50. See, e.g., Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 773–74 (2000) [hereinafter *Family Leave*] (proposing

proposal in this regard is to allocate some family leave after a baby is born that only men can take, on a “use-it-or-lose-it” basis.⁵¹ Making it paid leave would make men even more likely to take it.⁵² The idea is that if men are taking some leave when the baby is born (especially if they are the primary caregiver because the mom goes back to work),⁵³ they will be more comfortable parenting and will have a more involved role in their children’s lives going forward.⁵⁴

I have discussed this idea in prior work.⁵⁵ As I said then, although I think incentivizing men to take more leave is not a bad idea, I think it’s unlikely to make a significant difference, for several reasons.⁵⁶ First, gender norms are simply too entrenched.⁵⁷ Second, even if this proposal were enacted and men took more leave when their babies were born, and even if this caused some men to take on more of the care work throughout their children’s lives, its effect would still be rather minor because it would only affect dual-earner heterosexual families and it would not necessarily change employers’

paternity leave policies). *See generally* Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005) (discussing options for paid family leave).

51. *See* Lester, *supra* note 50, at 80–81 (describing “use-it-or-lose-it” paternal leave); Katsabian, *supra* note 8, at 55 (noting options to incentivize paternal leave); Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL’Y REV. 407, 434 (discussing countries that incentivize men to take leave).

52. *See* Lester, *supra* note 50 (discussing the need to create incentives for men to take paid leave around the birth or adoption of their child).

53. *See* Joan C. Williams & Jessica Lee, *Is It Time to Stop Stopping the Clock?*, CHRON. HIGHER EDUC. (Aug. 9, 2019), <https://perma.cc/95FY-7JHG> (discussing the fact that some male academics who take caregiving leave after their babies are born do not use it to care for those babies (as their wives are often home, too) but rather, use it to publish another article).

54. *See The Work-Family Conflict*, *supra* note 47, at 586 (explaining new gender roles within the home); Katsabian, *supra* note 8, at 56 (noting the importance of fostering better father-child relationships).

55. *See generally Embracing Caregiving*, *supra* note 49 (discussing changing gender norms).

56. *See id.* at 3 (examining the impact of incentivizing men to take paternity leave).

57. *See id.* at 5 (noting how deeply rooted gender norms are in society).

stringent policies regarding hours, attendance, etc.⁵⁸ Third and finally, even if this proposal were adopted, it would be many years before we would see any impact from such a proposal, which means it would not be a helpful solution to our current situation.

3. Prohibit Penalties or Incentives for Number of Hours Worked During the Pandemic

One reform suggestion specific to the pandemic is to prohibit employers from penalizing mothers for working reduced hours during the pandemic and rewarding fathers' proportionately higher hours.⁵⁹ The argument is that it is not fair to punish working moms who were put in a nearly impossible position of trying to care for and homeschool young children while working a full-time job.⁶⁰ Although I am in favor of this proposal, it would not be easy to implement (and even harder to get legislators and employers on board).⁶¹ Of note, however, is the fact that the FMLA has a similar provision for leave under that statute,⁶² so there might be precedent for this type of proposal.

4. Expand FMLA Leave to Include All School and Daycare Closures as Authorized Leave

Another reform related to the one immediately above would be to expand the reach of FMLA to include all school and daycare closures as authorized leave.⁶³ This is most important during a

58. See *id.* at 14–19 (highlighting policies that make meaningful change difficult).

59. See, e.g., Yearby & Mohapatra, *supra* note 42 (suggesting disallowing bonuses based on perfect attendance during the pandemic); Collins et al., *supra* note 8, at 111 (“To avoid long term losses in women’s labor force participation, employers should offer flexibility to keep mothers attached to employment, including allowing employees to work fewer hours.”).

60. See Collins et al., *supra* note 8 (illuminating the difficulties of balancing homeschooling children and full-time employment).

61. See, e.g., Yerby & Mohapatra, *supra* note 42 (advocating for the need to amend and adapt current legislation to changing social and political times).

62. See 29 C.F.R. § 825.220(c) (2021) (prescribing protection for employees who request leave).

63. See, e.g., Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 343 (2014)

pandemic, of course, and I sincerely hope that we won't experience another pandemic any time soon. But this proposal would also help working parents going forward.⁶⁴ Schools close for all kinds of reasons, including for snow days, in-service days, etc. In-home daycares close if the daycare worker is sick. But neither of these situations is currently covered by FMLA.⁶⁵ Most people do not have back-up care if their original arrangement falls through.⁶⁶ We should also allow this leave if nannies or babysitters are sick and therefore cannot report to work to care for the children. This could make a real difference in many working mothers' lives.⁶⁷

Other proposals related to the FMLA includes paid caregiving leave and expanding the coverage of the FMLA.⁶⁸ Paid caregiving leave would have been very helpful to the parents who could not work from home but had no caregiving options for their children during the pandemic.⁶⁹ And one of the most frequent criticisms of the FMLA is that it covers too few employers, only those with fifty or more employees.⁷⁰ Past

[hereinafter *Finding a Fix*] (discussing possible reforms, including expanding the reasons for taking eligible leave); *Synergistic Solutions*, *supra* note 10, at 784–85 (discussing the difficulties some employees have meeting their employers' stringent attendance norms when their kids' school closes or a babysitter does not show up); Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 196 (2004) (discussing proposals to expand the allowable reasons for taking FMLA leave).

64. See *Finding a Fix*, *supra* note 63 (advocating for reforms to the FMLA that would benefit more workers and allow leave for more reasons).

65. See *id.* (expounding upon what absences fall under the FMLA).

66. See *id.* at 363 n.150 (highlighting examples of what can happen when a parent is forced to work when a babysitter cancels).

67. See *id.* (proposing a solution to help working mothers).

68. See *id.* at 329 n.14 (describing FMLA expansions); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 1 (2007) (arguing in favor of FMLA expansion).

69. See Wiley & Bagenstos, *supra* note 1, at 36. (opining that temporary paid leave was provided during the pandemic, but that it exempted many employees—75 percent of whom are women—and the protection has since ended).

70. See *Finding a Fix*, *supra* note 63, at 329 n.14 (describing President Obama's FMLA expansions); Wiley & Bagenstos, *supra* note 1, at 38 (criticizing FMLA because it denies protections to 44 percent of private sector employees).

proposals have suggested covering employers with twenty-five employees or fifteen employees, the latter of which would make the FMLA's coverage consistent with the coverage of Title VII and the ADA.⁷¹

5. Work from Home

One of the biggest debates about the post-pandemic workplace is whether this “great American experiment” with telecommuting will and should continue.⁷² Although many employers allowed some employees to work from home before the pandemic, most employers did not.⁷³ Work-from-home is often coveted by working parents because it saves time on commuting and it allows parents to be home when children are not attending their normal daycare/school arrangement.⁷⁴ Moreover, working from home has been a widely debated and

71. See *Finding a Fix*, *supra* note 63, at 343 (discussing past expansion proposals); Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 157 (1998) (arguing in favor of expanded coverage).

72. See Patrick Dorrian & Robert Iafolla, *Asthmatic Worker Gets Covid-Related Telework Order, For Now*, BLOOMBERG LAW (Sept. 17, 2020, 5:38 PM), <https://perma.cc/LHV8-9938> (quoting Nicole Buonocore Porter as referring to the pandemic experience with work-from-home as the “great American experiment”).

73. See Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL'Y 203, 226 (2021) [hereinafter *Post-Pandemic*] (stating that before COVID-19, only 7 percent of employers allowed their employees to work from home); Maddie Shepherd, *Twenty-Eight Surprising Working From Home Statistics*, FUNDERA, <https://perma.cc/8QPM-DMF4> (last updated Apr. 7, 2020) (stating that before the pandemic, only 3.6 percent of the entire U.S. workforce was working from home at least half the time and only 7 percent of all employers in the United States offered work-from-home flexibility).

74. See Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 295–96 (2003) (discussing the perceived benefits to working mothers of being allowed to work from home); Katsabian, *supra* note 8, at 4–5, (stating that telecommuting has historically had a positive effect on work-life balance and that many mothers prefer it); Maria Cramer & Mihir Zaveri, *What if You Don't Want to Go Back to the Office?*, N.Y. TIMES (May 3, 2020), <https://perma.cc/GY4G-EQCP> (last updated May 31, 2020) (noting that people working from home during the pandemic appreciate the lack of time commuting).

frequently litigated issue in the disability context for decades.⁷⁵ Many people with disabilities need to work from home intermittently or permanently to properly manage their disabilities.⁷⁶ Before the pandemic, however, many employers often refused requests to work from home because they could not imagine how it could work.⁷⁷ How could employees be supervised, meet with clients, interact and brainstorm with colleagues if they were working from home? But as the pandemic taught us, the unimaginable is not only imaginable but can be quite successful.⁷⁸ In fact, some employers have already indicated a change to their work-from-home policies going forward to allow some or all of their employees the option to work from home.⁷⁹ This section will explore the law surrounding working from home both before the pandemic and what we might expect will happen with telecommuting after the pandemic.⁸⁰ Although parents do not have a legal right to ask for work-from-home accommodations, individuals with disabilities do have that right under the Americans with

75. See, e.g., Schur et al., *supra* note 2, at 15 (discussing the importance of providing telework for many people with disabilities); Lisa Schur & Douglas L. Kruse, *Coronavirus Could Revolutionize Work Opportunities for People with Disabilities*, CONVERSATION (May 5, 2020, 8:18 AM), <https://perma.cc/YRQ4-M5TN> (stating that workers with disabilities are most likely to benefit from working from home during the pandemic).

76. See Schur & Kruse, *supra* note 75 (noting mobility impairments that make it difficult for individuals to get to work and impairments that require frequent breaks).

77. See *infra* Part II.A.5.c. (discussing the evolution of work-from-home requests).

78. See Schur & Kruse, *supra* note 75 (calling the pandemic a “massive test” of employers’ ability and willingness to allow work-from-home arrangements); Schur et al., *supra* note 2 (stating that employers’ willingness to accommodate work-from-home arrangements during the pandemic has frustrated some people with disabilities who have been trying to get this for years).

79. See Schur et al., *supra* note 2, at 15 (noting that some employers might be willing to continue work-from-home arrangements long term); *Post-Pandemic*, *supra* note 73, at 226–27 (indicating a possible change in post-COVID-19 work life); Schur & Kruse, *supra* note 75 (stating that the pandemic has allowed employers to see the possibilities of working from home).

80. See *infra* Part II.A.5.c. (discussing telecommunicating and working from home before and after COVID-19).

Disabilities Act (ADA).⁸¹ Because there are many mothers who also have disabilities,⁸² this section will focus on the law under the ADA regarding work-from-home as a reasonable accommodation for employees with disabilities.

a. Work from Home as Reasonable Accommodation Before COVID-19

The ADA requires employers to provide individuals with disabilities reasonable accommodations if those accommodations are needed to allow employees to perform the essential functions of their job.⁸³ One accommodation that some individuals with disabilities need is to be able to work from home, either temporarily or permanently.⁸⁴ Some disabilities that might require a work-from-home accommodation include bowel or bladder issues (where constant and close access to a bathroom is necessary),⁸⁵ obsessive compulsive disorder (or possibly other mental illnesses),⁸⁶ complications from pregnancy that require the employee to be on bed rest,⁸⁷ pressure ulcers as

81. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC, <https://perma.cc/KV57-6F8M> (last updated June 28, 2021) (explaining that employers are not required to provide telework as an accommodation for employees without a disability).

82. See generally Nicole Buonocore Porter, *Mothers with Disabilities*, 33 BERKELEY J. GENDER L. & JUST. 75 (2018) (discussing the difficult intersectionality of mothers with disabilities). See Schur et al., *supra* note 2, at 4 (stating that during the pandemic women who bear primary responsibility for childcare and who also have a disability will face extra challenges).

83. See 42 U.S.C. § 12112(b)(5)(A) (defining discrimination as not providing accommodations that would allow employees with disabilities to perform the essential functions of their job).

84. See *Work at Home/Telework as a Reasonable Accommodation*, EEOC (Feb. 3, 2003), <https://perma.cc/9UXW-2UZB> (discussing working at home or telecommuting as a reasonable accommodation under the ADA).

85. See *EEOC v. Ford Motor Co.*, 782 F.3d 753, 757 (6th Cir. 2015) (en banc) (involving a plaintiff with irritable bowel syndrome who requested to work from home as a reasonable accommodation).

86. See *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136–37 (9th Cir. 2001) (holding that there is an issue of fact regarding whether working from home would have been a viable accommodation for the plaintiff who had obsessive compulsive disorder).

87. See *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 600–01 (6th Cir. 2018) (finding enough evidence indicating that essential job functions could be performed while plaintiff was on bed rest).

the result of paraplegia and sitting in a wheelchair,⁸⁸ and flare-ups of diseases like rheumatoid arthritis or multiple sclerosis.⁸⁹

For decades, courts have been split on whether a work-from-home arrangement is required as a reasonable accommodation.⁹⁰ Obviously, working from home is not possible for millions of jobs, including most jobs in the manufacturing, hospitality, service, and healthcare sectors. It is impossible to manufacture a car, clean a hotel room, cut someone's hair, or take care of patients in a hospital from home.

But even when it is theoretically possible to do the job from home, the general rule is that working from home is not a reasonable accommodation in most cases.⁹¹ The Seventh Circuit was the first court to declare a "majority rule" in *Vande Zande v. State of Wisconsin Department of Administration*,⁹² stating that employers are generally not required to accommodate disabled employees by allowing them to work from home.⁹³ The plaintiff in this case requested to work from home during an

88. See *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (involving a paraplegic plaintiff with pressure ulcers as a result of wheelchair use that needed to work from home for a brief period).

89. See Katherine Macfarlane, *Disability Without Documentation*, FORDHAM L. REV. (forthcoming 2021) (<https://perma.cc/NMC2-MPU5>) (noting there are some disabilities, like asthma, that would not have necessitated an accommodation before the pandemic, but because they increase the risk of severe illness from COVID-19, employees with asthma might have needed a work-from-home accommodation during the pandemic).

90. See *infra* notes 91–110 and accompanying text.

91. See, e.g., *Credeur v. Louisiana*, 860 F.3d 785 (5th Cir. 2017) (holding a litigation attorney was not able to perform essential job functions at home); *Ford Motor Co.*, 782 F.3d at 762–63 (concluding regular on-site attendance was essential for plaintiff's job); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (holding that a nurse could not be exempt from regular attendance); *Mulloy v. Acushnet Co.*, 460 F.3d 141, 153–54 (1st Cir. 2006) (holding a manufacturing machine program designer could not reasonably work from home to accommodate work-related asthma); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004) (holding that working from home was not a reasonable accommodation for a mail carrier suffering from post-traumatic stress disorder); *Vande Zande*, 44 F.3d at 544 (noting an employer is not required to allow a disabled worker to work at home if it would impact their productivity); *Tyndall v. Nat'l Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994) (noting it's an "unusual case where an employee can effectively perform all work-related duties from home").

92. 44 F.3d 538 (7th Cir. 1995).

93. See *id.* at 544.

eight-week period where pressure ulcers resulting from her paraplegia made it impossible for her to work in person.⁹⁴ The employer refused and in the subsequent lawsuit, the court held that the employer was not required to grant this accommodation because the plaintiff's job involved team work and required supervision.⁹⁵ The court stated that the majority rule is that employers are not required to allow employees with disabilities to work from home and that exceptions to this rule will be rare.⁹⁶ Interestingly, however, the court noted that the majority rule will "no doubt change as communications technology advances."⁹⁷

In 2015, twenty years after *Vande Zande* was decided, the Sixth Circuit, sitting en banc in *EEOC v. Ford Motor Company*,⁹⁸ upheld the general rule that working from home is not a reasonable accommodation for most jobs.⁹⁹ In the *Ford* case, the employee suffered from irritable bowel syndrome and requested to work from home up to four days per week.¹⁰⁰ Because the employee's job required frequent interaction and teamwork, the court deferred to the employer's judgment that, even though the interaction could take place by phone or email, it is more effectively performed face to face.¹⁰¹ Instead of scrutinizing the employer's assertion that in-person presence is required, the court gave considerable deference to the employer, relying on the general rule in other circuits and "common sense."¹⁰²

Not all courts agree. Over the years, some have been more willing to engage in a more fact-sensitive inquiry.¹⁰³ For

94. *Id.*

95. *Id.*

96. *See id.* at 544–45.

97. *Id.* at 544.

98. 782 F.3d 753 (6th Cir. 2015).

99. *See id.* at 762–63.

100. *Id.*

101. *See id.* (holding that on-site participation was necessary for job performance).

102. *See id.* at 761–62.

103. *See, e.g.,* *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 595 (6th Cir. 2018) (emphasizing the importance of evidence on reasonable accommodation trials); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001) (denying summary judgment); *Langon v. Dep't of Health & Hum. Servs.*, 959 F.2d 1053, 1060 (D.C. Cir. 1992) (holding that there was

instance, in *Mosby-Meachem v. Memphis Light, Gas & Water Division*,¹⁰⁴ three years after the *Ford*¹⁰⁵ decision, the Sixth Circuit (the same court that decided *Ford*) affirmed a jury verdict in favor of the plaintiff, holding that the employer violated the ADA by refusing to allow the plaintiff to work from home after she suffered complications from her pregnancy and her doctor put her on bedrest.¹⁰⁶ The plaintiff was an in-house attorney, and even though there was some evidence that regular, in-person attendance was essential (including the employer's job description that mentioned being present for court hearings, depositions, etc.), the court refused to just blindly defer to the employer's judgment and job description.¹⁰⁷ Instead, it noted that the plaintiff testified that she had never been required to perform some of the in-person functions that are listed on the job description and that the job description itself was based on a twenty-year-old survey that had not been updated in light of technology changes.¹⁰⁸ The court also considered testimony by some of the plaintiff's colleagues that it would be possible for the plaintiff to work from home.¹⁰⁹ Accordingly, the court held that a reasonable jury could find that the plaintiff was qualified to do her job even while working at home.¹¹⁰

b. Work from Home During the Pandemic

When COVID-19 forced the country to shut down, nearly two-thirds of American workers were working from home.¹¹¹ Many studies estimate that globally, 88 percent of all office workers were working from home and that this was a new

a genuine factual dispute as to whether the plaintiff's position could be performed at home).

104. 883 F.3d 595 (6th Cir. 2018).

105. 782 F.3d 753 (6th Cir. 2015).

106. *Id.* at 603.

107. *See id.*

108. *See id.*

109. *See id.*

110. *See id.* at 604.

111. Megan Brenan, *U.S. Workers Discovering Affinity for Remote Work*, GALLUP (Apr. 3, 2020), <https://perma.cc/8XWU-MF57>.

experience for 57 percent of them.¹¹² Employees continued to perform their job duties from home, relying on existing technology such as Zoom or other online platforms that allow video conferencing.¹¹³ These platforms have made both teamwork and remote supervision possible.¹¹⁴ Even things like court hearings and trials, that we never imagined could be performed at home were (and to some extent, still are) being successfully performed from home.¹¹⁵ As Professor Joan Williams has stated, employers and courts have always suffered from a lack of imagination, but that the experience with working from home during the pandemic has taught us that the “unthinkable has become not just thinkable but mundane.”¹¹⁶

More importantly, there is plenty of evidence that work-from-home arrangements have been very successful.¹¹⁷ Many employees have been more productive working from home.¹¹⁸ Some employees have increased their workdays by three or more hours per day and have suffered less absenteeism.¹¹⁹ Other benefits to employers from allowing work-from-home arrangements include decreased attrition and increased loyalty.¹²⁰ One study indicated that 80 percent of respondents would be more loyal to their employers if they had flexible work options.¹²¹ Employees who are able to telecommute also report higher morale.¹²² In one survey, half of all workers

112. See *Post-Pandemic*, *supra* note 73, at 217–18 (describing the changes in telecommuting and remote working during the pandemic).

113. *Id.*

114. See *Post-Pandemic*, *supra* note 73, at 220–21 (describing the ways in which platforms such as Zoom and Slack have aided in remote working).

115. Stephanie Lowe, *How Telecommuting During the COVID-19 Pandemic Impacts the Disability Interactive Process*, CAL. PUB. AGENCY LAB. & EMP. BLOG (June 18, 2020), <https://perma.cc/EF9P-9DP7>.

116. Joan C. Williams, *The Pandemic Has Exposed the Fallacy of the “Ideal Worker,”* HARV. BUS. REV. (May 11, 2020), <https://perma.cc/V4XH-S3EK>.

117. See Shepherd, *supra* note 73 (noting the ways in which productivity has increased when working from home).

118. See *id.* (stating that 86 percent of all employees say they are more productive when they work from home).

119. See *Post-Pandemic*, *supra* note 73, at 220.

120. See Shepherd, *supra* note 73 (noting that employees appreciate flexible work hours and in return feel more loyal to their employers).

121. *Id.*

122. *Id.*

who were working from home during the pandemic would like for it to continue after the pandemic is over.¹²³ Of course, as discussed earlier, this is not always (or even often) true for workers who are simultaneously caring for young children.¹²⁴

c. Work from Home After the Pandemic

The question remains: where do we go from here, after the pandemic is over? Will employers continue to insist that in-person attendance is an essential function of the job, denying work-from-home accommodation requests by disabled employees and caregivers? Or will employers see the benefit and value to working from home and start being more lenient in allowing these accommodation requests?¹²⁵ And how will courts respond if employers continue to insist that working from home is not feasible despite the significant evidence that it is? Finally, how do the answers to these questions affect working parents (with or without disabilities)?

There is some evidence that employees with disabilities may be able to use their telework experience during the pandemic to demonstrate that they are capable of performing their jobs from home, and therefore, they should be granted this accommodation going forward.¹²⁶ There is also some evidence that this experience will change how courts evaluate these requests.¹²⁷ Some scholars have argued that courts *should*

123. See Katsabian, *supra* note 8, at 10.

124. See *Post-Pandemic*, *supra* note 73, at 228–29 (noting that working from home during the pandemic was very difficult for mothers because their children were home and needed care and help with home schooling).

125. See Schur & Kruse, *supra* note 75 (“So, after the pandemic subsides, will employers return to a pre-crisis way of thinking about working from home? Or will more of them recognize that working from home can benefit both employees and the company—and that it’s a reasonable accommodation to make for employees with disabilities?”).

126. See Alexander Bogdan, *Back to Business After COVID-19: Addressing Disability Accommodation Requests in New York*, HOSP. & LAB. & EMP. ALERT (Apr. 2020), <https://perma.cc/H39B-3BLR>.

127. Robert Nichols & Caroline Melo, *Pandemic Telework May Undermine Employer ADA Defense*, LAW360 (Apr. 6, 2020, 4:55 PM), <https://perma.cc/KR99-XPVW>. See generally *Post-Pandemic*, *supra* note 73, at 218 (noting that the experience with working from home during the pandemic should give us the opportunity to revisit the general rule that working from home is not a reasonable accommodation).

acknowledge this new reality after the pandemic.¹²⁸ One study determined that 37 percent of jobs are compatible with working from home and these jobs employ 40 percent of all workers in the U.S.¹²⁹

Perhaps more importantly, there is significant evidence that employers might voluntarily extend these work-from-home arrangements, having seen the benefits first-hand.¹³⁰ For instance, in one survey, managers reported an increase in productivity from employees who were working from home during the pandemic.¹³¹ And in another survey, 73 percent of executives reported that work-from-home arrangements were a success and more than half of them plan to offer a work-from-home option after the pandemic.¹³²

Not surprisingly, there are still skeptics—some employers and managers do not think that the work-from-home experiment should continue.¹³³ While technology enables people to communicate and meet virtually, some people argue that it is not as effective as in-person interaction.¹³⁴ Despite the advances of online platforms, some of the most commonly uttered phrases during the pandemic have likely included: “can you hear me now?” “I can’t hear you,” and “you’re frozen.”¹³⁵

128. See *Post-Pandemic*, *supra* note 73, at 218 (calling the work-from-home arrangement during the pandemic “both an opportunity and an obligation”).

129. See *Post-Pandemic*, *supra* note 73, at 224–25 (noting that these percentages derive from the U.S. Department of Labor’s online assessment method, O*NET).

130. See, e.g., Katsabian, *supra* note 8, at 11 (stating that some companies are likely to embrace work-from-home in the future, especially big tech companies, such as Twitter and Facebook); Jason Aten, *Google’s 3-Word Plan for Returning to Work is the Best I’ve Ever Seen*, INC., (May, 7, 2021), <https://perma.cc/S5ZG-SG2G> (reporting Google’s announcement that its employees can choose to work remotely forever as long as their role allows it).

131. *Productivity Gains from Teleworking in the Post COVID-19 Era: How Can Public Policies Make It Happen?*, OECD (Sept. 7, 2020), <https://perma.cc/5QU4-UJQ4> [hereinafter *Productivity Gains*].

132. *Statistics on Remote Workers That Will Surprise You (2021)*, APOLLO TECH. (Jan. 4, 2021), <https://perma.cc/CTC8-G2JU>.

133. See *Productivity Gains*, *supra* note 131 (describing the ways remote working hinders communication and sharing of knowledge).

134. *Id.*

135. See *Basic Zoom Tips, Tricks, and Advice*, NAT’L CT. REPS. ASS’N. (Sept. 4, 2020), <https://perma.cc/G7PJ-U8N8> (describing common Zoom errors, tips, and associated phrases used during the pandemic).

Furthermore, one factor that might negatively affect perceptions about working from home is that most workers with caregiving responsibilities were *less* productive during the pandemic, as previously discussed.¹³⁶ Given that this problem should be solved as soon as schools and daycares are fully open, I hope that the skeptics can put the extenuating circumstances of the pandemic into context, recognizing that the decreased productivity of many working mothers was a problem that will soon be over (hopefully!).

For employers that remain skeptical of work-from-home arrangements, it is not clear how the effectiveness of telecommuting during the pandemic will affect their decisions regarding work-from-home requests after the pandemic.¹³⁷ In 2020, the EEOC issued guidance on this work-from-home debate, stating that if a disabled employee makes a request to continue working from home after the workplace reopens, the employer does not necessarily have to grant the accommodation.¹³⁸ The EEOC explained that where an employer allows employees to work from home because of the pandemic “and is choosing to excuse an employee from performing one or more essential functions,” the employer can deny a request to continue working from home if the employee would remain unable to perform all essential functions of the job once the workplace has reopened.¹³⁹ However, the EEOC’s guidance cautions that if an employee renews a work-from-home request that was denied prior to the pandemic due to the employer’s concerns that the employee would not be able to perform their job functions from home, “the temporary telework experience could be relevant to considering the renewed request.”¹⁴⁰ This is because the work-from-home experience could provide evidence that the employee was able to perform all essential functions while working remotely, and the

136. See *supra* Part I.B.

137. See Nichols & Melo, *supra* note 127 (explaining the various decisions that employers will need to make regarding work-from-home policies following the pandemic).

138. See EEOC *supra* note 81.

139. *Id.*

140. *Id.*

employer should consider this new information when deciding whether to grant or deny the request.¹⁴¹

The bottom line: it is unclear whether employers will voluntarily continue to offer work-from-home arrangements post-pandemic.¹⁴² If they refuse, courts should use the experience during the pandemic to reconsider their “general rule” that working from home is not a reasonable accommodation.

But even though there are significant benefits of being allowed to work from home for both employees with disabilities and those with caregiving responsibilities, it would not be prudent to *force* all employees to work from home.¹⁴³ Working from home is not ideal for all employees with disabilities, and it would not be ideal for all parents.¹⁴⁴ For instance, parents who live in very small spaces and those parents who have in-home babysitters and nannies would likely not welcome a permanent work-from-home mandate.¹⁴⁵ For these reasons, my conclusion on the work-from-home debate is that now that we have substantial evidence that working from home can be quite successful, we should increase the opportunities for employees to work from home, but we should not mandate it.¹⁴⁶

141. *Id.*

142. *Id.*

143. Jack Kelly, *A New FlexJobs Study Shows How Challenging It Was for Working Parents During the Pandemic*, FORBES (May 3, 2021, 4:43 PM), <https://perma.cc/7AZQ-VFZ5>.

144. It is not ideal for all non-parents either. Many workers do not have a quiet dedicated space in their homes to devote to working from home. Those of us in higher education saw firsthand the serious toll the pandemic took on some of our students that had to attend class online with chaotic, non-private living spaces.

145. *See* Kelly, *supra* note 143 (describing the challenges that parents faced during the pandemic).

146. *See also* Brenan, *supra* note 111 (noting that even though many workers would prefer to continue working remotely, 41 percent of workers surveyed would prefer to return to their workplace).

*B. Comprehensive Solution—Individual Accommodation
Mandate*

What should be obvious from the prior discussion of several possible reforms is that there is no one-size-fits-all solution.¹⁴⁷ Different parents have different workplace needs, depending on many different variables.¹⁴⁸ Some working moms need daycare assistance.¹⁴⁹ Some need more flexibility with their hours.¹⁵⁰ Some working moms can afford nannies but were uncomfortable using nannies during much of the pandemic.¹⁵¹ In this situation, these mothers needed either reduced hours or a leave of absence.¹⁵² And the working mothers who needed to reduce their hours because of their caregiving responsibilities need to not be sidelined forever because of it.¹⁵³

Because there is not a one-size-fits-all solution to the work/family balance problem that caused the departure of millions of women from the workforce and the sidelining of the careers of many millions more, I propose here (as I have before)¹⁵⁴ an individual accommodation mandate. This would allow working caregivers to request an individual accommodation that would help with their unique situation.

In prior work, I proposed accommodating caregiving in much the same way that we accommodate individuals with

147. See generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (Oxford Univ. Press 2000). See Katsabian, *supra* note 8, at 50 (noting that fixing the inequality between men and women is difficult because there are many causes).

148. See generally Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099 (2014) [hereinafter *Mutual Marginalization*].

149. *Id.* at 1101.

150. *Id.* at 1120.

151. Katherine Harmon Courage, *Day Care, Grandparent, Pod or Nanny? How to Manage the Risks of Pandemic Child Care*, NPR (Aug. 21, 2020, 5:00 AM), <https://perma.cc/KBN8-UK3J>.

152. See *Mutual Marginalization*, *supra* note 148, at 1138 (“Some caregivers need variable working hours on a regular basis. Some will miss work occasionally for reasons related to caregiving and will need exceptions to strict attendance policies. Some caregivers might need to work reduced hours. Some cannot work overtime. Some will be unable to travel.”).

153. *Id.*

154. See generally Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85 (2016) [hereinafter *Accommodating Everyone*].

disabilities.¹⁵⁵ I recognized that providing special accommodations for individuals with disabilities has caused those workers to be stigmatized and experience resentment from their coworkers.¹⁵⁶ I call this “special-treatment stigma.”¹⁵⁷ To ameliorate this stigma, I justified my proposal by relying on the communitarian theory.¹⁵⁸

Although a full exploration of this theory is beyond the scope of this Article, the basic idea is that communitarians believe that we should think about what benefits our communities rather than an over-fixation on individual rights.¹⁵⁹ One such community is our workplaces.¹⁶⁰ As I previously explained, accommodating individuals with disabilities benefits employers, coworkers, and society.¹⁶¹ Similarly, accommodating caregivers benefits non-caregivers.¹⁶² First, almost everyone will be called upon to care for someone during their working lives, so almost everyone will someday benefit from workplaces that allow flexibility for caregiving obligations.¹⁶³ Second, everyone benefits when parents are given the tools to successfully balance work and family because the consequences of not properly caring for children harms everyone.¹⁶⁴ Moreover, there is ample evidence that employers

155. See *Mutual Marginalization*, *supra* note 148, at 1139–40 (referencing an article focused on the relationship between ADA accommodations and caregiver accommodations).

156. *Id.*

157. *Id.*

158. *Id.* at 1140–51.

159. *Id.* at 1140.

160. *Id.* at 1141–43.

161. *Id.* at 1143–47.

162. *Id.* at 1148–51.

163. *Id.* Even though not everyone has children, many people might find themselves having to care for a sick or disabled spouse, partner, parents, or other adult family member. And even though women still do the vast majority of the caregiving, men might be called upon to be the primary caregiver for their spouses or their own parents. Interestingly, the FMLA only allows leave to care for one’s spouse, child, or parent, but not parent-in-law. See 29 U.S.C. § 2612(a)(1)(A)–(D). Accordingly, to the extent a married man might have tried to place the burden of caring for one of his aging or disabled parents on his spouse, if that spouse is also working, she would not be allowed to take leave to care for her parent-in-law. This might then force the man to take the leave.

164. See *Mutual Marginalization*, *supra* note 148, at 1149–50 (“As communitarian theory teaches us, parenting and other caregiving is not

benefit from accommodating caregiving through increased loyalty and productivity, and decreased costs of attrition.¹⁶⁵ Accordingly, a focus on our workplace community demonstrates that accommodating caregiving benefits everyone.

If the law had required an accommodation mandate for caregiving during the pandemic, I imagine that the most common requests would likely have been: working from home (if not already mandated), flexible schedules, reduced hours without penalty (although a reduction of pay is fair), and job-protected leaves of absence during the pandemic. Going forward, working mothers would benefit from many of these same accommodations.

The bottom line is this: mothers (and fathers) should not be penalized for doing what is necessary to take good care of their kids. There are so many stories of mothers having to make the impossible choice between caring for their children and keeping their jobs.¹⁶⁶ As noted above, society benefits when children are cared for properly. And employers benefit in the form of increased productivity and loyalty and decreased attrition costs when working parents are properly supported. I am not suggesting that working parents should be able to demand whatever workplace accommodations they want. But I am suggesting that if an accommodation is needed so that a parent can attend to an *unavoidable* caregiving obligation, that accommodation should be granted absent an undue hardship to the employer.¹⁶⁷

simply a choice—it is a responsibility—and caregivers' fulfillment of that responsibility benefits everyone.”).

165. See WILLIAMS, *supra* note 147, at 105–08 (explaining how policy changes and increased flexibility can increase an individual's loyalty and faith in their company).

166. See *Mutual Marginalization*, *supra* note 148, at 1106 (discussing real-life stories of a woman being terminated because her child was in a car accident and had to be hospitalized and a woman who left her children alone because the babysitter was late and her employer had threatened termination if she did not show up to work on time; the children died in a fire).

167. See *Mutual Marginalization*, *supra* note 148, at 1151–52 (explaining the logistics of accommodating caregiving and the impact that would have on employers); *Accommodating Everyone*, *supra* note 154, at 115–18.

CONCLUSION

Working while mothering is never easy. But the global pandemic made this balancing act so much harder. COVID-19 has cost so many people so much, and the costs have disproportionately fallen on people of color, low-income workers, and individuals with disabilities. To some extent, a mother's ability to *choose* to quit or reduce her hours because of the difficulty of working while mothering is a luxury that many people did not have. But still, not all mothers got to choose (many were laid off or terminated) and many of the mothers who did make this choice had no practical alternative. More importantly, women's lowest workforce participation level in thirty years harms everyone. If we had some of the protections in place that this Article has discussed, some of the workplace departures and career sidelining could have been avoided. Looking ahead, I hope the lessons learned from this pandemic can help us right this wrong.

Just as COVID-19 has possibly changed working from home forever, we can use this moment as an opportunity to force employers to reconsider their entrenched norms regarding hours, schedules, and shifts. When forced to consider alternatives to their default norms, employers might realize that these norms are not inevitable and necessary but rather, can often easily be modified in reasonable ways.¹⁶⁸ The goal is to get employers to reimagine the workplace. What does reimagining the workplace look like? For me, reimagining the workplace involves a broad accommodation mandate that would accommodate all of our lives and all of our different bodies.¹⁶⁹

168. See, e.g., Thomason & Williams, *supra* note 28 ("Now is a time to step back and reexamine which traditional ways of working exist because of convention, not necessity.").

169. See *generally Accommodating Everyone*, *supra* note 154. I am also in the process of writing a book that will elaborate on this reimagined workplace. The book is tentatively titled "Reimagining the Workplace to Accommodate Our Lives and Our Bodies." Here is another perspective on what reimagining the workplace might look like:

Executives and managers have the opportunity to choose quality work over quantity of work. They can value the creative ideas that emerge after a midday hike or meditation session, rather than putting in face time at the office. They can stop rewarding the faster response over the better response, or the longer workday over a more productive workday. They can rethink highly competitive

career tracks where you make it or wash out—such as giving tenure-track scholars and partner-track lawyers the choice of a longer clock before their evaluation.

Thomason & Williams, *supra* note 28.