Requesting Balance: Promoting Flexible Work Arrangements with Procedural Right-to-Request Statutes

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Introduction

Today's workforce increasingly prioritizes work-life balance.¹ Employers and their human resources departments are noticing.² However, many employers view flexible working arrangements³ (FWAs) with trepidation, thinking the practice might harm workplace dynamics and employee productivity.⁴ Even those employers that offer some flexibility typically afford the most generous arrangements to highly skilled or professional employees, rather than lower-wage workers.⁵ Employees who take advantage of flexible options are often stigmatized.⁶ Such problems preclude employees from experiencing lifestyles

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³ "Workplace flexibility is a Universal Strategy that can meet the needs of employers and their employees, which includes when, where, and how work is done." Workplace Flexibility Toolkit, U.S. DEPT. OF LABOR, https://www.dol.gov/odep/workplaceflexibility (last visited Nov. 19, 2017). The concept is also sometimes referred to as “alternative work arrangements,” “teleworking,” “flextime,” or “telecommuting.”

⁴ Some experts say that flexible working arrangements (FWAs) are not more widespread because they require a leap of faith that productivity will not be impaired. See Tara Siegel Bernard, For Workers, Less Flexible Companies, N.Y. TIMES (May 19, 2014), http://www.nytimes.com/2014/05/20/business/for-workers-less-flexible-companies.html.

⁵ Id.; see also Robert C. Bird, Precarious Work: The Need for Flextime Employment Rights and Proposals for Reform, 37 BERKELEY J. EMP. & LAB. L. 1, 4 (2016) (Low-wage workers would benefit most from FWAs because they “are disproportionately faced with the broader demographic challenges of the rise in single parenting, two working spouses, and extended care for elderly parents.”) [hereinafter Bird, Precarious Work].

⁶ Siegel Bernard, supra note 4.
with desired time for family care and proper rest and rob employers of productive and loyal workers.  

Part I of this Note explains how employees and employers benefit from FWAs. Part II offers several examples of “right-to-request” statutes and ordinances already in place in the United States and abroad. Part III describes a model right-to-request law designed to both (1) ensure employer good faith review of employees’ FWA requests and (2) avoid imposing an undue burden on employers. Part IV considers some obstacles to widespread adoption of FWA statutes.

I. The Benefits of FWAs for Employers and Employees

Employers and employees both benefit from FWAs. Flexibility allows employees to care for children and elderly parents and get proper rest without sacrificing income and risking their livelihoods.  

In return, employers retain happy employees who are more productive and positive about their workplaces.

A. The Impact of FWAs on Employees

The advantages of FWAs for employees are obvious. FWAs can help employees achieve work-life balance that limits stress and permits family care. Flexible working hours and arrival times have important health implications as well. Inflexible schedules interfere with medical care. Lack of balance can weaken immune systems, exacerbate medical conditions, and put employees at risk of substance abuse. FWAs, in turn, allow employees to remain productive and employed while still engaging in meaningful aspects of family life, such as transporting children to and from school.

Thus far, FWAs have most often been provided to white-collar office workers, largely because computers and mobile phones allow


10. Bird, Precarious Work, supra note 5, at 4 (“Inflexible work places a burden on a number of employees, rendering them unable to achieve a work-life balance, inhibiting appropriate child care, and impeding on the preferred use of personal time for medical visits, elder care, or other familial obligations.”).

11. Id. at 5.


14. Siegel Bernard, supra note 4 (“Highly skilled workers—and certain professional, technology and science occupations—are more likely to be offered the most flexible options, studies have found.”).
employees to accomplish work tasks outside the office. The legal profession has taken notice, and law firms are increasingly affording attorneys flexible work options. Electronic communication methods for white-collar workers facilitate connections to clients and the office. Open communication is critical to the success of such arrangements.

The growing prevalence of FWAs among professional employees may mask the lack of flexibility for low-wage workers. Arguably, the most glaring problem for low-wage employees is unpredictable schedules. Unpredictable work schedules negatively affect these employees’ ability to plan for childcare and recover from illness without risking much-needed income. While e-mail and cell phone technology permits white-collar employees to vary start times and work remotely, these technologies increase the ability of employers to cancel shifts and impose overtime on low-wage workers.

FWAs can also improve workplace gender equity. FWAs allow family caregivers (who even today tend to be women) to work during hours that better fit their personal needs. Potential employees with hectic family demands routinely reduce hours or take part-time jobs, and this practice results in lower earnings and job instability.

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16. Ed Finkel, Law Firms Gradually Embrace Telecommuting, 34 LEGAL MGMT. 1, 3 (2015) (“Legal [professionals] working remotely among the [U.S. News & World Report] Best Law Firms included 35 percent of lawyers (and 39 percent of female lawyers); 32 percent of associates (50 percent of female associates); 37 percent of counsel (47 percent of female counsel); 35 percent of equity partners (24 percent of female equity partners); and 34 percent of non-equity partners (39 percent of female non-equity partners.”). See generally Keith Cunningham, Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family, 53 Stan. L. Rev. 967 (2001) (traditional law firm structure failed to provide sufficient flexibility).
17. But see Mary C. Noonan & Jennifer L. Glass, The Hard Truth About Telecommuting, 135 MONTHLY LAB. REV. 38, 45 (2012) (“[T]he ability of employees to work at home may actually allow employers to raise expectations for work availability during evenings and weekends and foster longer workdays and workweeks.”).
19. Siegel Bernard, supra note 4 (for low-wage workers, the burden of work flexibility often falls on employees who are regularly subject to changing hours and schedules). Hourly employees and those in health care, retail, hospitality, restaurant and tourism, and manufacturing are examples of workers who are commonly low-wage earners. See Liz Watson & Jennifer E. Swanberg, Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation, 3 AM. U. LAB. & EMP. L.F. 380, 384 (2013).
20. See Bird, Precarious Work, supra note 5, at 5 (“When [low-wage] jobs do vary, they vary with unpredictability, not flexibility.”).
21. Id.; see also Robin R. Runge, Redefining Leave from Work, 19 GEO. J. ON POVERTY L. & POL’Y 445, 450 (2012) (“Low-wage workers have also decided to quit jobs shortly after starting them because of scheduling and family conflicts.”).
23. Id. (inflexible work “disproportionately impacts women”).
a practice that disproportionately affects women. Normalizing FWAs would reduce the stigma (which again, disproportionately affects women) of visibly juggling career and family life. FWAs avoid forcing employees to choose between work and family and empower men to take a more active family role, furthering gender equity.

In sum, employees have much to gain from FWAs, most obviously improved work-life balance and accommodation of family needs. However, FWAs are not just for white-collar workers who can log in to offices remotely. FWAs also enhance balance and job longevity for low-wage workers and improve gender equity.

B. The Impact of FWAs on Employers

Compared to benefits for employees, employers' gains from FWAs are arguably subtler. Employers that offer FWAs experience improved employee recruiting and retention. One study found that a third of employees considered workplace flexibility the most important factor when choosing an employer. Another study reported that ninety-one percent of human resources professionals agreed that FWAs "positively influence employee engagement, job satisfaction, and retention." Employers can attract top talent by marketing their flexible worktimes and workplaces. Other studies identified a correlation between flexibility and job satisfaction.

Perhaps most important for employers, FWAs tend to increase employee productivity. Indeed, there is a correlation between employee productivity and the adoption of FWAs. In one study, employers with higher percentages of women and professional workers saw the strongest correlation between flexibility and productivity. To be fair, an increase in productivity is not always clear.

25. See Bird, Why Don't More, supra note 9, at 362.
26. See Susan Dominus, Rethinking the Work-Life Equation, N.Y. TIMES MAG. (Feb. 25, 2016), https://www.nytimes.com/2016/02/28/magazine/rethinking-the-work-life-equation.html (forcing managers to acknowledge demands of life outside of work deconstructs "an image of professionalism [that] was closely tied, perhaps especially for women, to a strict respect for boundaries—to the presentation of the self, at the office, as someone wholly unencumbered by the messiness of home life").
27. See Bird, Precarious Work, supra note 5, at 6 ("Fathers frequently report being 'openly mocked' or 'passed over for promotions' because of taking time off for family obligations.").
29. Id.
31. Bird, Why Don't More, supra note 9, at 337 (citing Federica Origo & Laura Pagani, Workplace Flexibility and Job Satisfaction: Some Evidence from Europe, 29 Int'l. J. MANPOWER 539, 554 (2008)); see also Laurel A. McNall et al., Flexible Work Arrangements, Job Satisfaction, and Turnover Intentions: The Mediating Role of Work-to-Family Enrichment, 144 J. PSYCHOL. 61, 75 (2010).
32. In one study, employers with higher percentages of women and professional workers saw the strongest correlation between flexibility and productivity. Bird, Why Don't More, supra note 9, at 336–37 (citing Alison M. Konrad & Robert Mangel, The Impact of Work-Life Programs on Firm Productivity, 21 STRATEGIC MGMT. J. 1225, 1235 (2000)).
satisfaction and productivity promoted through FWAs because they erode conflicts between non-work issues and work demands.\textsuperscript{33} Specifically, "[f]lextime also improves healthy employee behaviors, which in turn can reduce medical costs, decrease employee absenteeism, and improve productivity."\textsuperscript{34} In certain fields, productivity benefits are greater.\textsuperscript{35}

In short, employers that implement FWAs see positive results. Offering prospective employees flexible working options makes a workplace attractive, and increased employee satisfaction reduces turnover. Employers do not experience decreased productivity. Instead, facilitating a better balance between home and work makes employees more productive.

II. FWA Statutes

Statutes can play different roles in encouraging employers to adopt FWAs. Some FWA statutes provide substantive rights to employees, while others offer only procedural safeguards.\textsuperscript{36} Substantive statutes guarantee flextime in the absence of valid extenuating circumstances.\textsuperscript{37} Procedural laws guarantee employees only procedural rights, such as a right to request flexibility without fear of retaliation.\textsuperscript{38} Some laws protect both substantive and procedural rights.\textsuperscript{39}

less-skilled workers in male-dominated jobs, productivity benefits from [FWAs] were negligible.

33. Id. at 337; see also Ravi S. Gajendran et al., Are Telecommuters Remotely Good Citizens? Unpacking Telecommuting’s Effects on Performance Via I-Deals and Job Resources, 68 PERSONNEL PSYCHOL. 353, 384 (2014) (“Managers can treat [FWAs as] mutually beneficial to the employee and the organization and as a form of work redesign that generates autonomy perceptions, a valuable job resource that could improve employee productivity and contextual performance.”).


35. See generally Finkel, supra note 16 (benefits of FWAs in law firms); Riva Poor, How and Why Flexible Work Weeks Came About, 42 CONN. L. REV. 1047, 1053–55 (2010) (listing various occupations that may see greater productivity from alterations in standard workweek schedules, including oil truckers and certain manufacturers and retailers).

36. See GEORGETOWN UNIV. LAW CTR., FLEXIBLE WORK ARRANGEMENTS (FWAS): POSSIBLE PUBLIC POLICY APPROACHES (2009) (“labor standards that provide employees with substantive rights to receive FWAs” compared to “labor standards that create structures or processes in which FWAs are easier to receive”).


38. See id.

39. For example, Germany grants a substantive right to reduced work hours while also requiring employers and employees to discuss proposed changes. See Model Work-Time Policies, BERKELEY FLEXIBLE WORK TIME INITIATIVE, http://www.flexibleworktime.com/models.html (last visited Nov. 19, 2017) [hereinafter Model].
A. Statutes Providing Substantive Rights

The hallmark characteristic of substantive FWA statutes is an employee right to reduced hours. Four countries recognize such a right. This section reviews four such notable statutory schemes.

1. Germany

German employees obtained the right to reduced work hours starting in the Part-Time and Fixed Term Contract Act. The Act allows those employed at their current job for at least six months to request reduced hours. Requests must be made three months before the change would take place, and the employer and employee must discuss barriers the employer has identified. The employer must grant requests “unless there are operational reasons standing in the way of such reduction . . . [such as when] the reduction of working time would fundamentally impair the [employer’s] organization, working process, or safety or incur unreasonable costs.” Employees may request reduced hours every two years, and employers that fail to follow prescribed procedures are subject to judicial review of their decisions and reduction of their workers’ hours to those initially proposed. The Act allows even high-level employees to reduce hours. It seeks to prevent discrimination against part-time and contract workers and to promote part-time work and employees’ choice of hours.

While the general concept of flextime covers where, when, and how employees work (allowing for changes not only in working hours but in remote working as well), Germany’s Act grants rights only for reduced hours. Germany’s law thus guarantees narrower rights than statutes in other countries that promote a broader range of flexibility options.

2. The Netherlands

Dutch workers gained a right to request both reductions and extensions of working hours in the Adjustment of Working Hours Act. The

40. See Hegewisch & Gornick, supra note 37, at 21 (differentiating between substantive FWA statutes ensuring flextime and those that protect only the right to request without retaliation and provide procedures for reviewing requests).
41. Id. at 5, 19 (Germany, France, the Netherlands, Belgium, and Finland).
44. Id. at 72.
45. Id. (quoting Anne Freckmann, Business Laws of Germany § 9.27 (2012)).
46. Id.
47. Model, supra note 39.
48. Id.
Act covers employees who have worked for the employer for at least one year before the requested changes would begin.\(^{51}\) Requests must be submitted in writing four months before the proposed change. Employees may make requests every two years, and employers must meet with employees before providing a “well-reasoned” written response.\(^ {52}\) Employers must grant requests absent significant business or service reasons for rejection.\(^ {53}\) The Act does not apply directly to employers with nine or fewer employees, but those employers must develop their own rules for adjusting working hours.\(^ {54}\)

The Dutch government cites several policy reasons for protecting working hours adjustments, including increasing worker supply, easing employees’ combination of work and other responsibilities, and facilitating workforce flexibility.\(^ {55}\) The Dutch government clearly does not view the right to flexible working hours as a benefit only for employees.

3. France

France also allows employees to reduce working hours.\(^ {56}\) French law dictates that, if a collective agreement is in place, employees’ requests may be rejected for objective reasons articulated in the contract.\(^ {57}\) However, similar to Germany and the Netherlands, “[i]n the absence of a collective agreement, the employer may only refuse such request if it can demonstrate the absence of available employment within the employee’s professional category or show that the change requested by the employee would result in prejudicial consequences on the proper operation of the company.”\(^ {58}\) Thus, French law presumes that employees may reduce their hours.

France provides employees several other substantive rights. For example, employees may on multiple occasions reduce work hours for one week to provide family care, and employees also may obtain reduced hours for child caretaking to allow them to maintain employment.\(^ {59}\) With such broad rights, it is no surprise that France boasts a comparatively high rate of women in the workforce while also maintaining a higher birth rate than other European countries.\(^ {60}\)

\(^{51}\) Model, supra note 39.

\(^{52}\) Visser et al., supra note 50, at 206.

\(^{53}\) Model, supra note 39.

\(^{54}\) Visser et al., supra note 50, at 206.

\(^{55}\) Id. at 204–05. (These policy justifications are listed in the Explanatory Policy Document to the Working Hours Amendment Act.)


\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.

4. New South Wales (Australia)

New South Wales, an Australian state, created a unique substantive right “to promote the widest possible use of flexible work practices to promote optimal agency performance and enable employees to balance work and personal responsibilities.”61 New South Wales categorized caregivers as a protected class62 under the Anti-Discrimination Amendment (Carers’ Responsibilities) Act of 2000.63 The law bans discrimination against employees caring for children or immediate family members in the absence of justifiable employer hardship.64 New South Wales employers must accommodate working parents and adult children of elderly parents.65 Necessary accommodations may include reduction to part-time hours or FWAs.66

In sum, the law in New South Wales applies only to employees who fit within the protected class, but it covers those who stand to benefit most from FWAs. The law’s narrowed scope and categorization of caregivers as a protected class distinguish it from other substantive FWA statutes.

B. Procedural Statutes

Several jurisdictions have procedural laws, also known as right-to-request statutes.67 To understand these statutes, it is helpful to review their origins.

1. United Kingdom’s 2002 Amendment to the Employment Rights Act

The first right-to-request statute appeared in a 2002 amendment to the United Kingdom’s Employment Rights Act (ERA) of 1996.68 The ERA was amended to address the growing need for workplace flexibility.69 The Act allows employees to request modifications to hours,

63. C2001-26, supra note 61.
64. Id.
65. Id.
67. Right-to-request statutes prevent employers from retaliating against employees who submit FWA requests and establish procedures governing employer review of FWA requests. See, e.g., 21 VT. STAT. ANN. § 309 (2017) (effective Jan. 1, 2014); see also Bird, Precarious Work, supra note 5, at 28 (“Right-to-request legislation grants an employee the right to ask for flexible work arrangements from her employer.”).
68. Bird, Precarious Work, supra note 5, at 28 n.178.
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working days, and work location (at home or in the office). However, the statute has a “caretaker requirement”—the request must be designed to care for a child up to age six or, if the child is disabled, eighteen. The statute suggests several non-exclusive grounds upon which employers may refuse requests, and, if denied, employees may not submit another request for twelve months. Before making a decision, however, the employer must meet with the employee within twenty-eight days of submission. The employer must provide written notice of its decision within fourteen days of the meeting, and the employee has fourteen days to appeal. Appeals go to an Employment Tribunal empowered to order employers to reconsider applications and to levy fines to be paid to employees for employers’ failure to comply with procedural requirements. Notably absent from the Employment Tribunal’s available remedies is the ability to grant employee FWA requests.

2. Vermont Statute

Vermont’s right-to-request statute has much in common with the United Kingdom’s ERA. Vermont also allows employees to request changes to hours, days of work, and working remotely. However, Vermont also gives employees the right to request job-sharing, and it specifies that FWAs do not include “vacation, routine scheduling of shifts, or another form of employee leave.” Another key difference is that Vermont has no caretaker requirement—any employee may submit FWA requests.

The Vermont statute also has a meeting requirement, though it does not set a deadline for employer-employee meetings. Employers

72. Id. § 47(2)(80G)(1). Legitimate business reasons for refusal include “(i) the burden of additional costs, (ii) detrimental effect on ability to meet customer demand, (iii) inability to re-organise work among existing staff, (iv) inability to recruit additional staff, (v) detrimental impact on quality, (vi) detrimental impact on performance, (vii) insufficiency of work during the periods the employee proposes to work, (viii) planned structural changes, and (ix) such other grounds as the Secretary of State may specify by regulations.” Id. § 47(2)(80G)(1)(b).
73. Id. § 47(2)(80F)(4).
74. Id. § 47(2)(80G)(2)(a).
75. Id. § 47(2)(80G)(2)(b).
76. Id. § 47(2)(80G)(2)(d).
77. Id. § 47(2)(80H)(1).
78. Id. § 47(2)(80I)(1)(a).
79. Id. § 47(2)(80I)(1)(b).
81. VT. STAT. ANN. § 309(a)(2).
82. Id.
83. See id. § 309(a)(1).
84. Id. § 309(b)(1).
Simply must meet with employees to consider requests in "good faith." Comparable to the ERA, a Vermont employer may deny an employee's request if "inconsistent with business operations or its legal or contractual obligations." There is no deadline for employer responses, but, if the request is written, the employer's response must also be in writing. Vermont's Attorney General, State Attorney, or the Human Rights Commission (in the case of state employers) may investigate and restrain employers' actions if they violate these procedural provisions. The governmental agent may then sue, and remedies include injunctive relief and costs. The court cannot overturn an employer decision, and the statute does not create a private cause of action. Finally, the statute explicitly prohibits retaliation against employees who request FWAs.

3. Family Friendly Work Ordinance (San Francisco)

San Francisco's right-to-request ordinance was designed to support single parents, combat gender pay inequity, and reduce traffic and commute times. Workers employed within San Francisco city limits who have worked for their employers for at least six months may request changes to hours, dates of work, work location, changes to work assignments, and predictable work schedules. There is a caretaker requirement. The employee must be making the request to care for a child under eighteen, a family member with a serious health condition, or a parent at least sixty-five years old. The request must be submitted in writing, and employees may make two requests within twelve calendar months unless a "serious life event" necessitates another request.

85. Id.
86. Id. § 309(b)(2). Factors that might make a request inconsistent with business operations include "(A) the burden on an employer of additional costs; (B) a detrimental effect on aggregate employee morale unrelated to discrimination or other unlawful employment practices; (C) a detrimental effect on the ability of an employer to meet consumer demand; (D) an inability to reorganize work among existing staff; (E) an inability to recruit additional staff; (F) a detrimental impact on business quality or business performance; (G) an insufficiency of work during the periods the employee proposes to work; and (H) planned structural changes to the business." Id. § 309(b)(3).
87. Id. § 309(c).
88. Id. § 309(e).
89. Id.
90. Id.
91. Id. § 309(f).
93. Id. § 12Z.1(6).
94. Id. § 12Z.4(a). Employers must also employ at least twenty workers. See also id. § 12Z.3.
95. Id. § 12Z.4(a). Employers may request verification of employee caretaker status. Id. § 12Z.4(c).
96. Id. § 12Z.4(b), (d), (e).
The ordinance grants employers twenty-one days to meet with employees concerning requests and twenty-one days thereafter to respond. Denials must be in writing and must identify a “bona fide business reason” for rejection. Within thirty days of rejection, employees may request reconsideration, giving employers another twenty-one days to meet and twenty-one days thereafter to respond. The ordinance outlaws retaliation against a requesting employee, and the Office of Labor Standards Enforcement may investigate potential procedural violations and levy small fines.

4. New Hampshire

The barest right-to-request statute belongs to New Hampshire, executed on June 3, 2016, in Senate Bill 416 and effective September 1, 2016. It simply reads:

No employer shall retaliate against any employee solely because the employee requests a flexible work schedule. Nothing in this section shall be construed to require any employer to accommodate a flexible work schedule. Nothing in this section shall be construed to create a cause of action for failure to provide a flexible work schedule at an employee’s request.

The enacted legislation is far narrower than the original legislative proposal. It mirrored Vermont’s procedural requirements and included substantive protections for hourly workers.

III. Considering the Ideal FWA Statute

Existing FWA statutes and ordinances share common features but also key differences. Assessing existing provisions offers guidance in designing a model FWA law.

97. Id. § 12Z.5(a).
98. Id. § 12Z.5(b), (d).
99. Id. § 12Z.5(c). Bona fide business reasons under the ordinance include, but are not limited to, “(1) The identifiable cost of the change in a term or condition of employment requested in the application, including but not limited to the cost of productivity loss, retraining or hiring Employees, or transferring Employees from one facility to another facility. (2) Detrimental effect on ability to meet customer or client demands. (3) Inability to organize work among other Employees. (4) Insufficiency of work to be performed during the time the Employee proposes to work.” Id.
100. Id. § 12Z.6.
101. Id. § 12Z.7(b).
102. Id. § 12Z.10(a)(2) (up to fifty dollars for each employee whose review procedure was violated).
104. Id.
106. N.H. SB 416.
A. Federal or State Law?

A key foundational question concerning FWAs is whether the law should be federal or state. In short, should the United States pass national legislation or enact incremental, individually tailored state laws? This question is important because it affects how soon employees might gain protections of any FWA law and whether employees have equal rights to FWAs, if any at all.

Speed of passage, fairness, and ease of administration are important factors to consider when selecting the proper level of legislation. Despite congressional inaction,¹⁰⁷ federal law would likely be fastest in ensuring all employees have access to some FWA protection. It is unlikely that all states could each pass a law before Congress could do so.¹⁰⁸

What level of legislation could best assure fairness to employees and employers? For employees, a federal law would ensure that workers in all states have uniform protection. The issue is more interesting from the employers’ perspective, however. The United States is geographically large and diverse economically and culturally, especially compared to other countries with FWA statutes.¹⁰⁹ Therefore, fairness might best be achieved if states devise FWA statutes that meet the needs of their industries and residents.

FWA laws should offer speedy review and cost-effective administration. States may address issues more quickly within their borders than the often-stretched federal government, though such a result is far from guaranteed. However, FWA law administration may unduly strain some state budgets.¹¹⁰ This concern could preclude some states from passing any FWA law.

Both federal and state legislative options present serious challenges. The best option is likely for states to follow New Hampshire and Vermont in crafting their own FWA statutes. That way, state representatives may craft provisions responsive to their own particular needs and desires. Further, divisive national politics may make passage of federal law unlikely.

B. Substantive or Procedural Rights?

With the exception of the ERA, there is a divide between the United States and other nations on whether to offer substantive or procedural FWA rights. While current U.S. laws are right-to-request statutes, some countries have offered substantive flexibility rights to employees. What type of system best fits the United States?

Opponents of substantive FWA laws might resist them as government marketplace intrusion. Even a procedural law allowing employers to deny requests only if required procedures are followed could significantly benefit employees. Employers that frivolously deny requests will have difficulty attracting and retaining talent, especially as workers continue to value flexibility. However, a substantive right to FWAs, similar to Germany or the Netherlands, will likely result in more flextime requests granted and, potentially, more dramatic improvement in work-life balance. Nevertheless, if a large number of workers seek FWAs, it could strain businesses and burden human resources and administration.

Ultimately, a procedural law is ideal because it encourages a broader notion of flextime and facilitates conversations. Substantive laws enacted so far generally ensure the right only to reduced hours. However, FWAs can include more than reduced hours, such as remote working and alternative arrival times and schedules. A substantive law presuming employees’ rights to work remotely or make significant scheduling changes would certainly be more burdensome to employers. Yet, only allowing the substantive right to reduced hours fails to encompass all benefits FWAs may offer. Therefore, a procedural law that guarantees employees the right to discuss with employers a broad range of flexible options strikes the best balance for both sides. Inevitably, employers will grant fewer requests, but approved requests will create better results. In addition, technological improvements, the growing popularity of flexible working, and employee demand should lead, over time, to granting more requests.

C. Who Should Qualify for FWAs?

Additional issues in statutory design include whether all employees or just certain groups qualify, how long employees must have been with their employers, when rejected employees may make another request, and how large an employer must be to be subject to the law. All or some of these answers likely depend upon the needs of the region, particularly if the statute is state-level.

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112. See Model, supra note 39.
FWAs should be accessible to employees generally, even those who work part-time. If a particular statute is available to only a particular group, such as the caregiver requirement in New South Wales, there will be an unequal distribution of work-life balance opportunities. As a practical matter, targeting a certain demographic may help repair a single important issue (such as gender equity) and make legislators less apprehensive about enacting the law, but an ideal act should be broader. In addition, protection should not be limited to full-time employees. America’s part-time workforce has exploded, and many people work multiple jobs and odd hours to earn a living wage. Balancing a schedule is just as, if not more, important in such cases.

Laws enacted in the United States and abroad illustrate a range in how long an employee must work for an employer before qualifying for a request. Germany and San Francisco require the shortest tenure, six months. A minimum of six months to a year is likely suitable. When considering a possible minimum, it is important to note that it can take up to six months, or even longer, for employees to grow accustomed to the rigors of a new position. Six months should allow both employers and employees to gauge the employee’s fit in the position. Even if a new position is particularly challenging, most workers adjust by the first year’s end, at which time they should have the opportunity to request FWAs.

FWA laws also present a range of options for when employees can make subsequent requests. Again, a period between six months and one year appears appropriate. Waiting as long as two years to make a second request, as employees must do in Germany, seems excessive. Circumstances often change dramatically in two years, both for the employee and for the company. It likely will not take as long for an employer to become better equipped to handle flexible workers, but it is likely that an employee could lose an opportunity to care for children or a relative in the meantime. Especially in a system utilizing procedural statutes, the costs are rather low for an employer simply to read, meet, and respond to employees’ requests.

114. Patrick Gillespie, America’s Part-Time Workforce Is Huge, CNN Money (Apr. 25, 2016), http://money.cnn.com/2016/04/25/news/economy/part-time-jobs (“[T]he 6 million Americans who work part-time but want full-time jobs today are at the highest level in about 30 years or so, . . . [and] some experts believe America now has a ‘new normal’—a permanently high number of part-timers.”).
Finally, there is a question of how many employees an employer must have to be subject to FWA laws. Admittedly, the question is difficult to answer, and there is a range not just in current FWA laws, but also U.S. employment laws generally. The Netherlands’ example, requiring employers below the minimum to develop their own systems for reviewing FWA requests, should be considered. There is a benefit to promoting flexibility for all employees, including those at small companies. Small companies and start-ups often require flexibility and task juggling from employees anyway, so allowing remote work, for example, will often fit the model.

D. Notification Period

For requesting employees, the notification period could be a crucial component of an FWA statute. For example, San Francisco’s municipal ordinance sets a maximum number of days that may pass before employers meet with employees to discuss requests and respond. Timing is important because employees will often request changes to provide immediate care to a child or aging parent. A prompt response could determine whether the employee can remain in the job, regardless of the answer.

However, the notification period must be sensitive to employer needs as well. Strict response times might be impractical for large employers with multiple unique requests. Granting a single request might require rearranging several employees’ schedules. Legislators should investigate the time employers actually need to determine a reasonable deadline for employer responses. The final notification period should ultimately reflect the needs of both parties.

E. Penalties

Employer penalties raise an engaging law-and-economics issue. How can law best promote “good” behavior? Current FWA laws provide examples. Germany allows courts to overturn denials. United Kingdom and Vermont employers may need to review a request again and pay a nominal fine for noncompliance with procedural requirements. However, both types of statutes present challenges. The German model makes FWAs a substantive right, and the latter two models could create long delays for employees.

119. VISSEr ET AL., supra note 50, at 206.
120. Bird, Precarious Work, supra note 5, at 5; Schawbel, supra note 13.
122. Bird, Precarious Work, supra note 5, at 5.
An ideal penalty system should be triggered only if an employer fails to comply with procedural requirements and should impose fines related to employer revenue or operating budgets. Drafters should determine a percentage that best discourages violations without unduly punishing innocent employer errors. Wronged employees should receive all or some of the fine to encourage reporting, but there should be no private right of action. An agency or government representative is the best advocate to argue a noncompliance claim before an administrative agency tribunal or a trial court.

Some would argue that having relatively minor remedies that do not order a second review or overturn a decision are toothless and unfair to employees. However, laws help advance cultural norms by altering perceptions of legitimacy and normality, especially when public opinions are already shifting. Simply put, penalties need not be severe to promote change. The goal, especially in the early stages of FWA legislation, is to facilitate discussion between employers and employees. Enactment of FWA laws might depend on their initial reception, and stiffer penalties could jeopardize passage. FWA laws should offer flexible means to create flexible workplaces. An FWA provision that imposes minimal penalties for procedural violations will still further positive outcomes.

IV. Potential Challenges to FWAs

Employers may oppose FWAs. The FWA legislative process will commonly require some level of compromise between the interests of employers and employees. Potential objections include the cost of accommodating flexing employees, office disruption, frivolous requests, and political ideology. In actuality, the stakes are lower than employers might anticipate if FWA laws are solely procedural. Ultimately, potential benefits to employers and employees outweigh these risks.

A. Cost to Employers

One key challenge to FWAs is the cost to employers. Employers may require specialized equipment to accommodate a remote worker or need to hire or reassign an employee to assume a requesting employee’s hours. Employers will invest time and money hiring and training

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124. See Goldsborough, supra note 18, at 35 (identifying the importance of communication between employees and employers).
125. See, e.g., Thompson et al., supra note 30, at 743 (worktime and workplace flexibility give employers a “competitive edge” in recruiting employees).
126. But see Sara McGuire, 6 Reasons You Should Hire Remote Workers and Where to Find Them, BUSINESS.COM, https://www.business.com/articles/6-reasons-why-you-should-hire-remote-workers (last modified Feb. 22, 2017) (“[T]he average business could save up to $11,000 per [remote working employee], per year if employees telecommuted even part time.”).
new employees and may have to purchase software and cameras for video chats, for example, to keep employees connected with co-workers and customers. This potential cost of creating a flexible workplace is likely a deterrent for some legislators.

Procedural laws impose fewer costs on employers. Such laws allow employers that follow required procedures to reject employee requests. The cost of reviewing a request is rather low, and it is the only requirement of this model. The hope is that employers, after conversing with requesting employees, will understand the mutual benefits of flexible working arrangements for employee health, productivity, and retention. Of course, not every job permits flexibility. Employers need not shoulder any costs they view as unwise because there is no substantive right to flextime.

B. Office Disruption

Employers that feel anxious about FWAs might fear workplace disruption. Inconsistent arrival and leave times and issues with remote workers could interrupt work flow. Jealous employees without FWAs might create morale problems. Nervous employers may tend to deny flextime on these grounds alone.

Procedural FWA laws allay these concerns because employers can simply deny flextime requests after following the required review protocol. However, technological and cultural changes may ease employers’ fears over time. Constant connectivity is altering traditional workplaces. Remote workers adjust quickly to communicating with one another. There may be some office jealousy, but as more employees gain access to flexibility and social norms change, potential office culture problems will be reduced.

C. Frivolous Requests

Employers may fear having to devote time to frivolous requests. While a substantive FWA statute might force an employer to choose needless absenteeism over risking penalties for wrongly denying FWAs, this is not a risk with procedural statutes. With procedural laws, employers need not decide whether employees are entitled to flextime or simply desire it. Employers retain full discretion over whether to grant all requests.

D. Current Political Climate

Some might view efforts to enact FWA laws as hopeless in the current political climate. Advocates will need to explain the mutually beneficial nature of FWAs and the modest demands of procedural
mandates. Providing information to lawmakers should make FWAs a bipartisan issue because procedural FWA laws protect employees with little burden on employers.

**Conclusion**

Flexible working arrangements promote and improve employee health, productivity, and retention. Employees want flexible work opportunities, and employers ought to regard them favorably as well. Current U.S. and foreign FWA models are helpful in constructing an ideal FWA statute. While a fundamental issue is whether FWA laws should be substantive or only procedural, other details of statutory design will depend on the needs of enacting jurisdictions. A model statute should be procedural and allow reasonably situated employees to request flextime. Deadlines for review of requests must respect the potential urgency of employees’ needs while recognizing employers’ time constraints. Modest penalties should be imposed only for failure to comply with procedural requirements. The objective is to facilitate conversations between employers and employees. Procedural FWA laws are a flexible solution for more flexible workplaces that can meet the needs of all.