Following in the Footsteps of Fair Pay: The Case for Exempt "Time Transparency" and the Mandatory Disclosure of White-Collar Work Hours

JENNIFER HASKIN WILL*

ABSTRACT

Demanding schedules are increasingly the norm for salaried office workers in the United States today, and there is no legal limit to their workweeks. The federal Fair Labor Standards Act of 1938 ("FLSA") is the nation's primary legislation governing wages and working hours, but it does not require overtime pay for all employees. Instead, several categories of employees are exempt from the FLSA's minimum wage and overtime protections, including certain executive, professional, and administrative employees, colloquially known as "white-collar" workers. Without overtime protections, white-collar workers are vulnerable to mounting workweeks. Despite repeated calls for reform, including specific proposals to rein in working hours for exempt employees, the FLSA has remained largely the same for over eighty years. But amending the FLSA to impose maximum hours or overtime protections may not be the best solution. The very fact that such proposals have repeatedly failed to gain traction in the past suggests that opposing concerns may be valid and that sweeping reforms may not be viable.

This Article suggests that we should consider new forms of reform instead. Specifically, we should follow the lead of pay-equity advocates who have responded to the inadequacies of the Equal Pay Act and Title VII by proposing pay transparency regulation as a means of informing and empowering employees and prompting employers to correct gender pay disparities on their own initiative, even in the absence of litigation. In a similar vein, this Article suggests that instead of revising the FLSA to limit hours, the more effective, less intrusive path to shorter workweeks for exempt white-collar workers may be as simple as requiring employers to disclose the hours that their white-collar workers actually work. Requiring employers to compile and disclose working hours could put downward pressure on long workweeks as employers compete in the marketplace to recruit and retain talent and maintain their reputations. This Article is the first to argue that for all the same reasons that pay transparency proposals promise to close a gender pay gap that has persisted for decades, exempt "time transparency" is better suited to produce more reasonable workweeks than command-and-control legislation regarding maximum hours and overtime.

* Jennifer Haskin Will is an Assistant Professor of Legal Studies at Hamline University in St. Paul, Minnesota.

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I. INTRODUCTION

Oppressive work hours are the norm for many salaried office workers in the United States today, and there is no legal limit to their workweeks. The federal Fair Labor Standards Act of 1938 ("FLSA") is the nation's primary legislation governing wages and working hours,[1] but it does not require overtime pay for all employees. Instead, several categories of employees are exempt from the FLSA's minimum wage and overtime protections,[2] including certain executive, professional, and administrative employees,[3] colloquially known as "white-collar" workers.[4] Without overtime protections, white-collar workers are vulnerable to mounting workweeks, exacerbated by technologies that extend the digital workday.[5] Despite repeated calls for reform, including specific proposals to rein in working hours for exempt employees, the FLSA has remained largely the same for decades.[6] When it comes to white-collar working hours, political gridlock has led to an FLSA stalemate. White-collar workers are on overload, and there is no end in sight.

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1. 29 U.S.C. §§ 201–219.
2. *See* 29 U.S.C. § 213(a).
3. 29 U.S.C. § 213(a)(1).
4. The United States Department of Labor has more recently referred to exemptions in Section 213(a)(1) as the "EAP"—executive, administrative, and professional—exemptions. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 51230, 51230 (Sept. 27, 2019) [hereinafter *Defining and Delimiting*] ("Section 13(a)(1) of the FLSA, commonly referred to as the 'white collar' or 'EAP' exemption, exempts from these minimum wage and overtime pay requirements 'any employee employed in a bona fide executive, administrative, or professional capacity.'"). However, given the prevalence of the term "white collar" in the case law and scholarly commentary regarding the exemption, and its popular use by the media and the public, this Article uses the term "white collar" to apply to executive, administrative, and professional employees throughout.
5. *See generally* ERIN L. KELLY & PHYLLIS MOEN, OVERLOAD: HOW GOOD JOBS WENT BAD AND WHAT WE CAN DO ABOUT IT (2021).
6. *See* Elizabeth Tippet et al., *When Timekeeping Software Undermines Compliance*, 19 YALE J.L. & TECH. 1, 9 (2017) ("It is worth pausing here for effect: the main law regulating work hours and pay for most employees in the United States has remained unchanged since before the Second World War.").

But amending the FLSA to impose maximum hours or overtime protections may not be the best solution. The very fact that such proposals have repeatedly failed to gain traction in the past suggests that opposing concerns may be valid and that sweeping reforms may not be viable. Imposing absolute weekly maximums or eliminating longstanding exemptions from overtime would be big, substantial reforms—even radical and heavy-handed ones—and for over eighty years, Americans have lacked the political will for such a mandate. That should tell us something. This Article suggests that we should consider new forms of reform instead.

Specifically, we should follow the lead of advocates of gender-pay equity, who have embraced the information transparency that is emblematic of the "new governance" approach to regulation.[7] By calling for employers to disclose pay rates, pay transparency would give employees the information they need to negotiate their salaries or challenge apparent discrimination, and mandating such transparency promises to be more effective than simply mandating equal pay by statute.

In a similar vein, this Article posits that the more effective, less intrusive path to shorter workweeks for exempt white-collar workers may be as simple as requiring employers to disclose the hours that their white-collar workers actually work. Forty-hour workweeks are no longer the norm. As a result, candidates for white-collar jobs often have little idea how long their workweeks will be when they take a new position. Without information about work hours, white-collar workers cannot even evaluate their own effective rate of pay, much less assess their anticipated quality of life. This is a stunning omission, and yet prospective white-collar workers risk jeopardizing their candidacy if they ask about hours. Thus, requiring employers to disclose the hours that prospective employees can expect to work would not only help applicants find employment that best suits

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7. For scholarship exploring pay transparency as a tool to promote gender pay equity, see, for example, Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1046 (2012) (proposing pay transparency as a means to "prevent, root out, and correct pay discrimination"); Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 957 (2011) (arguing that "as with executive compensation abuse, gender pay discrimination should be viewed as a market failure caused, in part, by pay secrecy and information asymmetries"); Sarah Lyons, Note, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 392 (2013) ("[R]egulations must mandate disclosure of pay information as a mechanism for smashing the social norms that discourage salary discussion. Until pay is transparent, inequality, and discrimination will persist."); Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547 (2020).

For descriptions of information transparency and new governance principles generally, see *id.* at 605–10; Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487, 492–98 (2016) (providing "a brief summary of the theory of information asymmetry, and information-forcing as a solution, that has developed in the economics literature"); Jeremy Blasi, *Using Compliance Transparency to Combat Wage Theft*, 20 GEO. J. POVERTY L. & POL'Y 95, 107–08 (2012) (providing a general description of transparency-based regulation and "new governance" in the analogous context of wage theft). *Cf.* Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287 (2021) (advocating the imposition on employers of affirmative public disclosure requirements for equality measures including pay, promotion, and harassment, by sex and race).

their preferences—which by itself could go a long way toward reducing perceived work/life conflicts—it would also supply them with essential information about the actual value of their proffered compensation. Equally important, requiring employers to compile and disclose working hours could put downward pressure on long workweeks, as employers compete in the marketplace to recruit and retain talent and maintain their reputations. This Article argues that for all the same reasons that the logic of pay transparency promises to close the gender pay gap, at long last, exempt "time transparency" is better suited to produce more reasonable workweeks than command-and-control legislation regarding maximum hours and overtime.[8]

This Article—which proposes exempt "time transparency" as a substitute for maximum hours legislation and is the first to coin that term—proceeds as follows. After this Introduction in Part I, Part II explores commonly proposed legal reforms for reducing exempt overwork, including setting maximum caps on weekly hours and expanding overtime protections. It also explains the political and practical impediments to those proposals. Part III then makes the case for taking an entirely new approach, capitalizing on the current surge of interest in pay transparency to argue that we should require employers to provide time transparency for white-collar workers. After first recounting the rationale for information disclosure in the realm of pay equity, this Part argues that requiring employers to disclose the actual average working hours of relevant positions to prospective exempt employees would promote fairness and efficiency in the job market and put downward pressures on overly long workweeks as well. By raising awareness of actual work hours for both employers and exempt employees, mandatory time transparency could empower employee choice and promote employer self-regulation for purposes of recruitment, retention, and reputation—without the potential adverse impacts of heavy-handed mandates controlling maximum hours. Finally, Part IV begins to sketch out what white-collar time transparency legislation might look like. It first considers and responds to potential objections to time transparency initiatives on grounds of confidentiality and cost. Next, it looks to existing and currently proposed legal mandates for employer payroll recordkeeping and disclosure and considers the features that may or may not be useful and desirable as a model for legislating time transparency. With these models as a foil, it outlines the key features of time transparency legislation that could adequately incentivize employers to reduce unreasonable working hours without unduly interfering with business operations. Finally, it concludes by identifying

8. In another Article, this Author has argued for FLSA reform of a different kind. *See generally* Jennifer Will, *The Case for the "No Collar" Exemption: Eliminating Employer-Imposed Office Hours for Overworked, Remote-Ready Workers*, 16 U. ST. THOMAS J.L. & PUB. POL'Y (forthcoming 2023) [hereinafter *No Collar*]. After noting the many obstacles to more reasonable working hours per se, *No Collar* proposed revising the salary basis test for white-collar exemption to require, as a condition for exemption, that white-collar workers be free from employer-imposed office hours. The *No Collar* proposal thus offered a way to make long working hours more manageable for white-collar workers. This companion Article explores an idea for making those long hours shorter.

further questions for exploration of this novel approach to controlling exempt overwork.

II. THE CASE AGAINST MAXIMUM-HOURS LEGISLATION AND OVERTIME PAY FOR EXEMPT WHITE-COLLAR WORKERS

As compared to 1938, when the FLSA was passed, many more employees in the United States today are exempt from overtime,[9] and many more of these exempt employees are working in excess of forty hours per week.[10] Longer working hours are especially prevalent among professional, managerial, and administrative employees, commonly known as "white-collar" workers.[11] Because exempt employees, by definition, are not eligible for overtime pay, their employers have no incentive to limit the length of their workweeks.[12] But with

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9. This shift began to occur years ago. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/HEHS-99-1645, WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 2 (1999) [hereinafter GAO REPORT] ("In recent years, the percentage of employees covered by these exemptions has been increasing."); *see also* Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139, 141 (1993) (providing data as of 1992 and noting that "while managerial and professional employees constituted a slim portion of the labor force when Congress enacted the FLSA, the last fifty years have seen their ranks swell to the point where they now constitute over one-quarter of the entire paid workforce"). "Indeed, by 1989, the number of managerial, professional, and technical workers in this country exceeded the number of blue-collar workers." *Id*. at 151.

10. *See* KELLY & MOEN, *supra* note 5, at 17 ("When we measure the average hours worked per week for those who are employed, we see few changes in recent decades—despite the sense of speed-up and time famine. But averages mask variations in workers' experiences, of course, and we have seen a bifurcation in work hours in the United States since the 1970s. More people—especially professionals, managers, and those earning higher salaries—are working very long hours, often measured as 50 or more hours per week.").

11. *See, e.g.*, JERRY A. JACOBS & KATHLEEN GERSON, THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY 35 (2004) (observing that "long workweeks are most common among professionals and managers"); Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 170 (1994) ("Salaried workers tend to have especially long hours."); *see also* KELLY & MOEN, *supra* note 5, at xi ("[O]ur research revealed that many professionals and managers worked at home late at night and on the weekends, whether they were also working full days in the office or not. Job insecurity pushed them to put in long hours, accept unrealistic timelines, and try to be visible to their managers and executives—often through quick responses to emails, texts, and chat—in hopes of hanging on to their jobs.").

12. *See, e.g.*, JACOBS & GERSON, *supra* note 11, at 37 ("Because employers are not required to pay overtime to professionals who work more than forty hours per week, and because extra hours of work by exempt employees do not cost additional wages at all, employers face no strong incentive to limit such workers to a forty-hour workweek."); Schor, *supra* note 11, at 170 ("[S]alaried workers are subject to an 'elasticity' in hours. Extra hours are essentially free to the employer, because payment is invariant with respect to hours."); Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, *in* PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 131, 139 (Judy Fudge & Rosemary Owens eds., 2006) (noting how the white-collar exemption "plus the fixed costs of benefits for managerial and professional employees, sets up incentives for employers to utilize them for longer hours, rather than incur the costs of additional wages and benefits that would be entailed by hiring more employees to do the work").

The fixed cost of a salary means that employers essentially pay white-collar workers less for each incremental hour over forty. Adding insult to injury, those very same incremental hours—which may impinge on evenings and weekends—may be the ones most valuable to the employees themselves.

workweeks getting longer and longer for an ever-growing group of exempt employees, scholars have increasingly called for legal reform. Despite repeated calls to action over the years, federal wage-and-hour law has remained largely unchanged, and exempt white-collar employees remain largely unprotected from overwork.[13] This Part II explores various proposals that have been advanced for revising the FLSA and considers why those proposals have not been successful. More importantly, this Part II also considers why, perhaps, such reforms should not be adopted.

A. Repeated Proposals to Limit Work Hours and Expand Overtime Protections Have Failed to Come to Fruition for a Variety of Valid Reasons

For decades, scholars have been advancing creative, compelling, and ambitious proposals to revamp and revitalize the outdated FLSA. Several such proposals have been directed specifically at the problem of white-collar overwork, with ideas for reducing long hours. In the literature, proposals consistently emerge around two themes: (1) reducing the length of the maximum workweek; and (2) overhauling or eliminating the exemptions to bring more workers within the ambit of overtime protections.

Proposals to put outside limits on working hours have come in many forms over the years. For example, nearly thirty years ago, Juliet Schor, author of the *Overworked American*, proposed reducing the forty-hour standard workweek and eliminating premium pay for overtime,[14] which she asserted "was designed to discourage long hours and create employment," but "has done the opposite, by tying workers and firms into a system of long workweeks."[15] Similarly, in 2001, Scott Miller, then staff counsel for the American Federation of State, County and Municipal Employees (AFSCME Council 31), proposed "capping work hours at eight hours per day, forty hours per week, dropping to thirty hours per week within ten years," so as to make the FLSA "a true maximum hours statute."[16] In 2004, researchers Jerry Jacobs and Kathleen Gerson proposed numerous methods of regulating workweeks, including moving to a thirty-five hour standard workweek[17] and limiting mandatory overtime.[18] In 2010, Professors Vicki Schultz and

13. Notably, the salary level required for white-collar exemption was raised in 2020, *see Defining and Delimiting, supra* note 4, at 51230, and the DOL is expected to seek further increases in the future, *see* Society for Human Resource Management, *Proposed Overtime Rule Now Projected to Come Out in Fall*, SHRM (June 23, 2022), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/spring-regulatory-agenda-2022-proposed-overtime-rule.aspx [https://perma.cc/7YTQ-4ML3]. The higher the salary level, the larger the number of employees who do not qualify for exemption, and the larger the number of employees who thereby become eligible for overtime protections. However, opposition to the recent salary level change was so fierce that the change was ultimately much more modest than first proposed. *See id.* (summarizing the regulatory history of the salary level increase). Accordingly, while future adjustments to the salary level could help ameliorate the problem of white-collar overwork, it would still seem advisable to explore other avenues, too.

14. Schor, *supra* note 11, at 167.

15. *Id.* at 168.

16. Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 110 (2001).

17. JACOBS & GERSON, *supra* note 11, at 183, 185–87.

18. *Id.* at 187.

Allison Hoffman advocated for "a coordinated series of steps designed to achieve a more moderate, more controllable workweek norm,"[19] including "reducing the standard workweek from forty to thirty-five hours for *all* employees."[20] Today, advocates are still struggling to set limits on the number of hours that exempt employees can be expected to work. In their recent book, *Overload*, Professors Erin L. Kelly and Phyllis Moen suggest, among many other reforms, capping mandatory overtime.[21]

In addition to limiting or reducing long hours directly, many of these same scholars have advocated for an overhaul of the white-collar exemptions as well, up to and including their outright abolishment. In theory, this approach would reduce long hours for exempt workers indirectly, by expanding the overtime protections that impose financial disincentives to long workweeks. For example, Professor Schor has proposed including all workers within the protections of the FLSA, with alternative standard workweeks of up to sixty hours designated for the top 20% of the workforce.[22] Similarly, attorney Miller has proposed "[r]eplacing the three white-collar exemptions with one exemption for the top 10% of an employer's workforce, analogous to the FMLA 'key employee' exemption."[23] Researchers Jacobs and Gerson have proposed extending overtime protections to "professional, managerial, and other salaried workers."[24] Professors Schultz and Hoffman have similarly suggested simply "eliminating the executive exemption for overtime."[25] As with maximum hours legislation, these same ideas are still circulating today. In *Overload,* Professors Kelly and Moen suggest, "One critical policy change would be to revise overtime laws so that professionals and other workers who are currently classified as exempt from the current Fair Labor Standards law are also paid overtime wages."[26]

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19. Schultz & Hoffman, *supra* note 12, at 140.

20. *Id*.

21. KELLY & MOEN, *supra* note 5, at 211.

22. Schor has also suggested several other reforms of wage-and-hour law, including: (1) requiring employers to permit employees to "trade income for time," by allowing employees to "forgo annual raises or reduce compensation" in exchange for such options as shorter daily hours, purchased vacation days, four-day workweeks, or sabbaticals; (2) legislating paid vacation; and (3) creating a legal "right to free time and choice of hours" and prohibiting employers from discriminating against employees who refuse to work excess hours. *See* Schor, *supra* note 11, at 168–71.

23. Miller, *supra* note 16, at 110. Miller has also proposed replacing the minimum wage provision with a "living wage" and "requiring employers to provide employees with four weeks of paid vacation per calendar year." *Id*. at 110–11.

24. JACOBS & GERSON, *supra* note 11, at 183, 184. Notably, instead of proposing expanded overtime protections, some scholars have advocated introducing a scheme of compensatory time in the private sector instead. *See* DeChiara, *supra* note 9, at 186–87 ("Rather, the FLSA should require employers to compensate managers and professionals for hours worked beyond a statutorily defined standard workweek by providing them with comp time.").

25. Schultz & Hoffman, *supra* note 12, at 141. Professors Schultz and Hoffman have also suggested mandating pro-rata benefits for all who work for an employer, tied to the number of hours they work; providing "reasonable, but not overly long, paid family leave and personal sabbaticals"; "adopting strong anti-discrimination measures" to protect those who take advantage of shorter hours; and, for low-earners, "providing earnings subsidies or other basic income supports." *See id*. at 140–41.

26. KELLY & MOEN, *supra* note 5, at 210. Other scholars have also proposed the outright elimination of the white-collar exemptions. *See, e.g*., Michael Cicala, Note, *Equalizing Workers in Ties and*

Given their persistence over the years, why is it that such compelling proposals have not become federal law? As a purely practical matter, political gridlock is to blame. Indeed, the very scholars who advocate for substantial reform often acknowledge, in the same breath, that "the current political and economic environment is not conducive to such large-scale reforms"[27] as would be required to mandate shorter workweeks. Indeed, "[e]ver since the FLSA was enacted, the interests of employers in expanding the white-collar exemptions as broadly as possible have competed with those of employees in limiting the use of the exemptions."[28]

Yet presumably, the political gridlock persists for good reason: There are compelling interests on both sides. As much as employees may wish to work fewer hours and spend more time on personal and domestic pursuits for the sake of the health and well-being of themselves and their families, employers who have come to depend on the fixed costs of exempt labor understandably fear the added expense of paying these workers overtime or hiring more workers to comply with requirements for maximum hours. The employer lobby is a formidable force that poses strong resistance to changing the status quo.[29] One may argue that the mere pecuniary interests of employers should not trump the well-being of employees, but at some level the risk of diminished economic productivity is real, which means that employer interests are to some extent aligned with the interests of the general public in a strong economy as well.

And this brings us to the complexity of the various forces inhibiting legal reform. This Article ventures that stagnation of the FLSA is not due solely to the opposing interests of employers and employees. Instead, in some sense, white-collar workers themselves—as well as the broader citizenry—appear complicit in maintaining the status quo, for reasons that are not limited to the economy but extend to social and cultural factors, too. In no particular order, these influences include the fact that hard work is a deeply held American value that is to some degree in tension with legislating maximum work hours. Another is that many white-collar workers identify strongly with their exempt status and would resist the perceived loss of that status that overtime protections may entail.[30] In this

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Coveralls: Removal of the White-Collar Exemption to the Fair Labor Standards Act, 27 SETON HALL LEGIS. J. 139, 162 (2002) ("The White-collar Exemption to the FLSA should be removed because it has ceased to be relevant in the workplace of the twenty-first century.").

27. Schultz & Hoffman, *supra* note 12, at 141.

28. *See* GAO REPORT, *supra* note 9, at 6. *See also* Miller, *supra* note 16, at 6 ("Opponents of changing maximum hours labor standards respond that the politics of overtime have not changed in over sixty years. Employers seek more exemptions from, and workers seek more inclusion within, the labor standards.").

29. *See* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 361 (2011) ("Employers' political opposition to new legal mandates sets a high bar for enactment of legislation . . . .").

30. *See* Opeyemi Akanbi, *Policing Work Boundaries on the Cloud*, 127 YALE L.J. F. 637, 641 (2018) ("[T]here is a level of pedigree associated with exempt employees such that some workers prefer to be classified as exempt despite having to forego overtime pay.").

author's estimation, some workers *want* to devote long hours to their work[31]—and we all stand to benefit from their energy and dedication. Silicon Valley start-ups and all manner of entrepreneurial enterprises thrive on an all-consuming work environment, and we would diminish a public good to disrupt such hives of activity. Beyond the simple oppositional dynamic between employers and employees, then, this Author surmises that these and other subtle but powerful forces have helped stymie our progress toward more reasonable workweeks.

Thus, what may matter most is not *why* FLSA reform has fallen short, but the very fact that it has. The body politic has spoken, and overtime reform is not going anywhere. Our lack of progress, regardless of provenance, should be reason alone to test new approaches to exempt overwork.[32]

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31. *Cf*. Robert D. Lipman, Allison Plesur & Joel Katz, *A Call for Bright Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. & EMP. L. J. 357, 380 (1994) ("Not all work in excess of forty hours in a workweek is undesirable."). *See also id*. at 382 ("[H]igher paid workers may be voluntarily willing to work long hours to further their careers . . . . The FLSA must be more flexible so that employees and employers may make their own decisions about the length of the workweek when such decisions do not result in unwanted social costs.").

32. To be fair, scholars and advocates have long recognized the importance of a multi-pronged approach to the problem of long workweeks for white-collar workers, and they have consistently paired calls for FLSA maximum hours reform with proposals for reform from other quarters. For example, Professors Schultz and Hoffman recognize that political gridlock makes it difficult to reform wage-and-hour law by means of traditional legislative mandates. Accordingly, they have proposed pursuing numerous other approaches simultaneously, including but not limited to government incentives such as subsidies, negotiated solutions, and a responsive regulation model that rewards employer compliance and levies increasing penalties for noncompliance. In addition to top-down legislative mandates, Schultz and Hoffman also advocate approaches such as collective bargaining and private industry initiatives. *See generally* Schultz & Hoffman, *supra* note 12, at 141–49.

Other scholars similarly offer approaches beyond merely limiting work hours. *See also* JACOBS & GERSON, *supra* note 11, at 170 ("In addition to discussing the place of work and family in our national culture, we need to consider three types of policy approaches: *work-facilitating and family-support reforms* that foster a better integration of family and paid work; *equal-opportunity reforms* that insure [sic] the rights of all workers, regardless of their gender or family circumstances, to combine the pursuit of work opportunities with parental involvement; and *work-regulating reforms* that provide more equitable and reasonable ways to organize—and limit—working time.") (emphases in original); *id*. at 169–202 (outlining proposals for reforms); KELLY & MOEN, *supra* note 5, at 193–218 (outlining changes that employers, individual managers and employees, and policy makers can make to create more "sane and sustainable jobs").

Indeed, this Author's own contribution to the conversation supports tackling the problem of exempt overwork from multiple angles, including a different approach to revising the FLSA. *See generally No Collar, supra* note 8. The *No Collar* article advocates FLSA reforms of a different kind, by reconsidering *how* exempt employees work, rather than *how long*. The article proposes a reform that would give employees more control over when they work, no matter how long.

Notably, however, none of the foregoing proposals invoke mandatory public information disclosure in lieu of substantive mandates as a means to achieve shorter workweeks, as proposed in this Article. *See infra* notes 100–112 and accompanying text. Professor Schor, however, comes close. In fact, as long ago as 1994, Professor Schor noted that "lack of information about hours expectations currently characterizes the recruiting and promotion process in salaried jobs." Schor, *supra* note 11, at 171. To correct this market deficiency, she proposed requiring employers to designate an established, alternative workweek of up to sixty hours for the exempt, top 20% of the workforce, and she argued that "[j]ob applicants and incumbents must be informed about the standard." *Id*. at 170–71. Although Schor was proposing a mandatory standard—a proposal in the style of traditional command-and-control legislation—she nevertheless recognized the market effect that making the standard public would likely have:

B. Even If Overtime Reform Were Likely, It May Not Be Helpful

Even if maximum hours legislation and overtime reform had a better chance of being enacted, it is worth asking whether such reforms are really as desirable as they may seem. On closer inspection, reflecting on how such reforms would actually operate in today's digital, knowledge-based economy, it is entirely possible that well-intentioned limits on exempt working hours would have unintended negative effects.

On the one hand, it is plausible that reforms limiting working hours would benefit large numbers of workers who are currently classified as exempt, but whose positions in many ways resemble nonexempt work. For example, in theory if the FLSA were revised to extend overtime protections to workers currently classified as exempt, then a low-level store manager who is currently scheduled to work fifty hours per week as an exempt employee could be assured of either a shorter scheduled workweek or ten hours of overtime pay. In other words, if overtime reform worked in her case, it would likely work as intended.[33] On the other hand, there are some white-collar workers whose work cannot be so easily measured and controlled by hourly increments. Indeed, this may be the case with most white-collar office workers today, who are increasingly engaged in "knowledge

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"The expectation is that competition among employers would serve to set standards below the hours salaried employees are currently working . . . ." *Id.* at 171. The proposal here does not entail any such maximum cap, but instead proposes that employers disclose exempt work hours, whatever those hours may be.

Another market-based idea was raised long ago by Professors Lipman, Plesur, and Katz, who proposed using "precise cut-offs based on earnings" for determination of exempt status and "explicit notification of specific employment terms" for employees in the middle tier of earnings, defined as those employees who earn an amount more than three times the minimum wage but less than six and one-half times the minimum wage. Lipman et al., *supra* note 31, at 383. Under the *Bright Lines* proposal, before middle-tier employees commence employment, "the employer and employee should be required to enter into a written wage agreement which specifies the employee's wage, overtime eligibility, maximum number of permissible work hours and any other equiflex parameters. The individual wage agreement would substitute for the FLSA's maximum hours standard." *Id.* at 385. In other words, prior to employment, affected employees would negotiate their own personal overtime threshold, as well as a maximum cap on their individual work hours. While such proposal for a wage agreement differs in numerous respects from the proposal offered by this Article, its authors, like Schor, nonetheless recognize the potential power of market forces when employees have information about their prospective work hours:

> If employees know at the commencement of their employment relationship about their right to receive overtime pay after working a certain number of hours in a workweek, they will better understand their rights and employers will better understand their obligations. Market forces will then come in to play to determine which employees will receive overtime premium pay. Employees should be permitted to decide whether to accept an employment offer based upon an employer's promises regarding wages, overtime pay, compensatory time off and maximum hours.

Id. at 385–86. In recognition of similar market forces, this Article proposes transparency regarding work hours for exempt employees more broadly, without overtime obligations, maximum work hours, or individual contract requirements.

33. Unless, of course, her employer, in response to the new mandates, made a downward adjustment to her straight time pay.

work" that is cognitive, intangible, and difficult to define by time.[34] Consider the employee whose job it is to troubleshoot when the network is down; to reconcile discrepancies in accounts; to calculate projected costs; to negotiate terms with vendors; to respond to imminent client needs and concerns. Consider, too, the employee whose work product is a piece of code, an explanatory memorandum, a responsive email, an instructive conversation. Assume that all such employees are expected to meet deadlines. When the clock strikes five, do these workers simply *stop*?

The question is important, and not only for the obvious practical reasons. A fundamental feature of the FLSA is that it requires employers to pay nonexempt employees for all hours worked—whether those hours are recorded or authorized, or not.[35] This feature is essential to the effective operation of the statute's minimum wage and overtime protections. Typically, the way the FLSA is structured now, the schedule for a nonexempt employee will be set by an exempt managerial employee, who will also authorize departures from that schedule, including overtime hours when warranted. But because overtime pay is an added expense for employers, managers must carefully weigh the benefits of the extra production time against the costs of overtime pay before authorizing the extra work.[36] Driven by the same budgetary concerns, employers typically prohibit nonexempt employees from working overtime without prior management authorization.[37] Indeed, the budgetary constraints on employers can be so intense that less scrupulous managers may pressure their employees to work "off the clock" so as not to record extra hours at all.[38] Such practices are not lawful under the FLSA, which requires employers to pay employees for all time the employer may "suffer or

34. *See* DeChiara, *supra* note 9, at 182 ("Concededly, an absolute ban on overtime work by managerial and professional employees would not work. Many tasks performed by managers and professionals cannot be confined to certain fixed hours, but frequently spill over into evenings and weekends. . . . Moreover, these [managerial and professional] tasks usually do not permit an easy substitution of personnel . . . .").

35. *See generally* 29 C.F.R. pt. 785 (2020); *see also* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #22: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT (July 2008), https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked [https://perma.cc/2UC4-MTE5] [hereinafter FACT SHEET #22].

36. *See generally Using Overtime Effectively*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/usingovertimeeffectively.aspx (last visited Oct. 31, 2021) (explaining how managers can use overtime effectively including reasons to use overtime, problems with excessive use, and corrective measures for excessive overtime).

37. *See* Tippet et al., *supra* note 6, at 13 ("An employer may have employee conduct rules regarding timeliness, attendance, and unauthorized overtime—for example, a rule that employees must obtain a supervisor's permission before working overtime.").

38. *See* Allen Smith, *Overtime Rule May Result in More Off-the-Clock Work*, SHRM (Oct. 3, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/overtime-rule-off-the-clock-work.aspx [https://perma.cc/PZ3B-LS44] (describing the management issues arising when a formerly exempt worker is reclassified as nonexempt, including a concern that "[f]aced with competing pressures of getting work done and managing labor costs, individual managers might encourage newly reclassified nonexempt employees to not report all of their work hours, even if corporate policy and the law say otherwise").

permit" the employee to work.[39] Even if employees work overtime on their own initiative, without permission, employers must still pay for the hours worked,[40] and at the premium rate (although technically they may choose to discipline their employees for working without authorization).[41]

These basic operational features of the FLSA have important implications for proposals to pay overtime to white-collar employees, or to put any kind of hard limit on their overall hours. Again, in the case of employees who are currently classified as nonexempt, it is their manager who will decide to schedule them for an extra hour, or not, and the manager who will be held accountable for any extra expense incurred, or not (or for the legal violation, if "true" maximum hours legislation were actually to be put into effect). This managerial responsibility is not unreasonable, when outputs are tangible and overtime costs are predictable. In contrast, given the intangible and internal nature of exempt white-collar work today, it is likely to be the white-collar workers *themselves* who will be in the best position to decide whether to work the extra time, or not, and the workers themselves who will then be held accountable for any extra expense, or not. The likely shift of scheduling responsibility from managers to their exempt subordinates is highly problematic.

The usual systems for overtime approval simply do not transfer well to today's knowledge worker. It is not realistic for these workers, many of them managers themselves, to consult their own managers for approval when their work is intangible and the need nonobvious. Explaining why an email needs to go out after hours, for example, would itself take time. Indeed, to argue ab absurdum, it is easy to imagine a conversation about permission to finish drafting an email exceeding the time it would take to finish the email in the first place. It is not realistic for such conversations to occur on a daily basis, as they surely would, for exempt work that is characteristically cognitive and has no clear endpoint. Even if it were realistic for white-collar managers to ask their own managers, in turn, for authorization to work overtime (in a cascading chain that basically becomes impossible for the executive at the end), those higher-level managers would be hard-pressed to make an informed decision. In the absence of adequate contextual

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39. *See* 29 U.S.C. § 203(g) ("'Employ' includes to suffer or permit to work."); 29 C.F.R. § 785.11 (2020) ("Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time."). *See also* FACT SHEET #22, *supra* note 35 ("By statutory definition the term 'employ' includes 'to suffer or permit to work.' Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer.").

40. *See* FACT SHEET #22, *supra* note 35 ("For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable.").

41. Tippet et al., *supra* note 6, at 13 ("[S]hould the employee violate the employer's rule and work unauthorized overtime, the employer must nevertheless pay the employee the overtime premium, as federal and/or state law requires. The employee can, however, be disciplined or even fired for failing to abide by the employer's conduct rule.").

information, and in the face of cognitive work that is highly contextual, it will often be in the interests of managers to say no, thereby offloading the pressures and costs of overtime decisions to the white-collar workers themselves. This dynamic would surely add even more daily stressors to white-collar workers, and it is all too easy to see how, in the end, such stressors would lead white-collar workers to chronically underreport their hours.[42] Underreporting would defeat the very purpose of the new overtime and maximum hours "protections," and further obscure the true cost of overwork in the process.

For all these reasons, simply putting outside limits or overtime premiums on exempt working hours may not be desirable solutions anymore, even if such legal reforms could realistically be achieved.

III. THE CASE FOR MANDATORY DISCLOSURE OF EXEMPT WORKING HOURS

As Part II illustrates, efforts to amend the FLSA for shorter workweeks have fizzled, despite an abundance of good ideas, and perhaps for good reasons. Faced with similar lack of progress in closing the gender pay gap, and a similar complexity of social and historical forces, pay equity advocates have turned their attention to a new approach: one that would use mandatory disclosure of pay rates, otherwise known as pay transparency. This Article attempts to make the case that "time transparency" could similarly accomplish what efforts for workweek reform have failed to do. This Part III begins with a brief overview of the arguments in favor of workplace transparency generally, drawn from the scholarship of Professor Cynthia Estlund, who pioneered the expansion of new governance models of mandatory disclosure regulation to the realm of employment law. Next, this Part III reviews the arguments in favor of pay transparency. Finally, it explains how these same arguments apply in favor of time transparency.

A. Just the Start: The Early Case for Workplace Transparency Generally

In her 2011 article, *Just the Facts: The Case for Workplace Transparency*, Professor Cynthia Estlund highlighted what was at the time a startling underuse of mandatory disclosure regulation in employment law.[43] Remarking that

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42. *See* Smith, *supra* note 38 ("And even if rogue managers aren't to blame for off-the-clock work, reclassified employees who are told they must complete their work within certain time periods, such as 40 hours in a week, might be tempted to not report all hours worked to avoid discipline for being inefficient."). This tendency can already be seen in white-collar workers who record their time for billing or budget purposes. *See, e.g.*, KELLY & MOEN, *supra* note 5, at 57 ("The IT professionals may decide that getting the project done well requires more time than managers have allocated to it. So they decide to pursue that quality and put in the time, but not bill the client to avoid 'blowing the budget.' . . . But this practice encourages future overload because it creates false expectations about how long the technical work really takes."). *Cf.* DeChiara, *supra* note 9, at 183–84 (raising and rejecting concerns that if the FLSA regulated the work hours of white collar employees, "[u]nscrupulous managerial and professional employees might lie to their employers about the hours that they have worked and claim overtime compensation to which they are not entitled" or "manipulate the pace of their work" to inflate hours).

43. *See generally* Estlund, *supra* note 29.

"mandatory disclosure has made barely a cameo appearance in the field of labor and employment law,"[44] she observed, "[t]hat is surprising, for mandatory disclosure has become a growing part of the modern state's regulatory repertoire."[45] As Estlund explained:

> Scholarly enthusiasm for mandatory disclosure has grown in recent decades as the cost of gathering and disseminating information has fallen, and as scholars from across the political spectrum have sounded a steady drumbeat of doubt about the efficacy of "command-and-control" regulation through substantive mandates. For many law and economics scholars, disclosure mandates are seen as a comparatively market-friendly form of state intervention. From other quarters, the proponents of "New Governance" have made transparency and information disclosure central to their proposals for governance-based solutions to regulatory problems. Mandating disclosure of information . . . is said to improve the efficiency and rationality of market decisions, avoid fraud, and advance public policy goals, all without intruding significantly upon the autonomy of market actors.[46]

For all these reasons, Estlund observed that mandatory information disclosure "sometimes appears as a kind of magical minimalism that delivers significant rewards at little cost."[47] Noting its potential for overuse for that reason,[48] Estlund goes on to make the case that under the right conditions,[49] there is nonetheless ample room for greater use of mandatory disclosure regulation in the workplace, on terms and conditions of employment ranging from workplace safety, to work-life balance, to employment policies and agreements, and yes, even to "hours of work and overtime demands"[50] and wages[51] (more on both topics in a moment).

Before turning to the specific topics of work hours and wages, it is worth noting the benefits of mandatory workplace disclosure generally, as outlined by Estlund. She highlights three goals. First, she notes that mandatory disclosure of employment information "can help make employment contracts more efficient as to terms and conditions . . . by better matching employee preferences and

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44. *Id*. at 353.
45. *Id*. at 354.
46. *Id*. at 353–54.
47. *Id*. at 354.
48. *Id*. at 354–55.
49. Legal scholar Jeremy Blasi also observes that transparency-based regulation is most likely to be successful under certain conditions, including: "an information gap creates needless risks or service failure; the policy problem lends itself to widely agreed upon measurements; users of the information have genuine choices; organizations as to which information is disclosed are in a position to improve products or practices; and an acceptable outcome involves some actors winding up better off than others." Blasi, *supra* note 7, at 108.
50. Estlund, *supra* note 29, at 365–66. Importantly, Estlund expressly limited this recommendation to nonexempt hours, a topic this Article takes up in Part III.B.
51. Estlund reserved full analysis of the topic of wage disclosure for a companion article. *See generally* Cynthia Estlund, *Extending the Case for Workplace Transparency to Information about Pay*, 4 U.C. IRVINE L. REV. 781 (2014) [hereinafter Estlund, *Extending*].

employers' proffered terms of employment."[52] This she describes as "mandatory disclosure in aid of contract."[53] Next, she observes that "disclosure of information to employees, prospective employees, and their advocates can promote employer compliance with existing substantive mandates by exposing evidence of noncompliance and facilitating enforcement," which she terms "mandatory disclosure in aid of compliance."[54] Finally, Estlund makes the point—highly relevant for our purposes here—that "disclosure of information to employees, prospective employees, and the public can promote goals that are not fully embodied in substantive mandates by encouraging employers to reach beyond compliance and to emulate or establish 'best practices.'"[55] This final goal she terms "mandatory disclosure in aid of reputational rewards and sanctions."[56] In short, Estlund argues that "the public has a legitimate interest in knowing far more about workplace policies and conditions than employers currently choose to reveal, and that compelling disclosure of that information can help make markets more efficient, mandates more effective, and reputations more reliable."[57]

In *Just the Facts*, Estlund goes on to consider and outline a comprehensive scheme of mandatory information disclosure in the workplace and advocate persuasively for its adoption. Importantly, because she envisions the disclosure of numerous key terms and conditions of employment, a recurring theme in her article is the vital role of intermediaries in disseminating and translating the disclosures, which could otherwise result in information overload that renders the data less useful to its ultimate consumers.[58] But for our purposes here, we are concerned only with the disclosure of exempt work hours—a more discrete data point—so it may be more helpful to study the concept of mandatory disclosure regulation in the context of another discrete data point, pay transparency, to which we turn next.

B. A Model to Consider: Arguments in Favor of Pay Transparency

Just as advocates of shorter work hours have long witnessed the insufficiency of the FLSA, so also have advocates of equal pay for equal work seen the shortcomings of the Equal Pay Act and Title VII, which have made disappointing progress in eliminating the gender income gap over the years. This section briefly outlines the history of traditional pay equity legislation and explains why pay

52. Estlund, *supra* note 29, at 369.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 403.
58. *See id.* at 373 ("The crucial role of intermediaries is a recurring theme in this analysis.") As Estlund explains, "[e]ven thus limited, the disclosure mandate would yield far too much information for prospective employees to digest and process; rather than filling an information gap, it might exacerbate an information overload. That is where intermediaries come in. Private intermediaries would be relied upon to do the slicing and dicing of information and to rate and compare employers in a particular region, industry, or occupation, or with regard to particular workplace issues." *Id.* at 367.

transparency proposals hold such great promise as an alternative, especially in our current cultural moment.

1. Command-and-Control Statutes Such as the Equal Pay Act and Title VII Have Made Slow Progress, at Best, in Closing the Gender Pay Gap

As with the stagnant FLSA, "[f]or decades, the story of the pay gap has been one of stagnation."[59] Despite legislation designed to eradicate the gap, it persists.[60] Nearly sixty years ago, the federal Equal Pay Act ("EPA") was passed in 1963,[61] at a time when gender income disparities were deeply entrenched by historical and cultural forces.[62] Broadly speaking, the EPA made it illegal to pay women less than men for the same work,[63] although judicial interpretations of the statute's somewhat exacting definitions and generous affirmative defenses[64] have narrowed its impact over the years.[65] Thus, "[i]n addition to the multiple cultural and societal forces at work that create headwinds for women, the inherent limitations of the Act, constrained further by administrative regulations and judicial interpretations, have hampered the ability of the EPA to bring about the wage equality envisioned by its drafters."[66]

Shortly after the EPA was passed, the Civil Rights Act of 1964 was enacted, with Title VII prohibiting discrimination on the basis of sex in terms and conditions of employment, including compensation.[67] Plaintiffs can assert a sex discrimination claim under Title VII alleging a gender-based pay disparity; but again, "cases under Title VII often fare no better than claims under the EPA," because of "broad judicial interpretations of defenses to these claims."[68]

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59. Lobel, *supra* note 7, at 553.

60. *See* Amanda Barroso & Anna Brown, *Gender Pay Gap in U.S. Held Steady in 2020*, PEW RSCH. CTR. (May 25, 2021), https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/ [https://perma.cc/CH2A-XCHK]*; see also* Lobel, *supra* note 7, at 553 ("In 2019, the pay gap remained wide, hardly narrowing in over a decade.").

61. Equal Pay Act of 1963, 20 U.S.C. § 206(d).

62. *See generally* Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. LEGIS. 385, 388–93 (2013) (addressing the origins and recent status of the gender pay gap).

63. *See* 29 U.S.C. § 206(d); *see also* Kulow, *supra* note 62, at 391 ("President Kennedy listened and signed into law the Equal Pay Act of 1963, making it illegal for the first time to pay women less than men for the same work.").

64. *See* Susan R. Fiorentino & Sandra M. Tomkowicz, *Can Millennials Deliver on Equal Pay? Why the Time Is Finally Right for Pay Transparency*, 38 HOFSTRA. LAB. & EMP. L.J. 253, 259 (2021) (noting how "[l]itigants have long found it difficult to meet the standard of 'equal work' as construed by the courts under the Act" and how the EPA defense of "any factor other than sex" has been "interpreted broadly by the courts and has allowed employers to sweep in justifications that may appear to be gender-neutral on their face, but are predicated on the very biases and stereotypes that aid in the perpetuation of the wage disparity").

65. *See* Kulow, *supra* note 62, at 416 (noting that while the EPA "would appear to provide a powerful tool in combating indefensible gender wage discrimination," "the statute contains a few hurdles").

66. Fiorentino & Tomkowicz, *supra* note 64, at 258.

67. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1).

68. Fiorentino & Tomkowicz, *supra* note 64, at 261.

Moreover, some narrow judicial interpretations of the statute of limitations under Title VII further limited its impact before 2009,[69] when President Obama signed into law the Lilly Ledbetter Fair Pay Restoration Act.[70] The Act provides that the statute of limitations under Title VII begins anew with each discriminatory paycheck.[71] By adopting this paycheck accrual rule, the Lilly Ledbetter Act overturned a 2007 case decided by the United States Supreme Court, which determined that Ms. Ledbetter's Title VII claims were untimely because she did not file suit within 180 days of the discriminatory pay decision that led to her first unequal paycheck many years before.[72] As Justice Ginsburg noted in her dissent, however:

> Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.[73]

By overturning the majority decision, the Lilly Ledbetter Act made great strides in addressing the problem Justice Ginsburg identified, which is that employees are often unaware of discriminatory pay decisions at the time they occur. But even though the Act effectively extended the statute of limitations for late discoveries, plaintiffs must still have the requisite knowledge to advance their claims at some point. The fact remains that many potential plaintiffs simply do not have comparative information about coworker pay, so they are none the wiser. As Professor Marianne Kulow succinctly states, critiquing the EPA, Title VII, and Lily Ledbetter Act, collectively, "all three statutes suffer from a common limitation. They each place the burden of implementing the tool on the victim of wage discrimination. Many such victims, however, remain unaware that they are victims due to wage secrecy."[74]

The problem with pay equity legislation historically, therefore, is that potential plaintiffs simply do not know that they may have a claim.[75] This problem is

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69. *See generally* Kulow, *supra* note 62, at 417–18.

70. Lilly Ledbetter Fair Pay Act of 2009 ("FPA"), Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

71. 42 U.S.C. § 2000e-5(e)(3)(A); s*ee also* Kulow, *supra* note 62, at 418.

72. *See generally* Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

73. *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

74. Kulow, *supra* note 62, at 412.

75. *See, e.g.*, Kulow, *supra* note 62, at 386 ("One reason for the remaining gap unaddressed by current initiatives is that wage discrimination often goes undetected by its victims because salaries of

exacerbated by a strong societal norm of pay secrecy,[76] which suggests that it is improper or rude to share wages with co-workers. Indeed, strong social norms—and even employer prohibitions—against wage disclosure persist, even though the National Labor Relations Act protects the rights of all non-supervisory employees, including nonunion employees, to discuss their wages.[77] Thus, despite the existence of strong legislative mandates, gender disparities in income remain,[78] with documented differentials that endure even after controlling for factors other than discrimination.[79]

2. Pay Transparency Promises To Be Much More Effective in Closing the Gender Pay Gap

In the face of these statutory failures, Professor Kulow and others have determined that "[t]he final legal approach to eradicating the gender wage gap is to mandate wage transparency."[80] Pay transparency, by requiring employers to disclose pay rates, would provide employees with the information they need to negotiate their pay or discover a discrepancy. Such disclosures would breathe new life into statutory mandates for equal pay. In addition, making pay rates public could also unleash popular opinion and attendant market pressures that motivate employers to comply with the statutory mandates, even in the absence of a compliance action.

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comparably employed males are usually private information. Hence, the legislative tools available to remedy wage discrimination are underutilized due to lack of awareness of claims.").

76. *See generally* Eisenberg, *supra* note 7, at 958 ("[T]he workplace norm of pay secrecy facilitates and conceals pay discrimination against women. Without transparency, employees lack the information they need to value their own labor and to negotiate fair wages in the first place."). In addition, recent developments in technology, remote work, and employment practices have arguably intensified information asymmetries between employers and employees. *See generally* Lisa J. Bernt, *Workplace Transparency Beyond Disclosure: What's Blocking the View?*, 105 MARQUETTE L. REV. 73 (2021).

77. The National Labor Relations Act ("NLRA") protects the rights of nonsupervisory workers to engage in "concerted activity" for "mutual aid or protection." *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."). Courts have interpreted the NLRA to protect employee rights to discuss their wages. *See* Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 43 n.14 (2005) (collecting cases and other authorities). *See also* Eisenberg, *supra* note 7, at 988 ("The National Labor Relations Act prohibits employers from terminating workers who discuss their wages and benefits. Yet, most employers keep pay information under tight security and discourage workers from sharing information about their wages. Even in the absence of pay secrecy policies, discussions about money—especially wages—are often considered crass or arrogant in the workplace.").

78. *See* Barroso & Brown, *supra* note 60. *See also* Lobel, *supra* note 7, at 553 ("In 2019, the pay gap remained wide, hardly narrowing in over a decade.").

79. *See, e.g.*, Kulow, *supra* note 62, at 404 ("All four other proffered explanations for the gender wage gap do not completely explain the phenomenon. Thus one can reasonably conclude that some wage discrimination continues to exist."). *See also* Eisenberg, *supra* note 7, at 972 ("[S]ubstantial evidence exists that pay discrimination against women remains widespread, persistent, and systemic, even after controlling for factors . . . that may explain some of the disparity.").

80. Kulow, *supra* note 62, at 412.

Indeed, pay transparency could effectively address all three goals of workplace information disclosure identified by Professor Estlund and enumerated in Part III.A above.[81] First, "[f]or both employers and employees, better information about jobs and positions leads to smarter and faster job matches."[82] In addition, pay transparency can serve "as a means of equipping victims with the necessary information to negotiate or to litigate for fair pay."[83] Requiring employers to give applicants and employees comparative pay data could thus provide the benefit that Estlund describes as "mandatory disclosure in aid of contract."

Wage transparency could also provide the benefit that Estlund describes as "mandatory disclosure in aid of compliance," because it may expose wage disparities that potentially violate the EPA or Title VII, not to mention other laws, thus facilitating enforcement efforts by affected employees, advocacy agencies, and government entities. Notably, in her seminal article about workplace information disclosure, Estlund deferred discussion of wages and salaries, a complicated topic that she deemed "beyond what is possible here."[84] But in a subsequent companion article, she specifically sought to explore "whether the general case for workplace transparency extends to information about wages and salaries,"[85] and concluded that there was "a fairly strong though not uncomplicated case to be made" in favor of mandatory disclosure.[86] In the course of making that case, she opined specifically on the role of pay transparency in aid of compliance, observing that "greater public information about actual pay levels and practices would also help to promote enforcement of and compliance with wage and hour laws, and to combat wage theft. . . . because disclosures that can be seen by all, and that are at odds with facts known by some, are likely to make violations more obvious."[87]

Finally, pay transparency could provide what Estlund describes as "mandatory disclosure in aid of reputational rewards and sanctions." Admittedly, Estlund herself gives a rather tepid endorsement of pay transparency in this regard, noting that its success would depend in part on "whether economic inequality and egregious pay disparities—currently a topic of generalized public concern and debate—can enter the pantheon of major [corporate social responsibility] issues for which

81. *See also* Lobel, *supra* note 7, at 602 ("The purpose of mandatory reporting is threefold. First, it allows administrative agencies to better engage in compliance, investigation of complaints, and enforcement. Second, it allows employees to know where they stand and assess different employers accordingly. Third, and most important from a governance perspective, it incentivizes employers to examine their own practices.").

82. *Id.*

83. Kulow, *supra* note 62, at 412.

84. Estlund, *supra* note 29, at 365. "Because the distinctive difficulties posed by the idea of salary transparency threatened to obscure the general case for workplace transparency, *Just the Facts* set that large issue aside." Estlund, *Extending, supra* note 51, at 782.

85. Estlund, *Extending*, *supra* note 51, at 782.

86. *Id.* at 783.

87. *Id.* at 785. *See also*, Kulow, *supra* note 62, at 427 (arguing that mandatory wage disclosure would enhance efforts to close the gender pay gap for reasons including that gender "wage differences within particular jobs . . . could be more easily illustrated to employers and to courts" and the "EEOC would have comparison data readily available when wage discrimination claims are brought").

particular corporations (at least large "branded" corporations) are pressured to take responsibility."[88] Importantly, however, in giving her assessment of wage transparency, Estlund does not focus on the gender pay gap, but rather on "staggering disparities between salaries at the top and the bottom of major corporations."[89] There may of course be both legitimate and illegitimate reasons for pay disparities between salaries at the top and bottom of the corporate ladder. Because pay equity is instead concerned with unexplained gender-based pay disparities for what is essentially the same work, it presents a much less complicated case, and exposure of such discrepancies could be more confidently expected to trigger the kind of public outcry that would induce employers to take corrective action, even in the absence of litigation.

Moreover, even as to executive compensation, other scholars take a different view of the power of pay transparency. Professor Deborah Eisenberg, for example, notes that whether or not corporations adjust executive compensation downward as a result of mandatory disclosure, pay transparency nonetheless provides "an 'outrage constraint' that forces firms to be more thoughtful and deliberate about the goals of their executive compensation plans."[90] Her point is that mandatory disclosure can still prompt socially beneficial corporate action in the form of more clearly articulated compensation objectives, whether absolute salary figures are reduced or not.[91] Moreover, mandatory disclosure may also prompt employee action which, in turn, could itself provoke the desired corporate response. As Professor Charlotte Alexander has observed, when workers have new information about their jobs that changes their assessment of whether the job is a good fit, the "information-driven matching process not only improves the functioning of the labor market, but may also, over time, prod employers who experience high job vacancy or quit rates, or who have to meet workers' repeated compensatory wage demands, to correct the underlying workplace problems."[92] Thus, there is every reason to believe that pay transparency can prod employers to change their practices for the sake of their public image and to enhance recruitment, retention, and reputation.

And indeed, available research strongly suggests that wage transparency narrows the gender pay gap,[93] presumably for all the above reasons. Given its great

88. Estlund, *Extending*, *supra* note 51, at 789.

89. *Id*.

90. Eisenberg, *supra* note 7, at 962.

91. *See id*.

92. Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 CONN. L. REV. 177, 185–86 (2015).

93. *See, e.g.*, Fiorentino & Tomkowicz, *supra* note 64, at 274 ("The research on the efficacy of pay transparency is well developed, with generally widespread agreement that pay transparency does reduce the gender wage gap."); *id*. at 277 ("Research across disciplines strongly supports the finding that pay transparency policies reduce the gender wage gap."); *see also*, Kulow, *supra* note 62, at 425 ("The federal public sector wage disclosure laws do seem to have had an impact on the gap."); Ramachandran, *supra* note 7, at 1063 ("Pay transparency is more common in state employment and at unionized workplaces than in non-unionized private employment, and many studies have documented reduced wage disparities on the basis of race and gender in such workplaces.").

potential to solve a problem that the EPA and Title VII combined have failed to fix, the notion of pay transparency has spawned a wealth of scholarship[94] and inspired a surge in new proposed pay equity legislation at both the state and federal level.[95] In short, "[a]fter years of stagnation, pay equity law is gaining spectacular momentum."[96]

3. Pay Transparency Stands to be Even More Effective in the Face of Shifting Social Norms

Importantly, the surge in interest in pay transparency coincides with—and may even be precipitated by—shifting social norms and changing attitudes about the workplace. Parallel to government action to promote pay transparency, private sector initiatives are gaining ground, too. "[P]rivate sector initiatives, including the use of digital platforms to create networks of employees who share salary information and the use of software tools to identify internal pay gaps, are creating alternatives to mandatory transparency laws."[97] These private initiatives evince a broader cultural shift. As legal scholars Susan Fiorentino and Sandra Tomkowicz observe:

> Perhaps one of the most compelling arguments for adopting pay transparency policies is the widespread social pivot away from the non-inclusive, white male-dominated workplace typical of the twentieth century, towards a more diverse and equitable workplace of the twenty-first century. Some social scientists argue that the difference now is that grassroots efforts, spearheaded by younger, socially conscious Americans demanding corporate social responsibility . . . on a host of issues, are placing enormous pressures on big business to address systemic workplace inequities. These millennials want workplaces

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94. *See, e.g.*, *supra* notes 7, 51, 62.

95. *See* Fiorentino & Tomowicz, *supra* note 64, at 255 ("Specifically, an increasing number of states are adopting provisions requiring salary history bans, mandatory disclosure of salary ranges in certain circumstances, prohibitions against barring employees from discussing pay in the workplace, and safe harbor provisions for those employers who conduct internal wage audits in an attempt to proactively counter wage disparity."). There is, of course, a wide degree of variation among the various forms of enacted and proposed legislation. For a broad overview of this variety and the strengths and weaknesses of the various approaches, see Lobel, *supra* note 7, at 550, 552 (stating that the goal of the article is "to analyze the promise as well as the limits of the contemporary multifaceted pay equity reforms and to suggest directions for the future of pay equity law" and arguing that "while policies that reverse information flows at the hiring stage are important, policies for continuous direct pay transparency through reporting and pay scale provision are likely to have an even greater systematic impact.").

96. Lobel, *supra* note 7, at 548. When Professor Orly Lobel wrote about the multiplicity of emerging equal pay reforms in 2020, he observed, "Over a dozen states have passed new legislation in the past three years, with numerous other bills pending before the federal, state, and local legislatures." *Id.* at 548–49. For a regularly updated account of pay equity legislation, see *Pay Equity and State-by-State Laws*, PAYCOR, https://www.paycor.com/resource-center/articles/pay-equity-and-state-by-state-laws/ [https://perma.cc/4MPX-YKYF].

97. Lobel, *supra* note 7, at 553*; see also id.* at 591 ("Social norms have also been changing rapidly with the rise of online connectivity. Digital platforms including LinkedIn, Glassdoor, Salary.com, and SalaryExpert provide crowdsourced salary information and are becoming the launchpad for people on the job hunt.").

> with purpose, and they are more comfortable taking action to promote social change. Thus, in the current environment of heightened social justice activity, it has arguably never been a more strategic moment for corporations to adopt pay transparency.[98]

Professor Kulow similarly takes note of the changing times, remarking: "In a time of easy electronic access to information, with a generation of young adults culturally open to broader sharing of previously private information, with the technology available to protect access to the information, and with the business case growing for wage transparency, the time is ripe to adopt mandatory wage disclosure laws for all United States employers."[99]

These same considerations arguably apply generally to time transparency as well; therefore, with the added momentum of the pay transparency movement itself, there may not be a more strategic moment than the present to push for time transparency, too.

C. A New Application of Transparency Regulation: The Unique Case for Time Transparency

The parallels should by now be evident between pay transparency and time transparency, and the case for each is largely the same. Although pay transparency would address a serious transgression—illegal sex discrimination—the same principles of mandatory disclosure regulation could be applied to the problem of white-collar overwork, which adversely impacts a substantial portion of the workforce, despite its legality.[100] As with pay transparency, requiring employers to disclose information about white-collar working hours could facilitate individual employee job choices and also exploit market forces to put downward pressure on long hours. Finally, as with pay transparency, the dramatic increase in pay disclosure proposals nationwide, together with generational shifts in attitudes about work, make the present moment equally ripe for time transparency as for pay transparency.

Nonetheless, the case for time transparency carries its own distinctive features. Accordingly, in addition to all the reasons supporting pay transparency discussed above, this section highlights certain unique aspects of the case for time transparency that warrant special attention, including certain distinct attributes of the

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98. *See* Fiorentino & Tomkowicz, *supra* note 64, at 257 ("Accordingly, this article argues that the time is right, both legally *and* socially, for private-sector employers to denounce the taboo of pay secrecy and to embrace meaningful pay transparency policies that align with the rapidly changing legal and societal landscape."); *see also*, Eisenberg, *supra* note 7, at 958 ("In the information age, the workplace norm of pay secrecy may be changing. The popular press and many blogs advocate for greater wage transparency.").

99. Kulow, *supra* note 62, at 434–35.

100. *See* Miller, *supra* note 16, at 76–77 ("There are currently no cultural and legal protections from required overtime for the large and growing pool of professional employees. This lack of protection results in an enormous cost on a personal (quality of life) and societal level (overworked families struggle to outsource home and child care with mixed results).").

information deficits facing white-collar workers, and distinct qualities characterizing the problem of exempt overwork.

1. Distinct Attributes of the Information Deficits Facing White-Collar Workers

Information deficits support both the case for pay transparency as well as the case for time transparency. This section explains how the information deficit faced by white-collar workers is distinguishable in ways that make it both more and less conspicuous than the deficit faced by potential victims of pay discrimination—but in ways that warrant adoption of time transparency mandates, nonetheless.

First, lack of information about gender pay disparities is egregious, but the lack of information about working hours for exempt office workers is unjust in its own way: the potential victim of wage discrimination is at least informed of her own starting salary, but the typical exempt worker applying for a new "fulltime" job is unlikely to get any further information from the employer about work hours. That means the typical white-collar worker is not only ignorant of the working conditions she can expect, she is also in the dark about the true value of her own effective rate of pay. Without knowing her anticipated work hours, it is impossible for her to evaluate the return on her time that her proffered salary represents. That is unconscionable.

The fact is, exempt hours vary, often by quite a bit. Time usage data in the United States indicates that the average forty-hour workweek is just that—an average—and that the *actual* working hours of American employees tend toward workweeks that are both too short, and too long.[101] What this means for white-collar workers—who tend to be disproportionately working those very long workweeks[102]—is that they may have no idea, when they take a new fulltime job, how many hours they will be expected to work, because the range may be considerable. Even if applicants knew their new employer's standard hours of operation, technological advances and remote work capabilities mean that their new employer's so-called business hours are merely a minimum.

Perhaps in an earlier era, white-collar work hours could have more safely been presumed. Before remote work became rampant, the hours that an office was open for business could serve as a rough indicator of exempt hours expectations. That may explain why Professor Estlund, in arguing for workplace information disclosure, includes "hours of work and overtime demands" on her list, but then quickly adds, parenthetically, "(at least those [employees] who are covered by

101. *See, e.g.*, Schultz & Hoffman, *supra* note 12, at 137 ("[N]ewer work by Jerry Jacobs and Kathleen Gerson disaggregates averages of hours worked to reveal that the real story of working time in the United States is its increasing dispersion, moving away from the 40-hour norm to higher incidence of both longer and shorter weeks.").

102. As of 2004, when Jacobs and Gerson published *The Time Divide*, exempt white-collar workers made up almost fifty percent of the workers who worked fifty or more hours per week, even though those workers made up only one-third of the workforce. *See id.* at 139.

legal overtime requirements)."[103] She does not, then, call for exempt time transparency per se. But today, it is the white-collar workers without overtime protections who may face the greatest unknowns about expected time commitments, and it is the very lack of attention to this issue that prompts the specific call in this Article for exempt time transparency.

Exempt workers not only lack information about work hours, they also lack effective means to acquire it. To some extent this is true for any job applicant. In theory, any applicant can ask their prospective employer for more information about the terms of employment that the applicant is interested in, if given the opportunity (which will not always be the case).[104] But, this sort of "one off" exchange of information is not very efficient for the applicant, and it offers no benefit at all to other applicants or the public.[105] Moreover, applicants ask at their peril. Rarely will an employer infer, for example, that an applicant for an exempt position who asks about work hours is looking to work as many hours as possible. It is far more likely that the employer will draw a negative inference from the question and assume that the applicant is uncommitted to the job, or burdened with competing responsibilities, or not highly motivated—and so the employer will refrain from extending an offer.[106]

Increasingly in our internet age, however, applicants for white-collar jobs can turn to other sources of "insider" information, such as may be found on Glassdoor and similar sites with employee ratings and reviews. While these anonymous, crowdsourced platforms may offer information that is somewhat unpredictably available and not entirely trustworthy, a prospective employee might nonetheless be able to use them, at least for large employers, to get a rough sense of whether exempt employees of the company enjoy a high quality of life or work around the clock. Applicants might also, if they have personal contacts or know a "friend-of-a-friend," consult incumbent employees or simply "ask around." And in that sense, the information gap regarding work hours is less cavernous than the information gap regarding pay. Applicants for white-collar jobs, unlike potential victims of gender pay discrimination, are not frustrated by norms of pay secrecy. Insiders might be more willing to share about hours; in fact, they might even boast about them. This makes the nature of the information deficit faced by potential victims of pay discrimination quite different from the nature of the information deficit faced by exempt white-collar workers.

And that difference is worth exploring. Historically, social norms have strongly supported pay secrecy in the United States. As a result of these strong social norms, women are largely unaware that they are underpaid. Thus, one

103. Estlund, *supra* note 29, at 365.

104. *See id.* at 387 ("[M]any prospective employees do not get the chance to ask much of anything before they receive and accept a job offer.").

105. *See id.* (observing that "job interviews are an exceedingly costly way of ascertaining the terms that competing employers are offering").

106. As Estlund put it, "There are, in short, signaling problems with asking about many features of the job." *Id.*

rationale supporting pay transparency proposals is their capacity to disrupt these counterproductive social norms, exposing pay disparities that may previously have gone undetected. In stark contrast, social norms regarding workloads do not foster "time secrecy"—quite the opposite, in fact. Our culture values hard work and high performance; but with respect to white-collar knowledge work, which is largely cognitive and internal, achievement and productivity are not always outwardly obvious. As a result, in white-collar workplaces, employers and employees alike often valorize long hours as a visible measure of dedication to the job and hard work. Far from hiding their schedules, white-collar workers often proclaim their hours loudly, as a means of signaling their status and worth at work. "I'm so busy" is the expected refrain.

The question arises, then, whether requiring exempt time transparency would add any value in the face of social conventions dictating that long hours are not only not secret but are already affirmatively advertised by the employees themselves. If such "hours advertising" is widely practiced, and everyone already knows that long hours are expected, what is the benefit of tracking and reporting exempt time? The causes and conditions of "hours advertising" are undoubtedly complex and warrant further research. In the meantime, this Article proceeds on the premise that time transparency would nevertheless be useful. The reason is that "hours advertising" takes the form of generalities, whereas time transparency would put a number on actual average working hours for specific full-time positions.

Quantifying workload expectations in this way is important, because more so than generalities, actual numbers should aid workers in sorting themselves into the most appropriate jobs for their desired work/life balance. And importantly, the exercise of quantifying workload expectations would still raise internal awareness—and external exposure—for employers.

Working long hours may be a badge of honor for employees, due to social pressures that promote hours advertising. Despite these norms, the behavior that is socially acceptable for employers is quite different. Outside of Silicon Valley and other select enclaves, earning a "sweatshop" reputation is undesirable, and many employers instead seek recognition for being "family friendly" and embracing workplace flexibility. Forcing employers to disclose how long their exempt workers typically work—and how often they work nights and weekends—should therefore raise valid employer concerns about recruitment, retention, and reputation. For all these reasons, quantifying and reporting working hours could still promote market efficiency and put downward pressure on long workweeks, even in a culture where employees advertise their hours.

Moreover, social norms that support hours advertising are changing. Workers of all ages may feel pressure to advertise their hours as a way of confirming their worth at work, but at the same time, younger generations of workers also display changing attitudes about the relative importance of work and income as compared

to quality of life.[107] Millennials are challenging conventional notions about time. As with pay transparency,[108] time transparency proposals stand to benefit from Millennial demands for corporate responsibility.[109] In a social climate where more up-and-coming workers are demanding more reasonable workweeks, requiring time transparency could have an accelerator effect, bringing about change much faster than mere generational shifts could achieve.

For all these reasons, information deficits support time transparency, just as they support pay transparency. The deficits facing white-collar workers may be different in kind and degree, but it seems clear that mandating employer disclosure of work hours could still set in motion market forces that put downward pressure on long workweeks, even in a culture where employees already advertise their long hours. And in any case, giving applicants at least enough information to calculate their own projected effective rate of pay seems only fair, and long overdue.

2. Distinct Qualities Characterizing the Problem of Exempt Overwork

As explained above, there are unique aspects of the information deficit facing white-collar workers, which make the case for time transparency distinct. But there are also other aspects of the problem of exempt overwork that distinguish it from the problem of gender pay disparity. This section explores these additional differences and again concludes that time transparency nonetheless stands as a promising solution to the problem of white-collar overload.

The remaining differences derive from two sources: the nature of pay rates versus work hours as commodities in the employment relationship, and the nature of the underlying regulatory landscape in which the respective problems of pay disparities and white-collar overwork have persisted. First, pay rates and work hours are not equally susceptible to bargaining. Pay rates are typically variable within a range for any given position and therefore individually negotiable; and once established, they are stable until the next occasion for renegotiation. By contrast, exempt work hours are also inherently variable, but dictated by the work as it arises, making individually negotiated differences in time commitments for the

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107. *See, e.g.*, Franziska Alesso-Bendisch, *Millennials Want a Healthy Work-Life Balance. Here's What Bosses Can Do*, FORBES (July 23, 2020, 9:00 AM), https://www.forbes.com/sites/ellevate/2020/07/23/millennials-want-a-healthy-work-life-balance-heres-what-bosses-can-do/?sh=34847faa7614 ("Younger workers expect and demand more flexibility from their jobs than previous generations.").

108. *See supra* notes 98–99 and accompanying text.

109. *See* Alesso-Bendisch, *supra* note 107 ("Millennials want companies that align with their own internal values."); Claire Cain Miller & Sanam Yar, *Young People Are Going To Save Us All from Office Life*, N.Y. TIMES (Sept. 17, 2019), https://www.nytimes.com/2019/09/17/style/generation-z-millennials-work-life-balance.html [https://perma.cc/8LQP-EZVD] ("Demanding that employers treat employees well is part of the value system of the youngest generation of workers . . . ."); Theresa Agovino, *Millennials Hit Middle Age*, SHRM (Oct. 30, 2021), https://www.shrm.org/hr-today/news/all-things-work/pages/millennials-hit-middle-age.aspx [https://perma.cc/GB7Q-6ZPP] ("As the largest generation in the workplace today, Millennials have forced employers to bend to their will. . . . [T]hey have pushed for policies that create a more employee-centered workplace benefiting people of all ages.").

same position difficult. Second, in the case of pay disparities, gender pay discrimination is unlawful. In the case of white-collar overwork, long workweeks are not.

These two stark distinctions have important implications for the mechanisms by which time transparency would achieve the three goals of mandatory information disclosure as identified by Estlund: disclosure in aid of contract, disclosure in aid of compliance, and disclosure in aid of reputational rewards and sanctions. To cut straight to the most significant consequence, mandatory disclosure of exempt work hours would offer no aid of compliance because, for all the reasons discussed in Part II above, there is no standard of maximum exempt work hours with which employers must comply. An obvious question arises, then, regarding what benefit could be expected from any time transparency regime. This Article argues that the remaining benefits of a time transparency regime in aid of contract and in aid of reputational rewards would both be sufficient to warrant the adoption of time transparency as a governance tool.

First, even though long hours for white-collar workers are lawful—and quite common—a system of time transparency could nonetheless be expected to facilitate efficient contracts and, in the process, discourage employers from expecting long work hours of their exempt employees. Although exempt applicants are not realistically in a position to negotiate their work hours in quite the same way that they would be able to negotiate their rate of pay, time transparency would aid efficient contracts for the following reasons. First, time transparency would have the effect of highlighting a heretofore hidden term and condition of employment, putting it out in the open for employers and employees alike to see. Armed with this information, applicants could at the very least make better decisions about goodness of fit, increasing the likelihood that individual applicants will be able to choose jobs that are manageable for them personally, however long the workweeks for a given job may be. Moreover, the new optics of the offer may leave employers somewhat chagrined, and employees aghast, increasing the chances that employers will adjust expectations lest applicants walk away.

Second, and perhaps more importantly, time transparency would also enable negotiation, albeit indirectly, by making applicants for white-collar jobs more aware of their effective hourly rate of pay. Even if applicants cannot realistically renegotiate their expected work hours, they can easily bargain for a higher salary at the outset in the face of those expected hours. One of the reasons that long workweeks have become such a problem for exempt workers is that salaries represent fixed costs for employers. But if employers are routinely forced to pay *higher* salaries as a result of time transparency, then employers will suddenly face a direct cost for long workweeks that they have not faced before. For these reasons, time transparency should thus aid the formation of efficient and fair contracts, and at the very least improve goodness of fit between employers and employees.

In addition to aiding in the formation of contracts, a time transparency regime would also serve the final function identified by Estlund, in which transparency

impacts employer reputation, and thereby shapes corporate behavior, even absent further direct government intervention. Because there is no compliance consequence for long exempt work weeks, the impact of mandatory disclosure in aid of reputational rewards and sanctions is all the more pivotal to the success of time transparency. Yet, the lack of a compliance consequence for long workweeks perhaps highlights the indirect but powerful effect of information disclosure. As Estlund points out:

> Where neither mandates nor markets meet public aspirations for fair and decent work—for example, workplace diversity or family friendliness—mandatory disclosure of socially salient terms and conditions of employment can help to enable stakeholders and advocates to push firms to reach beyond compliance and above the floor set by mandates and the market.[110]

Thus, where the FLSA has failed to put a check on exempt overwork—and where there appear to be good reasons to avoid enhancing its substantive mandate—time transparency may be precisely the regulatory charm to fill the void. If employers are required to make work hours public, the disclosure will raise awareness not only with employees and the employers, but also with the public. Corporations anxious to appear—and to be—more "family friendly" as compared to their competition may be forced to reexamine their practices, not only to attract employees, but also to retain them, and to maintain a positive public image.

Here the work of Professor Eisenberg is again instructive, by analogy. Borrowing from the executive compensation context, where some degree of pay transparency is already in place, she notes, "'This is an area in which the very recognition of problems may help alleviate them.''[111] She also draws parallels to securities regulation more generally, which relies heavily on information disclosure for efficient operation of financial markets. In this context she offers the following quotation, which could be said equally of time transparency. She writes:

> Felix Frankfurter, one of the architects of the early securities laws, explained that transparency operated as a restraint on unreasonable pay arrangements: "There is a shrinking quality to such transactions; to force knowledge of them in the open is largely to restrain their happening."[112]

Similarly, this Article bets on the premise that forcing knowledge of long hours for white-collar workers into the open will largely constrain their happening.

For all the reasons offered in this Part III, this Article argues that the best way to protect exempt workers from overly long workweeks is not to impose artificial legal limits on working hours, which may inhibit economic productivity and run

110. Estlund, *Extending*, *supra* note 51, at 782.

111. Eisenberg, *supra* note 7, at 1005 (quoting LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE PAY 12 (2004)).

112. *Id*. at 984.

counter to workers' own desires. And the solution is not to extend overtime "protections" to these workers either, despite the intuitive logic of requiring extra pay for extra work. Overtime pay requirements would likely, as a practical matter, shift the burden of schedule control from management to the workers themselves, with intense attendant pressures to work "off the clock," and without any real reduction in time expended. So instead, this Article argues that simply directing employers to disclose real working hours for their exempt positions will help improve goodness of fit between employees and employment opportunities, at whatever level of work is mutually acceptable to both employer and employee. Moreover, the very asking of employers to undertake the exercise of collecting and disclosing actual hours worked for exempt positions could itself be expected to reduce working hours—or at the very least, to create a broader spectrum of options—as employers vie for competitive position in the realms of recruitment, retention, and reputation.

IV. A PRELIMINARY SKETCH OF PROPOSED DISCLOSURE OBLIGATIONS AND ENFORCEMENT MECHANISMS FOR TIME TRANSPARENCY

With the benefits of time transparency in full view, this Part IV begins to explore what exempt time transparency might look like in the form of proposed legislation. First, this Part explores potential objections to time transparency on grounds of confidentiality and cost and considers how proposed legislation could be tailored to mitigate those concerns. Next, this Part considers whether any payroll recordkeeping and reporting regimes already in existence or under consideration might serve as ready vehicles for exempt time transparency regulation and concludes, after examining both the recordkeeping requirements of the FLSA and the proposed Paycheck Fairness Act, that an independently tailored directive would be better suited to achieve exempt time transparency objectives. Finally, this Part identifies key features that would ideally be included in any effective time transparency legislation to achieve objectives without undue burden to business, and it also opens questions to be answered in the process.

A. Skepticism Regarding Confidentiality and Cost Is Unwarranted and Could Be Addressed by Adjusting the Scope of Required Disclosures in Any Event

Mandatory disclosure initiatives have been met with challenges on grounds of both confidentiality and cost. Similar claims could be made in opposition to exempt time transparency, which would likewise compel employers to take steps to disclose information that they otherwise would not. However, because employers already have an obligation to track and disclose hours for their nonexempt workers, neither concerns about confidentiality nor cost would seem to carry much weight; and in any case, time transparency legislation could be tailored to mitigate such concerns if necessary.

1. Confidentiality

Mandatory disclosure initiatives can be subject to challenge on grounds of confidentiality generally because they compel disclosure of information that was previously kept private. With respect to the disclosure of employment information specifically, employers might advance concerns about proprietary information and unfair competition, trade secret protection, and even constitutional rights against compelled speech. For the following reasons, none of these concerns should stand in the way of exempt time transparency.

First, employers may object generally on grounds that employee work hours are confidential and proprietary information, perhaps even trade secrets, the disclosure of which would put them at a competitive disadvantage.[113] As a preliminary matter, it is doubtful that mundane employment information generally rises to the level of a protected trade secret.[114] Concededly, however, with respect to pay rates in particular, "'properly designed employee compensation programs can represent a source of company competitive advantage.'"[115] The competitive interest of employers in pay data arises from a fear that competitors would use the information to lure valuable employees away.[116] One could anticipate similar fears of employee raiding—or employee exodus—arising with respect to time transparency, as competitors and employees alike obtain information about comparatively more or less attractive work schedules.[117] However, equally with respect to time transparency as to pay transparency, "the employers' desire to avoid lawful labor market competition for their at-will employees ought not to count as a legitimate commercial interest in confidentiality. It should raise no bar against a public disclosure mandate that is intended in part to improve labor market competition and employees' bargaining power."[118] In other words, where the very design of time transparency is intended in part to achieve beneficial social outcomes through competitive market pressures, employer confidentiality claims based on competitive interests should carry no weight.

Even if one were to grant more deference to employer confidentiality concerns, the fact remains that in the absence of time transparency, candidates for exempt positions cannot meaningfully evaluate the compensation they have been offered for the job. So, even assuming that keeping hours secret gives employers some kind of competitive edge that the law should otherwise respect, the employer's

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113. *See* Estlund, *Extending*, *supra* note 51, at 791–93 (describing and refuting anticipated employer objections to pay transparency based on assertions that pay is proprietary information).

114. *See* Estlund, *supra* note 29, at 391–94.

115. Estlund, *Extending*, *supra* note 51, at 792 (quoting Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way.": Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 177 (2004)).

116. *Id.*

117. Alternatively, one could as easily anticipate employer fears of public exposure of their inefficiencies or indifference, if they require such long hours from workers to accomplish their corporate objectives.

118. *Id.* at 794.

confidentiality interest should still fall in the face of the more compelling interests of employees to be informed of such a basic condition of their employment. Even if employers could make the case that exempt work hours are confidential, time transparency legislation could be minimally designed to communicate such information only to candidates for the position in question. While that would lessen the reputational impact of time transparency, it would at least allow time transparency to promote efficient and fair individual contracts.

Related to employer confidentiality is the privacy of other employees. This concern figures prominently in discussions of pay transparency,[119] to the extent such proposals would require employers to disclose pay rates tied to position titles and other identifying characteristics. But as discussed above, gender pay disparities are strongly associated with pay secrecy norms, whereas long workweeks, in sharp contrast, are common fodder for cocktail conversation. It is therefore hard to imagine strong privacy concerns emerging from white-collar workers themselves. Moreover, time transparency could be effective without revealing anything approaching the granularity required for effective disclosure of pay rates. Instead, information about individual working hours could be anonymized and aggregated for any given job classification,[120] and would arguably be more meaningful to prospective workers that way.

Finally, it is worth briefly considering the question of constitutionality, if only because the issue looms large in other applications of mandatory information disclosure.[121] However, the strongest challenges by employers asserting constitutional rights have arisen in the context of mandatory workplace posting requirements, when employers challenge government-drafted postings.[122] Here, employers would not be forced to convey government-drafted poster language, but rather would only be required to reveal information about working hours in their own workplaces; information that employers already make available to the government for nonexempt employees. Accordingly, this concern would seem to apply with much less force, if at all, to any proposal for time transparency.

2. Cost

It is also easy to anticipate objections to time transparency on the basis of cost, for the simple reason that employers do not currently track exempt hours of work,

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119. *See, e.g.*, Estlund, *Extending*, *supra* note 51, at 797–98; Kulow, *supra* note 62, at 431–34; Bierman & Gely, *supra* note 115, at 176–77.

120. *See infra* Part IV.C.

121. *See, e.g.*, Alexander, *supra* note 92, at 205–11 (analyzing the constitutionality of workplace postings required by the National Labor Relations Board on grounds of First Amendment rights against compelled speech); Blasi, *supra* note 7, at 126–36 (analyzing the constitutionality of proposed labor standards compliance posting on grounds of compelled speech, equal protection and selective enforcement, and procedural due process); Bornstein, *supra* note 7, at 355–57 (concluding, in the context of a proposed requirement to disclose employer equality and antidiscrimination data, and in the face of longstanding EEO-1 data collection, that "any rule merely expanding factual information collected from employers could likely be drafted without implicating the First Amendment").

122. *See* Alexander, *supra* note 92, at 205–11; Blasi, *supra* note 7, at 126–36.

so any new disclosure requirement would in theory force employers to incur new expenses. Yet such expenses should be marginal. The vast majority of employers are already required by the FLSA and similar state laws to keep records of the hours worked by their employees who are classified as nonexempt,[123] so the necessary infrastructure to track, record, and maintain hours worked for disclosure should already be in place.[124] Any cost of exempt time transparency would be merely incremental. Moreover, current technologies have revolutionized the speed, simplicity, and ease of employee time-tracking,[125] and many employers have already invested in and now use digital platforms for this purpose.[126] Adding an additional slate of users should entail only minimal transaction costs.

Finally, for exempt time transparency to be effective, the information that would need to be collected and maintained need not be anywhere as detailed—or as daily—as that required to meet the minimum wage and overtime requirements of the FLSA. Unlike nonexempt hours of work, which usually must be recorded by every nonexempt employee, every day, for every day of employment, to ensure that each individual worker gets paid appropriately for each hour, the purposes of exempt time transparency could be served by a mere snapshot of information by comparison. What end-users need to know for time transparency to be effective is more in the nature of anonymized, aggregate average hours worked for full-time job positions. This distinction is important, because exempt workers themselves might also perceive a cost to exempt time transparency in the form of a new burden to track their work hours. This minimal time tracking burden—light as it is today, with time tracking technology—could be made even lighter by requiring data collection only for a window of time, at annual or biannual intervals, for example. Such collection details are taken up in more detail in Part IV.B below. In short, the cost of time transparency should not be expected to be

123. For a more thorough discussion of the recordkeeping requirements under the FLSA, see *infra* notes 127–135 and accompanying text.

124. Moreover, in some white-collar workplaces, exempt workers already record their time for purposes of billable hours, federal or private contract requirements, or project management. Lawyers, for example, bill by the hour, and most large firms have tracking software for this purpose. Moreover, law firms have been providing this information for years to the National Association for Law Placement, which reports firms' average hours worked and billed for the benefit of law students looking for the best employment match. *See Research & Statistics*, NALP, https://www.nalp.org/lawfirmadministration [https://perma.cc/586F-MHR6].

125. *See generally* Dave Zielinski, *On the Clock: New Time and Attendance Software Helps Track Labor Costs and Ensure Legal Compliance*, SHRM (Apr. 1, 2012), https://www.shrm.org/hr-today/news/hr- magazine/pages/0412tech.aspx [https://perma.cc.FH5V-B5DN] ("How companies track and manage employee work hours has come a long way from the days when workers punched paper time sheets in time clocks. Today, more organizations employ systems that enable workers to punch in and out by scanning identification badges on electronic readers, which then beam information to time and attendance software that calculates work hours, tracks overtime or vacation requests and integrates with payroll processing.").

126. *See* Tippet et al., *supra* note 6, at 2 ("Electronic timekeeping is a ubiquitous feature of the modern workplace. In place of the old punch-card time clock, employees now log onto a computer or mobile device, swipe a radio frequency identification (RFID) badge, scan a fingerprint, or gaze into an iris recognition device.").

prohibitively burdensome to either employers or employees, especially considering projected public benefits.

B. Neither the Recordkeeping Regulations of the FLSA Nor the Proposed Federal Paycheck Fairness Act Serves as a Ready Vehicle for Exempt Time Transparency

In developing new legislation for exempt time transparency, it is useful to examine other legislative and regulatory models that have already been developed requiring employers to record or report employee payroll information, including working hours, and to consider whether any such existing or proposed model might serve as a ready vehicle for exempt time transparency reform. This section examines two models that are the most obvious candidates for such purposes and evaluates their feasibility as a template or guideline for formulating time transparency legislation: the recordkeeping requirements of the federal Fair Labor Standards Act and the proposed federal Paycheck Fairness Act. This Article concludes that these two models both offer useful frameworks for white-collar time transparency, but they are ultimately ill-suited to achieve its objectives.

1. The Recordkeeping Requirements of the FLSA

First, the federal Fair Labor Standards Act represents the oldest and most widely applicable recordkeeping requirements already in effect for employee payroll information. To help ensure that employers are meeting their obligations to pay minimum wage and overtime to nonexempt employees, and to aid in DOL enforcement of the statute, the FLSA and its regulations require employers to keep certain employee records. First, the statute itself authorizes the Administrator or designated staff of the DOL's Wage and Hour Division to "investigate and gather data regarding the wages, *hours*, and other conditions and practices of employment" in any covered industry and to inspect such records as the investigator deems relevant to determine compliance and aid in enforcement.[127] Further, the statute requires every covered employer to "make, keep, and preserve" such records as the Administrator by order or regulation requires—including "the wages, *hours*, and other conditions and practices of employment"—and requires employers to preserve and report those records to the DOL.[128] These provisions of the statute do not make distinctions on the basis of exempt status. Standing alone, they would seem already to authorize the DOL to require employers to create and preserve records of hours worked, without regard to employees' exempt or nonexempt status.

The recordkeeping regulations promulgated by the DOL, however, do not require an hourly accounting for white-collar time. Instead, with respect to bona fide executive, administrative, or professional employees (and certain other

127. 29 U.S.C. § 211(a) (emphasis added).
128. 29 U.S.C. § 211(c) (emphasis added).

exempt employees), the regulations require employers to keep only a portion of the records that are generally required to be maintained for nonexempt employees.[129] The records required to be kept for both exempt and nonexempt employees alike include: the employee's name, address, date of birth, sex, occupation, and the time of day and day of the week on which the employee's workweek begins.[130] However, while employers are also required by regulation to keep records for nonexempt employees of "hours worked each workday and total hours worked each workweek,"[131] no such records of hours worked are required for exempt employees.[132]

The existence of the recordkeeping requirement for nonexempt hours provides at least some precedent for creation of a similar requirement for exempt white-collar hours. Additionally it raises the question of whether one feasible approach to time transparency regulation would be for the DOL simply to extend the recordkeeping regulations that are already in effect under the FLSA. Such a change would amount to a mere technical edit on paper, requiring only that the language in 29 C.F.R. § 516.3 that currently excludes the hours requirement in 29 C.F.R. § 516.2(7) be modified to include it. Although logistically simple, such an approach is at once both overly broad and also insufficient to fulfill the objectives of white-collar time transparency.

First, most exempt employees do not currently track their time. Extending the existing daily recordkeeping requirement, as is, to exempt employees would impose a significant new burden on white-collar workers and their employers alike. Moreover, any requirement to track hours worked by every exempt employee on each and every workday for each and every workweek, as the regulations require, would likely produce a substantial amount of redundant data that far exceeds, both in volume and in particularity, what a prospective employee would want to know about general time commitments required for a given job. In these respects, extending the existing FLSA recordkeeping requirements to exempt hours would be an overly expansive approach.

Moreover, nothing in the current FLSA regulations requires that any of that voluminous data be disclosed to prospective employees. Instead, the FLSA recordkeeping regulations only require that employers maintain and preserve the

129. 29 C.F.R. § 516.3 (2020) (for "white-collar" employees and certain others, "employers shall maintain and preserve records containing all the information and data required by § 516.2(a) except paragraphs (a) (6) through (10)," an exclusion that eliminates the requirement to keep records of hours).

130. *See* 29 C.F.R. § 516.2(a)(1)–(5) (2020). The "workweek" is defined under the FLSA as "any fixed and regularly recurring period of 7 consecutive workdays." 29 C.F.R. § 516.2(7) (2020). Determination of an established workweek is necessary both to determine overtime for nonexempt employees, 29 C.F.R. § 778.105 (2020), and to some extent to determine whether white-collar workers are paid on a salary basis as required for exemption, 29 C.F.R. § 541.602(a)(1) (2020). Accordingly, workweek records would be pertinent to DOL enforcement for both groups of employees.

131. 29 C.F.R. § 516.2(a)(7) (2020). This requirement also applies to certain other categories of employees who are exempt from overtime but not minimum wage requirements. *See* 29 C.F.R. § 516.2(a) (2020).

132. 29 C.F.R. § 516.3 (2020).

specified records, which may be kept in any form,[133] for disclosure to the DOL.[134] In that sense, extending existing FLSA recordkeeping requirements to exempt hours would have limited benefit. To be sure, the process of tracking and compiling the data would be an illuminating exercise for the employer and employees alike, and to the extent the exercise would raise awareness of long workweeks, it would confer some benefit. But if employers lack any affirmative obligation to share that information directly with prospective candidates, simply compiling the information would have limited influence in shaping behavior.

As a final flaw in any proposed plan merely to extend the FLSA recordkeeping requirements, the DOL's statutory authorization to collect records only extends to those records deemed "necessary or appropriate" to determine whether a violation has occurred or to "aid in the enforcement" of the statute.[135] One could conceivably argue that records of actual hours worked by exempt white-collar employees are not necessary to enforcement of the statute, to the extent such employees are exempt from the Act's minimum wage and overtime requirements. Because the DOL's authority in that regard is presumably limited, any extension of the existing regulation to require tracking of exempt-employee hours could be subject to challenge on those grounds.

For these reasons, extending the existing FLSA regulations for recordkeeping requirements is not the easy path to white-collar time transparency that it may seem. Instead, a new, targeted, standalone directive to collect and report working hours is preferable, to the extent it is more selective, effective, and defensible.

2. The Proposed Federal Paycheck Fairness Act

Might such a directive be found in the Paycheck Fairness Act, legislation proposed at the federal level? As outlined in Part III above, legislative proposals in support of equal pay have been advanced at the state and federal level for years. Recently at the federal level, the federal Paycheck Fairness Act (PFA) was reintroduced in 2021 and passed in the House, but as of this writing, has not been passed by the Senate.[136] Whether the bill is ultimately enacted in its current form, the PFA as proposed and passed in the House (H.R. 7) provides for collection of

133. 29 C.F.R. § 516.1(a) (2020).

134. 29 U.S.C. § 211(c); 29 C.F.R. § 516.7 (2020). *See also* U.S DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #21: RECORDKEEPING REQUIREMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (July 2008), https://www.dol.gov/agencies/whd/fact-sheets/21-flsa-recordkeeping [https://perma.cc/T2VJ-VGQN] [hereinafter FACT SHEET #21]. In turn, the DOL makes various enforcement data available to the public, but not in a form calculated to aid prospective employees broadly. *Data Enforcement*, U.S. DEP'T OF LAB., https://enforcedata.dol.gov/homePage.php [https://perma.cc/UBL2-3CJF].

135. 29 U.S.C. § 211(a), (c).

136. Paycheck Fairness Act, H.R. 7, 117th Cong. (2021). The latest activity on the bill is available at Congress.gov, https://www.congress.gov/bill/117th-congress/house-bill/7. This Article examines the proposed legislation at a particular point in time, recognizing the likelihood of future iterations.

pay data, including working hours.[137] Given its high visibility of and the breadth of its impact if enacted, H.R. 7 represents another possible model—or perhaps even a vehicle—for enactment of time transparency legislation, and is worth exploring for our purposes here.

As a preliminary matter, the data-collection provisions of H.R. 7 are not the only or even the primary thrust of the bill. More broadly, the bill would amend the Equal Pay Act to address shortcomings that have become apparent over the years, including, among other things, what constitutes a factor other than sex permissible to justify unequal pay under the EPA and what constitutes the same "establishment" for purposes of equal pay comparisons.[138] Although H.R. 7 would not require pay transparency per se, it includes other provisions designed to help close the gender pay gap, including negotiation skills training, research, education and outreach, and establishment of a national award for pay equity in the workplace.[139] Importantly for advocates of equal pay, H.R. 7 would protect worker rights to discuss salary, restrict employers' consideration of wage history in the hiring process, and confer anti-retaliation protections on employees who challenge pay practices.[140]

Most relevant for our inquiry, H.R. 7 as currently passed by the House would direct the EEOC to collect compensation data, including working hours.[141] The EEOC already collects certain personnel data,[142] but H.R. 7 would significantly expand those collection obligations.[143] The legislation directs the EEOC to

137. *See infra* notes 141–146 and accompanying text.

138. H.R. 7 § 2.

139. H.R. 7 §§ 4–6.

140. H.R. 7 §§ 2, 9.

141. H.R. 7 § 7.

142. The EEOC is already required to collect from "all private sector employers with 100 or more employees, and all federal contractors with 50 or more employees meeting certain criteria . . . demographic workforce data, including data by race/ethnicity, sex and job categories" on what is known as the EEO-1 report. *See generally EEO-1 Data Collection*, EEOC, https://www.eeoc.gov/employers/eeo-1-data-collection [https://perma.cc/NWA4-926H]. Of note, the Office of Federal Compliance Programs ("OFCCP") also collects certain personnel information from federal contractors as part of contractors' affirmative action plans. *See generally* U.S. Dep't of Lab., Off. of Fed. Compliance Programs, *1G12 Data Collection Analysis*, FEDERAL CONTRACT COMPLIANCE MANUAL, https://www.dol.gov/agencies/ofccp/manual/fccm/1g-review-section-503-aap-and-itemized-listing-data-acceptability/1g12 [https://perma.cc/US6U-LC56]. The OFCCP requirements apply only to employers who are federal contractors, *id.*, and the OFCCP relies jointly with the EEOC on EEO-1 data, *see generally* Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5113-5114 (Feb. 1, 2016) [hereinafter EEOC 2016 Collection Activities].

143. H.R. 7 §§ 7, 8. There is some on-again, off-again history here, as the EEOC took steps to start collecting compensation data during the Obama Administration, *see generally* EEOC 2016 Collection Activities, *supra* note 142, but reversed course under the Trump Administration, and future developments under the Biden Administration remain to be seen. For a general summary of the course of events, see Denise A. Cardman, *The Paycheck Fairness Act*, AM. BAR ASS'N, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/ [https://perma.cc/7TSU-5QRH] (advocating passage of the Paycheck Fairness Act and describing Executive Action under the Obama Administration to advance pay equity including support of compensation data collection). *See also* Mark Bakker, Lauren Deyo & Nexsen Pruet, *EEOC Announces New Deadlines for EEO-1 Reporting*, JD SUPRA (Apr. 1, 2021), https://www.jdsupra.com/

provide for the annual collection of compensation data from covered employers disaggregated by sex, race, and national origin, and states that in doing so, the EEOC may use compensation ranges reporting "(i) the number of employees of the employer who earn compensation in an amount that falls within such compensation range; and (ii) *the total number of hours worked by such employees*."[144] Moreover, H.R. 7would require the EEOC to make the aggregate compensation data for demographic groups publicly available periodically, in disaggregated form.[145] Thus, H.R. 7appears to offer a legislative vehicle both for collecting generalized work hours and for disclosing that information to the public, a vehicle that the FLSA does not provide.

Unfortunately, however, even if enacted as is, H.R. 7 would serve no better than the FLSA recordkeeping requirements for purposes of exempt-time transparency. Again, as with the FLSA regulations, the information H.R. 7 would collect and the form in which that information would be presented is simultaneously overly broad and insufficiently specific. With its focus on eradicating discrimination, H.R. 7's compensation data would include demographic information and highlight discrepancies that are not strictly relevant for purposes of exempt-time transparency (as important as that data may be for pay equity and transparency).

Moreover, and most importantly, H.R. 7 punts on the collection of exempt working hours. It provides that when collecting compensation data with respect to exempt employees, the EEOC may permit employers simply to report a flat forty hours of work per week for full-time employees, and twenty hours for part-time, as proxies for actual hours worked.[146] Presumably, H.R. 7 makes this allowance because employers do not normally track hours for exempt workers. Yet it is precisely the full-time hours *over forty* that are central to the exempt-time transparency legislation proposed here. Thus, H.R. 7 would make inroads in hours collection and reporting, but unfortunately not in a manner that promotes exempt time transparency. One might question whether the relevant provisions of the legislation could be revised in future iterations to delete the proxy option for reporting exempt hours, and instead require the reporting of actual hours worked;

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legalnews/eeoc-announces-new-deadlines-for-eeo-1-3722507/ [https://perma.cc/TVT9-JTYT] ("There is no Component 2 ('hours worked' and 'pay data') reporting requirement for 2019 or 2020. . . . Because the White House recently affirmed that pay equity and pay data transparency will be a Biden administration priority, Component 2 data collection may be revived at some point in the future."). The OFCCP has similarly gone back and forth on whether it intends to use such information. *See* Jim Paretti et al., *OFCCP Reverses Course, Will Use EEO-1 Pay Data for Investigation, Enforcement*, LITTLER (Sept. 1, 2021), https://www.littler.com/publication-press/publication/ofccp-reverses-course-will-use-eeo-1-pay-data-investigation [https://perma.cc/9UJR-MXFT].

144. H.R. 7 § 7 (emphasis added).

145. *Id.*

146. *Id.* This mirrors the approach the EEOC proposed when it launched similar efforts in 2016. *See* EEOC 2016 Collection Activities, *supra* note 142, at 5117 ("The EEOC seeks employer input with respect to how to report hours worked for salaried employees. One approach would be for employers to use an estimate of 40 hours per week for fulltime salaried workers. The EEOC is not proposing to require an employer to begin collecting additional data on actual hours worked for salaried workers, to the extent that the employer does not currently maintain such information.").

but again, this would likely result in over-collection of information for the limited purpose of white-collar time transparency, and it could have the unintended effect of saddling H.R. 7 with further objections to its implementation.

Moreover, as helpful as a reporting of actual hours would be, candidates for white-collar jobs would likely also benefit from understanding the general distribution of hours during the workweek, because the hours worked over forty are most likely to conflict with evenings, weekends, and other times historically reserved for nonwork activities. Similarly, the weight of being "always on" can significantly damage quality of life, whether or not employees are actually called into action. [147] Thus, to promote the best employment match, disclosure of manager expectations regarding employee availability outside of standard office hours would be valuable. Accordingly, this Article proposes that what is needed for effective time transparency is new, standalone legislation designed to collect only the minimal information necessary for meaningful transparency in working hours, with minimal burden to employers and employees, but with sufficient disclosure requirements to prompt employer action and enable employee decision making.

C. Any Proposed Time Transparency Legislation Should Require Disclosures Sufficient to Shape Employer and Employee Behavior Without Undue Burden on Business Operations

The foregoing observations about existing models of regulation point to various key features that should be included in any time transparency legislation, whatever form it ultimately takes. Notably, "[a]ny legislative proposal that ignores the concerns of private sector employers has little hope of success."[148] Accordingly, any time-transparency legislation should require disclosures sufficient to shape employer and employee behavior without undue burden on business operations. With this basic principle in mind, this Article proposes that time-transparency legislation should have the following features regarding the data to be collected, the means of collection, the manner of disclosure, and the methods of enforcement.

Data to be collected: Employers should be required to maintain aggregate, anonymous records of average hours worked (defined more fully below) by all full-time employees within each individual exempt job title and department. The data should be sorted sufficiently to indicate the percentage of hours worked outside of standard office hours on weekdays and the percentage of hours worked on weekends. The data should also capture surge weeks and indicate whether

147. *See* KELLY & MOEN, *supra* note 5, at 21–22 ("Overload arises from management expectations that employees and managers will do whatever they are asked, no matter how many hours have already been worked or when those requests come in."); *see also id.* at 6 (describing a manager who "explains that her 10 p.m. meetings mean her 'entire evening is actually ruined' because she is 'on edge' and busy preparing for the call.").

148. Kulow, *supra* note 62, at 430.

workloads are seasonal. Records should reflect when the data was collected and last updated.

Archival records should be maintained and made available for at least three years, to reflect stability or trending increases or decreases. Finally, employer statements regarding expectations of employee availability—wholly apart from hours actually worked—would be useful information for candidates.

Means of collection: Employers should have considerable latitude in choosing the means of data collection, as they do for nonexempt-employee time recording.[149] Importantly, employers should not be required to undertake the burden of collecting and maintaining exempt records on a daily basis (although they should be free to do so, if that proves most expedient). The question then arises what lesser method would be workable and sufficient to capture "average" hours. This question may be best tested by various states experimenting with different models. This Article suggests, as one approach, that employers be required to collect data for one full year after enactment of the mandatory disclosure requirement, and for each new full-time position created thereafter. After the initial year-long collection of data, it should be sufficient for employers merely to collect information over a period of several weeks, on an annual or biannual basis, at approximately the same time during the year. Full, annual collections could be repeated at significantly longer intervals. Provided that employers report the date and duration of data collection, as recommended above, end-users should be able to glean sufficient information from such periodic updates to put the data in proper context.

Manner of disclosure: Ideally, exempt-hours information would be posted on the employer's website (or, if the employer has no website, submitted to a government clearinghouse site designed to post data for such employers), using a standard format for ease of comparison across positions and employers. In addition, and at a minimum, a statement in the standard format should be distributed to all internal and external applicants for a position, including promotions and transfers. A sample standardized form might look something like this:

149. *See* FACT SHEET #21, *supra* note 134.

STATEMENT OF EXEMPT HOURS WORKED	
Name of employer entity	[This column to be completed by employer]
Exempt position title, job grade, and department	Title: Job Grade: Department:
Aggregate average hours worked per year, and year of collection ("collection year")	Average annual hours: Collected from (month/day) to (month/day), (year)
Aggregate average hours worked per week ("weekly hours'), and dates of collection ("collection period")	Average aggregate hours per workweek: Collected from (month/day) to (month/day), (year)
Percentage of weekly hours worked on weekdays before 8:00 am or after 5:00 pm during the collection period	_____%
Percentage of weekly hours worked on weekends during the collection period	_____%
Number of workweeks during any collection year and during any collection period that exceed the aggregate average for that period by more than 10% ("surge weeks')	_____surge weeks per collection year _____surge weeks per collection period
Are work hours seasonal? State Yes or No and Explain.	Yes _____/ No _____ Explanation:
Are employees in this job position usually expected to check messages and be available on cell phones during all waking hours? If not, identify periods when employees are not usually expected to check messages or be available.	Yes _____/ No _____ Periods during the day _____or the week_____ when employees are not usually expected to check messages or be available.

Methods of enforcement: This Article strongly opposes creating a private right of action for enforcement of time transparency. Further, this Article recommends that any time transparency legislation affirmatively provide that the disclosures made pursuant to its requirements are for information purposes only and do not create a contract for employment. Instead, the records could be subject to audit by the DOL or a comparable state agency, with civil penalties for failure to accurately maintain or disclose required records. This enforcement approach would best capitalize on the ability of transparency regulation to influence corporate action with a minimum of government intervention. For it is not entirely the threat of government enforcement at the back end that will drive the greatest

benefit from time transparency, but rather the up-front exercise of collecting and disclosing the information itself. As Eisenberg observes with respect to pay transparency:

> To be most effective, transparency should offer meaningful information to employees and job applicants, and should allow enough flexibility to fit within the culture of an organization. Most importantly, it is the very process of developing such a system—and the constant dialogue between employers and employees required to implement and refine such a system—that would be most helpful in eliminating discriminatory wage practices and empowering women.[150]

Likewise, in the case of time transparency, the very process of collecting exempt work hours, and the dialogue between employers and employees that occurs in the process, will be the most helpful in exposing, and therefore reducing, excessive work hours.

D. As With All New Ideas, Many Questions Remain

This Article makes a new proposal for exempt white-collar "time transparency" as an alternative to legal mandates for shorter workweeks. The goal is to get the conversation started on what could be a promising avenue of reform. Accordingly, the ideas offered here are untested, and leave many questions unanswered:

Would exempt workers object to tracking their time, even periodically, and would such recordkeeping prove too burdensome for employers, even with the aid of technology? What is the least intrusive, most effective means of tracking exempt time? In a culture that gives bragging rights to the exempt workers who work longest, could time transparency have the opposite of its intended effect, sparking a "race to the bottom" (or to the top, as it were) with employers and employees competing for the longest workweeks? And would women—who still carry the bulk of domestic work and caregiving responsibilities—self-select into jobs identified to have shorter working hours, and attendant lower pay, thus exacerbating the gender income gap? Or would time-transparency instead generate a wider variety of hours options for all workers, eventually normalizing universally more reasonable workweeks for everyone in the long run?

This Author is betting on the latter, and invites conversation.

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150. Eisenberg, *supra* note 7, at 1006.