

THE FUTURE OF WORK: EXPLORING THE POST-PANDEMIC WORKPLACE FROM AN EMPLOYMENT LAW AND HUMAN RESOURCES PERSPECTIVE

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INTRODUCTION

In March of 2017, when we were blissfully ignorant of what was to come in that same month a few years later, an associate professor of political science named Robert Kelly was being interviewed on BBC from his home office in South Korea. About a minute into the interview, his four-year-old

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daughter pranced into the room and was followed by her little brother in a baby walker. Shortly thereafter, Kelly's horrified spouse, Kim Jung-A scrambled in to collect the kids and close the office door.¹

The BBC interview mentioned above, which now has tens of millions of views on YouTube, took place long before our collective experiment in working from home.² While Kelly's experience was novel in 2017, it feels like just another day at the office in 2020. If we have not personally had a kid "bust down the door" during a Zoom call, then we have seen someone else's kid do the same.³ While Kelly's interview may have still gone viral if it had happened today—this was live on BBC, after all—the whole experience feels far more familiar than it once did.

As the COVID-19 pandemic stretches on, much has been written about the remote workplace of the future. Experts argue that the pandemic has fast-forwarded us by years in the direction of working from home and surveys of business leaders suggest that remote work is here to stay.⁴ But what exactly

¹ Scott Stump, *'BBC Dad' reflects on viral work-from-home moment*, TODAY (Mar. 13, 2018, 7:12 AM), <https://www.today.com/parents/bbc-dad-revisits-his-family-s-viral-moment-one-year-t124934>.

² BBC News, *Children interrupt BBC News interview*, YOUTUBE (Mar. 17, 2017), <https://www.youtube.com/watch?v=Mh4f9AYRCZY>.

³ See Adam Gorlick, *Productivity pitfalls of working from home in the age of COVID-19*, STANFORD INSTITUTE FOR ECONOMIC POLICY RESEARCH (Mar. 30, 2020), <https://siepr.stanford.edu/news/productivity-pitfalls-working-home-age-covid-19> ("My 4-year-old regularly bursts into the room hoping to find me in a playful mood shouting 'doodoo!'—her nickname for me—in the middle of conference calls."); Beth Castle, *Letting Your Kid(s) Be On Your Video Calls During Quarantine Will Help the Workplace Later*, FAST COMPANY (Apr. 19, 2020), <https://www.fastcompany.com/90492495/letting-your-kids-be-on-your-video-calls-during-quarantine-will-help-the-workplace-later>.

⁴ See, e.g., Becky Frankiewicz & Tomas Chamorro-Premuzic, *The Post-Pandemic Rules of Talent Management*, HARV. BUS. REV. (Oct. 13, 2020), https://hbr.org/2020/10/the-post-pandemic-rules-of-talent-management?ab=at_articlepage_relatedarticles_horizontal_slot2 ("At the onset of the Covid-19 crisis, talent literally left the building, and we're now beginning to realize that in many places, it is unlikely to come back. Technology is moving humanity away from the office and back into homes across our nation every day. We are building culture outside of buildings, with work that supports life on a more even playing field, with talent that can come from anywhere. As we look to the future, it's time to unleash these new way [sic] of working for the long-term, with a focus on well-being, equality, and productivity that can work for both employers and employees long after this crisis ends. It's time to embrace the truly global talent pool that is available to drive growth, regardless of where people call home."); Susan Lund et al., *What 800 Executives Envision for the Postpandemic Workplace*, MCKINSEY GLOB. INST. (Sept. 23, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/what-800-executives-envision-for-the-postpandemic-workforce#> ("Unprecedented restrictions on travel, physical interactions, and changes in consumer behavior since COVID-19 took hold have forced companies and consumers to change the way they operate. This has spurred digital transformations in a matter of weeks rather than months or years Before the pandemic, remote work had struggled to establish much of a beachhead, as companies

does this mean? Is the future of work primarily virtual? What will be the new role of the physical workspace? What are the implications of this potential sea change from an employment law standpoint?

As we examine these and other questions in the coming pages, we will explore some of the research and common sentiments regarding the business-case and human resources arguments for and against remote work. We will continue on to argue that the “hybrid workplace,” in which more people work from home more of the time, is our likely future. We will then consider the novel questions and challenges this raises in the field of employment law. And we will conclude by arguing that giving employees choices about where they work boosts workplace morale and increases productivity while eliminating several legal and human resources pitfalls.

I. AN UNLIKELY CASE STUDY

While this article is certainly not about the legal industry, it does present a rare opportunity to use law firms, often mocked as “dinosaurs,” as both a model of innovation and a glimpse into our post-pandemic future.⁵ I started my legal career in the Manhattan office of one of these purported dinosaurs, an international law firm that was founded in 1891.⁶

As a new associate, I was assigned to the defense team for a public company involved in a multi-party, multi-district commercial litigation. The other members of my team were situated across the country, which meant that I would dutifully come into the office, sit down at my desk, and proceed to have phone calls, email exchanges, and chat messages with paralegals and attorneys whom I had never met in person. Although my supervisor sat in Washington, D.C., we worked with a paralegal team in California and other attorneys were based hundreds of miles away. It would have been out of the question to suggest that any of us should work from home in 2008.

About a decade later, following that first foray into “remote” work, I joined a law firm in which nearly 150 attorneys, paralegals, and staff work in

worried about its impact on productivity and corporate culture. With the advent of COVID-19, however, tens of millions of employees were sent home, armed with laptops and other digital technologies, to start work. Now, some employers intend to increase the number of their employees working remotely at least some of the time . . .”).

⁵ See Dan Mills, *An Innovation Model for Firms to Follow*, D.C. BAR: WASH. LAWYER (Sept./Oct. 2020), <http://washingtonlawyer.dcbar.org/septemberoctober2020/index.php#/p/8>; Emily Tan, *Quick Chats: Dov Greenbaum, Director of the Zvi Meitar Institute for Legal Implications of Emerging Technologies*, LAWTECH.ASIA (Jan. 8, 2019), <https://lawtech.asia/lawtech-quick-chats-dov-greenbaum>.

⁶ See Jennifer Smith, *Morgan Lewis Partners Approve Bingham Deal*, WALL ST. J. (Nov. 14, 2014, 6:40 PM ET) <https://www.wsj.com/articles/BL-LB-49821>.

home offices across the country.⁷ These “New Model” law firms—including Culhane Meadows, Fischer Broyles, Potomac Law Group, Rimon, Taylor English, and VLP Law Group—have been making waves in the legal industry by recruiting partners and even entire practice groups from traditional large firms.⁸ Although New Model firms have physical offices available, the majority of attorneys work from home most of the time.⁹

When skyscrapers in major legal hubs like Manhattan, D.C., and Chicago are replaced with a few flex offices, the cost savings help eliminate twelve-hour days for attorneys—standard fare in Big Law—while lowering hourly rates for clients.¹⁰ Clients get the same attorneys they had at traditional large firms at a reduced cost, while attorneys have a far better quality of life with no minimum billable hour requirements.¹¹ This win-win is brought to the legal industry by the virtual office.

As Law360 observed *prior* to the pandemic, “Large and midsized law firms continue to see incremental increases in revenue and head count [while] cloud-based firms are reporting soaring growth figures.”¹² Experts have long argued that New Model firms will continue to account for a rapidly-growing percentage of the legal market while creating an appealing option for attorneys who prefer to work remotely—a trend that has only been accelerated by the

⁷ See Mills, *supra* note 6.

⁸ See Aebrá Coe, *Why Virtual Law Firm Growth is Outpacing BigLaw*, LAW360 (Feb. 9, 2018, 2:17 PM ET), <https://www.law360.com/articles/1008959> (“[M]ultiple virtual law firms say they are poaching talent directly from BigLaw, often depending on BigLaw expats as their primary talent source, and count Fortune 500, 100 and even 25 corporations among their clients.”); Joan C. Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: New Models of Legal Practice*, 67 HASTINGS L.J. 1, 4 (2015), http://repository.uchastings.edu/faculty_scholarship/1279; Kristina Montgomery, *The End of Brick and Mortar Law Firms?*, LAC GROUP (Nov. 1, 2018), <https://lac-group.com/blog/the-end-of-brick-and-mortar-law-firms>.

⁹ See Coe, *supra* note 9.

¹⁰ See Coe, *supra* note 9 (“Often, the cost savings that can be realized at a virtual law firm are a big draw for partners and clients, experts say. While their business models do vary, most cloud-based and virtual firms have very few to no offices, staff or associates, drastically reducing overhead costs, and allowing the money saved to go toward lower fees and more partner pay.”); Williams et al. *supra* note 9.

¹¹ See Coe, *supra* note 9.

¹² Coe, *supra* note 9 (“The 400 largest law firms in the U.S. by domestic head count have grown between 1 and 2 percent a year on average over the past five years, according to data collected by Law360. And revenue growth has been similarly modest, with the American Lawyer reporting average revenue growth in 2016 of 4.3 percent and 1.2 percent among the first and second 100 largest firms in the U.S. by revenue, respectively. Those figures are not true of the majority of high-profile virtual law firms that have sprouted up in the industry over the past decade. The firms—which largely eschew offices for home- and remote-based working, usually made possible by cloud technology—often post head count growth of between 15 percent and 30 percent a year, and revenue growth of up to 50 percent a year—a far cry from the average brick-and-mortar law firm.”)

pandemic.¹³ The New Model law firms is a microcosm of what employment experts have been seeing in many other industries.¹⁴

What can these firms teach us about the future of work more generally? First, some industries have taken a deep dive into remote work well before the COVID-19 pandemic left us without options and have seen positive employee outcomes and tremendous growth from this voluntary undertaking. Second, when a self-selecting group of employees chooses to work from home, those employees tend to do very well in that environment. As we will discuss, working from home is certainly not for everyone, which is one of the many reasons that traditional offices will not disappear anytime soon. Third, when a particular employer has most employees work from home, its office expenses are substantially lower than those of competing employers operating in traditional offices. Both customers and employees benefit from those cost savings, as does the employer itself. As discussed below, all of these occurrences provide a glimpse into the post-pandemic workplace.

II. THE FUTURE OF WORK

In our efforts to define the future of work, we must remember that remote work is neither possible nor desirable in many industries. Just to name a few, consider the impossibility of remote work in restaurants, schools, childcare centers, hotels, tourist destinations, factories, delivery companies, transportation providers, museums, theaters, boutique retailers, gyms, research labs, and medical offices.¹⁵ The list could go on and on.

These types of employers may have some limited online options, particularly for office staff who do not have customer- or client-facing roles,

¹³ Williams et al. *supra* note 9; Montgomery, *supra* note 9; Michael Moradzadeh, *The Path Forward for Law Firms in the Post-COVID World*, LAW.COM: THE RECORDER (Jul. 10, 2020, 10:29 PM), <https://www.law.com/therecorder/2020/07/10/the-path-forward-for-law-firms-in-the-post-covid-world/>.

¹⁴ See Adam Hickman & Jennifer Robison, *Is Working Remotely Effective? Gallup Research Says Yes*, GALLUP (Jan. 24, 2020), <https://www.gallup.com/workplace/283985/working-remotely-effective-gallup-research-says-yes.aspx> (In a pre-pandemic article, Gallup summarized the following findings: “Remote work is on the rise. The number of hours spent working off-site is increasing, as is the number of workers. In 2012, Gallup data showed 39% of employees worked remotely in some capacity, meaning they spent at least some of their time working away from their coworkers. In 2016, that number had grown four percentage points to 43%. And of those who do work remotely some of the time, the percentage of time spent working remotely increased from 2012 to 2016 as well. The Society for Human Resource Management (SHRM) found a threefold increase in the number of companies offering remote work options between 1996 and 2016.”)

¹⁵ Dana Wilkie, *Why Are Companies Ending Remote Work?*, SOC’Y FOR HUMAN RES. MGMT. (May 7, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/drawbacks-to-working-at-home-.aspx>.

but their purpose and spirit is lost if they operate virtually. By some estimates, 60% of American workers must do their jobs in person.¹⁶ Remote opportunities are concentrated in industries such as technology, finance, insurance, management, and law, but they are simply not an option in many others.¹⁷

As we talk about remote work and the virtual office, the conversation applies to the subset of industries which have the option for some or all employees to work from home. In those industries, leaders will have to make some significant decisions in the coming weeks and months, not the least of which is answering the following questions: Will all employees be *required* to return to work in person? Will some have the *option* to work remotely? Will others be *required* to work remotely?¹⁸

Since these are first and foremost business decisions, we begin by exploring these questions from a management and human resources standpoint. Following that discussion, we will examine the significant employment law implications inherent in the dynamic between mandatory and optional work locations. As we will see, the question of who decides where employees work does not come without legal pitfalls.

A. The Primary Arguments For and Against Remote Work

Whether we look to the academic or popular literature, a key takeaway is that experts do not reach any kind of consensus on the best approach to remote work.¹⁹ Some venerate remote work as a sort of panacea while others say it is fraught with unintended negative consequences. What does emerge from the literature is a series of themes in the business-case and human resources arguments for and against remote work. We explore these themes below to

¹⁶ See Lund et al., *supra* note 5.

¹⁷ *Id.*

¹⁸ See Andrea Alexander, Aaron De Smet & Mihir Mysore, *Reimagining the Post-Pandemic Workforce*, MCKINSEY QUARTERLY (Jul. 7, 2020), <https://www.mckinsey.com/business-functions/organization/our-insights/reimagining-the-postpandemic-workforce#>.

¹⁹ See *id.*; Ravi Gajendran & David Harrison, *The Good, the Bad, and the Unknown About Telecommuting: Meta-Analysis of Psychological Mediators and Individual Consequences*, 92 J. APPLIED PSYCHOL. 1524, 1538 (2007) (“a common refrain in reviews of telecommuting research has been the inability, over 20 years of studies, to draw consistent conclusions about even its most basic consequences”); Timothy Golden, John Veiga & Zeki Simsek, *Telecommuting’s Differential Impact on Work-Family Conflict: Is there No Place Like Home?*, 91 J. APPLIED PSYCHOL. 1340, 1340 (2006) (“The literature on the impact of telecommuting on work–family conflict has been equivocal, asserting that telecommuting enhances work–life balance and reduces conflict, or countering that it increases conflict as more time and emotional energy are allocated to family.”); Timothy Golden & John Veiga, *The Impact of Extent of Telecommuting on Job Satisfaction: Resolving Inconsistent Findings*, 31 J. MGMT. 301, 301 (2005) (“Although popular management wisdom has suggested that telecommuting enhances job satisfaction, research has found both positive and negative relationships.”).

contextualize the important workforce decisions that employers are slated to make in the coming weeks and months.

B. Arguments Against the Virtual Office

For every person who embraces the benefits of working from home, countless others find themselves experiencing some combination of downsides, including: feeling like they are constantly working; losing a sense of separation between work and personal life; feeling lonely and socially isolated; being unfocused; battling distractions from roommates and family; and not having the space, resources, or knowledge to properly set up an effective and productive home office.²⁰

Kevin Roose sums up a common sentiment in his New York Times opinion piece, *Sorry, but Working From Home Is Overrated*:

As a white-collar millennial, I'm supposed to be cheering on the remote work revolution. But I've realized that I can't be my best, most human self in sweatpants, pretending to pay attention on video conferences between trips to the fridge. I'll stay home as long as my bosses and the health authorities advise. But honestly, I can't wait to go back to work.²¹

Not every employer is sold on the idea either. Robert Kruszewski, CEO of Stifel Financial Corporation, reflects another common sentiment in the Wall Street Journal article, *Companies Start to Think Remote Work Isn't So Great After All*: "I am concerned that we would somehow believe that we can basically take kids from college, put them in front of Zoom, and think that three years from now, they'll be every bit as productive as they would have had they had the personal interaction."²² An organizational and industrial psychologist makes the same observation in a recent Here & Now interview.²³ The core of

²⁰ See *The 2020 State of Remote Work, Top Insights and Data from One of the Largest Remote Work Reports*, BUFFER (Feb. 2020), <https://buffer.com/state-of-remote-work-2020#>.

²¹ Kevin Roose, *Sorry, but Working From Home Is Overrated*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/technology/working-from-home.html>.

²² Chip Cutter, *Companies Start to Think Remote Work Isn't So Great After All*, WALL ST. J. (Jul. 24, 2020, 11:10 AM ET), <https://www.wsj.com/articles/companies-start-to-think-remote-work-isnt-so-great-after-all-11595603397>.

²³ Jad Sleiman, *Are You Cut Out to Work From Home?*, HERE & NOW (Jul. 14, 2020), <https://www.wbur.org/hereandnow/2020/07/14/work-from-home-pros-cons> ("Introverts, perhaps unsurprisingly, do very well. For them, just being at work takes work . . . [C]onfident workers thrive as well, those with high task confidence. As in, you don't typically need to ask a colleague to look over your work." However, "someone who's new in their career and just starting their very first job, and then COVID hits and they're not a confident person to begin with, this would be difficult.")

this argument is that a great deal of training and development happens during informal check-ins, spontaneous conversations, and downtimes before and after meetings, but those opportunities are lost when everyone works from home.²⁴

Prior to the pandemic, many companies were experimenting with remote arrangements, but the outcome of those experiments did not always weigh in favor of the virtual office. In a 2019 Society for Human Resource Management article called *Why Are Companies Ending Remote Work?*, Dana Wilkie observes that, among other employers, Bank of New York, IBM, Yahoo!, Aetna, and Best Buy made headlines for calling previously-remote employees back to the office.²⁵ Experts attribute this to some combination of employees lacking training and proper resources to work from home, supervisors lacking training and comfort in managing remote employees, remote employees being less productive compared to those working from the office, and negative cultural impacts of having some employees work from home while others work in person.²⁶

Research shows that relationships between remote employees can suffer when they lack regular in-person interactions.²⁷ Indeed, as we will discuss below, regular opportunities for in-person interaction are a key component of successful remote work arrangements.

Moreover, two separate cultures can emerge within the same organization when some employees work remotely, causing “the sense of belonging, common purpose, and shared identity that inspires all of us to do our best work [to] get lost.”²⁸ Thus, when Yahoo!’s CEO famously ended remote work in 2013, she observed that “the company needed to become ‘One Yahoo!’ again.”²⁹ Summarizing multiple studies on this topic, a Brookings Institute article explains: “Having more coworkers who telework can result in lower performance, higher absenteeism, and higher turnover among those who do not telework, particularly if team members have very limited face-to-face time.”³⁰

Another common concern is the productivity of remote employees. In a 2016 study of procrastination among patent examiners, researchers concluded that the “weakened supervision associated with telecommuting” exacerbates “pre-existing self-control problems” and thus reduces productivity.³¹

²⁴ See Cutter, *supra* note 23; Sleiman, *supra* note 24.

²⁵ Wilkie, *supra* note 16.

²⁶ *Id.*; Alexander et al., *supra* note 19.

²⁷ *Id.*

²⁸ Gajendran et al., *supra* note 20.

²⁹ Alexander et al., *supra* note 19.

³⁰ Katherine Guyot & Isabel V. Sawhill, *Telecommuting Will Likely Continue Long After the Pandemic*, BROOKINGS INSTITUTION (Apr. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic>.

³¹ Michael Frakes & Melissa Wasserman, *Procrastination in the Workplace: Evidence from the US Patent Office* 28 (Nat’l Bureau of Econ. Research, Working Paper No. 22987, 2016).

Compounding the issue, many employees do not have the physical space or proper home circumstances to work remotely effectively.³² In a frequently-cited study standing for the proposition that remote workers are *more* productive than in-person workers, employees were not even allowed to participate unless they had a home office, the office was not a bedroom, and nobody but the employee was allowed into the office during the workday.³³ The author of that study, Stanford Economist Nicholas Bloom, explains that “working from bedrooms or common rooms, with noise from partners, family, and roommates” is a “productivity disaster.”³⁴ Yet, for many, that is the only option.³⁵

Let us briefly digress to consider the larger context of these arguments. By this point in the pandemic, most have many months of personal experience working or studying from home. Some likely read the downsides of remote work while nodding their heads in agreement and thinking they cannot wait to get back to the office. By contrast, others likely read these downsides while actively thinking of counters to each argument. We will discuss arguments in favor of remote work and then go on to reconcile the two competing views. As we will see, this “Team Office v. Team Sweatpants” dynamic has significant implications for employers’ remote work decisions.

C. Arguments for the Virtual Office

Although some studies and articles certainly point to the downsides of remote work, many others support a very different view. For example, a post-pandemic analysis of email, chat, and calendar data shows that remote work has often extended the workday by 10-20%.³⁶ While a longer workday does not necessarily mean higher productivity, many other experts have concluded that employees are indeed more productive from home.³⁷ Multiple studies have

³² See Gorlick, *supra* note 4.

³³ *Id.*

³⁴ *Id.*; see also Kevin Kniffin et al., *COVID-19 and the Workplace: Implications, Issues, and Insights for Future Research and Action*, AM. PSYCHOLOGIST, August 10, 2020, available at <https://psycnet.apa.org/fulltext/2020-58612-001.pdf> (“As large numbers of workers are forced to work from home, many face challenges due to such fundamental issues as not having space in one’s home to attend to work. Employees who live with others also face a larger set of challenges than those who live alone since they need to navigate others’ space as well.”).

³⁵ See Kniffin, *supra* note 35.

³⁶ See Ethan Bernstein et al., *The Implications of Working Without an Office*, HARV. BUS. REV. (Jul. 15, 2020), <https://hbr.org/2020/07/the-implications-of-working-without-an-office>.

³⁷ See, e.g., Julian Birkinshaw, Jordan Cohen & Pawel Stach, *Research: Knowledge Workers Are More Productive from Home*, HARV. BUS. REV. (Aug. 31, 2020), <https://hbr.org/2020/08/research-knowledge-workers-are-more-productive-from-home>; Kathy Gurchiek, *COVID-19 and Deciding Who Continues Working from Home*, SOC’Y FOR HUMAN RES. MGMT. (Jul. 7, 2020), <https://www.shrm.org/hr-today/news/hr-news/pages/covid19-and-deciding-who-continues-working-from-home.aspx> (citing an internal company study which

shown double-digit productivity increases when employees transitioned to working remotely.³⁸ As one researcher put it, “[T]he productivity improvements attributed to telecommuting are widely praised. There seems to be a consensus that dramatic reductions in unit costs and increases in hourly output are available, at least for some applications and in certain organizations.”³⁹

Those cost reductions primarily come from reducing or eliminating office space. As Ethan Bernstein argues in the Harvard Business Review, when employers “conceptualize office space as an add-on to virtual work, as opposed to the default where people work,” they can “substantially reduce their real estate footprint (and cost),” while refocusing the purpose of the physical office on what it does best, which is fostering connections between employees by facilitating team-building and spontaneous conversations.⁴⁰ This is, by the way, exactly how the New Model law firms use their office space.⁴¹ Supporting this approach, Gallup research finds that remote employees are more engaged and productive than in-person employees when they work from home the majority of the time but still have regular opportunities for in-person interaction with coworkers.⁴²

Having a remote workforce also enables employers to access a national and global talent pool, rather than limiting themselves to those who live, or are willing to move, near the office.⁴³ In a study of more than one thousand chief financial officers, “over a third of the respondents felt that availability of telecommuting was the most important inducement for attracting excellent

found that IT teams saw a 25% increase in productivity when working from home and sales teams saw a 13% increase in productivity when working from home); Gorlick, *supra* note 4; Hickman et al., *supra* note 15.

³⁸ *Id.*

³⁹ Stephen Ruth, *The Dark Side of Telecommuting—Is a Tipping Point Approaching?* 6 (George Mason Univ. Sch. Pub. Policy, Research Paper No. 2012-02, 2012), https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1406453 (“One researcher summarized over a dozen telecommuting success stories—American Express telecommuters generated 43 percent more business and handled 26 percent more calls than office-bound employees; IBM and Compaq Computer Company generating productivity improvements from 15-40 percent; Anderson Consulting employees spending 25 percent more face-to-face time with their customers once they gave up their permanent office spaces, etc. The Telecommuting Research Network report, like many others in the pro-telecommuting movement, is expansive about potential savings in a future environment where most of the workers telecommuting at least half the week: ‘If the 50 million potential telecommuters in the U.S. worked from home 2.4 days a week (the national average for those who already do), companies, communities, and individuals could collectively save over \$900 billion a year.’”)

⁴⁰ Bernstein, *supra* note 37.

⁴¹ Moradzadeh, *supra* note 14.

⁴² Hickman et al., *supra* note 15.

⁴³ See Frankiewicz et al., *supra* note 5.

employees and nearly half or the rest felt that it was the second-ranking employment inducement—only salary amount ranked higher.”⁴⁴

From an employee morale standpoint, studies have found that remote arrangements are effective at “reducing work-related stress and negative emotions, increasing confidence and well-being, and increasing communication [among employees].”⁴⁵ Moreover, in and of itself, eliminating lengthy commutes can have a significant positive psychological impact, allowing employees to spend more time with family and take back previously-stressful and uncompensated lost hours.⁴⁶ Studies also show that remote work significantly reduces attrition among those who work remotely, and more than half of non-remote employees say they would switch jobs for the opportunity to work from home.⁴⁷

D. One Size Does Not Fit All

At this point, you might find yourself questioning what to make of these conflicting findings. Does remote work result in socially-isolated, unproductive employees that cannot be effectively supervised? Or does it increase productivity, lower employee stress, boost collaboration, and benefit the bottom line? As we are about to discuss, the answer to both sides of this question is *yes*.

By surveying the current state of both academic and popular writing on remote work, a small sample of which is provided in this article, employers can find ample support for either approach, whether it is working remotely or calling everyone back to the workplace.⁴⁸ While comprehensive studies in the months and years to come may shed more light on the benefits and drawbacks

⁴⁴ Ruth, *supra* note 40.

⁴⁵ Frankiewicz et al., *supra* note 5.

⁴⁶ See Annette Schaefer, *Commuting Takes Its Toll*, SCI. AM. (Oct. 1, 2005), <https://www.scientificamerican.com/article/commuting-takes-its-toll>; Kate Lister, *Latest Work-At-Home/Telecommuting/Mobile Work/Remote Work Statistics*, GLOB. WORKPLACE ANALYTICS (Mar. 13, 2020), <https://globalworkplaceanalytics.com/telecommuting-statistics> (“We estimate that employees save between \$2,500 and \$4,000 per year by working at home half the time. Those savings are primarily due to reduced costs for travel, parking, and food. They are net of additional energy costs and home food costs. In terms of time, a half-time telecommuter saves the equivalent of 11 workdays per year in time they would have otherwise spent commuting. Extreme commuters save more than three times that about. These estimates assume a 75% reduction in driving on telework days.”)

⁴⁷ Gurchiek, *supra* note 38 (stating that remote work leads to lowest attrition rate in three years based on company study); Lister, *supra* note 47; Bloom, *supra*; Hickman et al., *supra* note 15.

⁴⁸ See, e.g., Golden, Veiga & Simsek, *supra* note 20 (“The literature on the impact of telecommuting on work–family conflict has been equivocal, asserting that telecommuting enhances work–life balance and reduces conflict, or countering that it increases conflict as more time and emotional energy are allocated to family”); Golden & Veiga, *supra* note 20 (“Although popular management wisdom has suggested that telecommuting enhances job satisfaction, research has found both positive and negative relationships”).

of remote work, many outcomes will likely be industry-, employer-, and employee-specific.⁴⁹

Some employees would love nothing more than to continue working from home forever, and perhaps those are the ones who are most productive out of the office. Other employees cannot wait to return to the physical workplace, and perhaps those are the ones who feel socially-isolated at home. Some management teams embrace remote work and are likely comfortable supervising a virtual workforce. Other management teams continue valuing face-time and may find it easier to collaborate in person.⁵⁰

Consider this finding from a 25,000-worker survey conducted by IBM's Institute for Business Value:

The forced shift to operating as a largely remote workforce has led to nearly 40 percent of respondents indicating they feel strongly that their employer should provide employee opt-in remote work options when returning to normal operations. And remote work appears to be growing on people, as more than 75 percent indicate they would like to continue to work remotely at least occasionally, while more than half—54 percent—would like this to be their primary way of working.⁵¹

Looked at from a different angle, 60% of respondents did not say they feel strongly about having remote work options, 25% did not say they are interested in continuing to work remotely, and 46% did not say they would like remote work to be their primary mode of working.

In a PwC survey of senior executives, 30% of respondents projected needing less office space in three years due to remote work.⁵² Likewise, a survey of Fortune 500 CEOs projects that 26% of employees will continue working from home indefinitely.⁵³ Again, looking at the other side of these

⁴⁹ See, e.g., Kniffin et al., *supra* note 35 (explaining that different personalities have different preferences regarding remote work); Sleiman, *supra* note 24 (explaining that different types of personalities thrive in different work environments).

⁵⁰ See Kniffin, *supra* note 35

⁵¹ *IBM Study: COVID-19 Is Significantly Altering U.S. Consumer Behavior and Plans Post-Crisis*, IBM NEWS ROOM (May 1, 2020), <https://newsroom.ibm.com/2020-05-01-IBM-Study-COVID-19-Is-Significantly-Altering-U-S-Consumer-Behavior-and-Plans-Post-Crisis>.

⁵² *When Everyone Can Work From Home, What's the Office For?*, PwC (Jun. 25, 2020), https://www.pwc.com/us/remotework?WT.mc_id=CT3-PL300-DM1-TR1-LS2-ND30-PR2-CN_FFGFY21-remotework&gclid=Cj0KCQiAkuP9BRcKARIsAKGLE8U4wE0yTc3j9XQG38LOLTKKescV0PjL2IG6R3-wY53aKGaCCMqzWpsaAnayEALw_wcB.

⁵³ Alan Murray, *Fortune 500 CEO survey: How are America's Biggest Companies Dealing With the Coronavirus Pandemic?*, FORTUNE MAG. (May 14, 2020, 2:30 AM), <https://fortune.com/2020/05/14/fortune-500-ceo-survey-coronavirus-pandemic-predictions>

numbers, roughly 70% of executives do not project needing less office space in three years, and Fortune 500 CEOs believe that 74% of employees will not work from home indefinitely.

As an attorney who regularly counsels management teams addressing remote work considerations, my experience certainly aligns with these findings. Employees and managers have different preferences regarding remote work. Similarly-situated management teams will take different approaches to their workforces, regardless of where the research lands.⁵⁴ Likewise, if given the choice, similarly-situated employees will make different decisions about where they work.⁵⁵

This element of human preference is why the future of the workplace will likely be a combination and interplay between remote and in-person arrangements—a collective “hybrid workplace,” in which some employers are primarily virtual, others remain primarily in-person, and yet others fall somewhere in between, allowing more employees to work from home more of the time, while still maintaining offices and encouraging in-person interaction.⁵⁶

III. THE LEGAL AND HUMAN RESOURCES IMPLICATIONS OF CHOICE: WHO DECIDES WHERE EMPLOYEES WORK?

When the relevant COVID-19 laws and regulations allow employees back to the physical workplace, employers will have five primary options regarding where employees work:⁵⁷

1. Every employee works remotely;
2. Every employee has the option to work remotely;
3. No employee works remotely;
4. Some employees are chosen by the employer to work remotely;
and
5. Some employees have the option to work remotely.

(stating that Fortune 500 CEOs say 26% of employees will continue working from home indefinitely).

⁵⁴ See *IBM Study*, *supra* note 52

⁵⁵ *Id.*

⁵⁶ See Cutter, *supra* note 23 (“more companies now envision a hybrid future, with more time spent working remotely, yet with opportunities to regularly convene teams”); *What 800 Executives Envision*, *supra* note 5; *When Everyone Can Work From Home*, *supra* note 53; Murray, *supra* note 54.

⁵⁷ See generally *Coronavirus Restrictions and Mask Mandates for All 50 States*, N.Y. TIMES (Dec. 5, 2020), <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> (last visited Jan. 22, 2021).

Of course, each of these options has variations, such as remote employees occasionally coming in for in-person events, in-person employees having some number of discretionary work-from-home days, and “blended work,” where employees split each week between their home and the office.⁵⁸

Variations aside, a critical question from both a legal and human resources standpoint concerns who owns the decision in each option:

Option	Decision-Maker
Every employee works remotely	Employer
Every employee has the option to work remotely	Employees
No employee works remotely	Employer
Some employees are chosen by the employer to work remotely	Employer
Some employees have the option to work remotely	Partially employer, partially employees

We have already discussed that similarly-situated employees have different preferences about where they work. Some prefer to work from home, others prefer to work from the office, and yet others prefer some combination of the two. By allowing employees to choose, employers empower individuals to tailor their work experience to their unique preferences.⁵⁹ This has a few key benefits from a human resources standpoint.

In the well-known Nicholas Bloom study referenced above, researchers analyzed a 16,000-person Chinese company which initially had a group of volunteers work from home and subsequently allowed all employees to opt in to working from home, at which point half the initial volunteers chose to go back to the office.⁶⁰ The study found that employees who worked from home were more productive than those who worked from the office, and employees who *chose* to continue working from home after trying it for a while were the

⁵⁸ Jason McCann, *Is a Blended Office Model the Future of Work?*, FORBES (Oct. 20, 2020, 9:40 AM ET), <https://www.forbes.com/sites/forbesbusinesscouncil/2020/10/20/is-a-blended-office-model-the-future-of-work/?sh=6e068e9b1002> (“We’re seeing a new model emerge, a ‘blended office model’ where companies take a flexible approach to in-office vs. remote work — allowing for a little of both. This model lets businesses support employee safety and well-being while also getting the benefits that come along with having a central, physical workspace. For many companies, this middle-ground approach may be here to stay.”)

⁵⁹ Kniffin, *supra* note 35.

⁶⁰ See Gorlick *supra* note 4; see also *The Remote Work Experiment that Upped Productivity 13%*, BBC: REMOTE CONTROL (Jul. 10, 2020), <https://www.bbc.com/worklife/article/20200710-the-remote-work-experiment-that-made-staff-more-productive> [hereinafter “The Remote Work Experiment”].

most productive of all.⁶¹ Notably, employees who choose to work remotely following the pandemic fall into the latter category.

In addition to boosting productivity, employee choice increases individual happiness and workplace morale.⁶² Consider this conclusion from Gallup's research on remote work:

Leaders and managers need to be aware that, as working remotely becomes more common, companies that can't accommodate it will become unusual. And those cultures, over time, may also struggle to keep their in-house workers engaged.

Engagement is not an exercise in making employees feel happy—it's a strategy for better business outcomes. It is true that engaged employees are more enthusiastic, energetic and positive, feel better about their work and workplace, and have better physical health, but engagement isn't a perk for leaders to dole out, it's a way leaders can improve KPIs. As decades of Gallup research shows, when employees are engaged their performance soars: Highly engaged workplaces can claim 41% lower absenteeism, 40% fewer quality defects, and 21% higher profitability.

And job flexibility [including giving employees the choice to work from home] increases engagement.⁶³

In his famous book, *The Happiness Advantage*, Shawn Achor cites extensive research about the benefits of employee happiness to workplace productivity.⁶⁴ Achor also goes to great pains to explain that giving employees choices and allowing them to be “masters of [their] own fate” is a key element of their happiness.⁶⁵

⁶¹ See The Remote Work Experiment, *supra* note 61.

⁶² See Shawn Achor, *The Happiness Advantage*, CROWN PUBL'G GRP. (Sept. 14, 2010), <https://crownpublishing.com/archives/8729>.

⁶³ Hickman et al., *supra* note 15.

⁶⁴ Achor, *supra* note 63.

⁶⁵ SHAWN ACHOR, *THE HAPPINESS ADVANTAGE: THE SEVEN PRINCIPLES OF POSITIVE PSYCHOLOGY THAT FUEL SUCCESS AND PERFORMANCE AT WORK* [PAGE NUMBER] (1st ed. 2010) (“Feeling that we are in control, that we are masters of our own fate at work and at home, is one of the strongest drivers of both well-being and performance. . . . [E]mployees who feel they have high levels of control at the office are better at their jobs and report more job satisfaction. These benefits then ripple outward. A 2002 study of nearly 3,000 wage and salaried employees for the National Study of the Changing Workforce found that greater feelings of control at work predicted greater satisfaction in nearly every aspect of life: family, job, relationships, and so on. People who felt in control at work also had lower levels of stress, work-family conflict, and job turnover. . . . Because feeling in control over our jobs and our lives reduces stress, it even affects our physical health. One sweeping study of 7,400 employees found that those who felt they had little control over deadlines imposed by other people had a 50 percent higher risk of coronary heart disease than their counterparts. In fact, this effect was

Research also shows that giving employees choice about where they work attracts new talent while reducing attrition.⁶⁶ More than half of employees say they would switch jobs for the opportunity to work from home, and about 30% would take a pay cut to have that option.⁶⁷ Put simply, employees place a high value on choice.

A. When Employers Own the Decision

Notwithstanding the above, for innumerable justifiable reasons, many employers prefer to own the decision of where employees work.⁶⁸ As with every decision handed down to employees by management, not every employee will be happy with the outcome or appreciate its underlying reasoning.⁶⁹

When employees are unhappy with management decisions about remote work, those decisions become susceptible to certain legal challenges, which are far less likely when employees have choice.⁷⁰ Thus, when employers make decisions about where employees work, they should bear in mind certain employment law and human resources considerations which will be quite different coming out of the pandemic than they were before the pandemic.

B. “Benevolent” Intentions, Discriminatory Results: When Choice is Required

While COVID remains a significant health concern, well-intentioned employers may be inclined to require older, disabled, and/or pregnant employees, all of whom the CDC has identified as being at higher risk of complications, to continue working from home. However, even when employers are motivated by “benevolent concern,” they cannot require vulnerable employees to work remotely while others appear in person.⁷¹ This

so staggering, researchers concluded that feeling a lack of control over pressure at work is as great a risk factor for heart disease as even high blood pressure.”).

⁶⁶ Lister, *supra* note 47; Bloom, *supra*; *The Remote Work Experiment*, *supra* note 61; Ruth, *supra* note 40.

⁶⁷ See Lister, *supra* note 47; Hickman et al., *supra* note 15.

⁶⁸ Cutter, *supra* note 23.

⁶⁹ See Ron Ashkenas & Matthew McCreight, *Stop Trying to Please Everyone*, HARV. BUS. REV. (Jul. 29, 2015), <https://hbr.org/2015/07/stop-trying-to-please-everyone>.

⁷⁰ See Scott Horton, *Happy Employees Don't Sue*, HORTON MGMT. LAW (Aug. 8, 2018), <https://hortonpllc.com/happy-employees-dont-sue/>.

⁷¹ See F. Beaumont Howard & Nicholas B. Corser, *Return-to-Work FAQs: How to Avoid Disability and Age Discrimination Claims*, LEXOLOGY (May 22, 2020) [hereinafter “Return-to-Work”], <https://www.lexology.com/library/detail.aspx?g=166b8283-e50a-4703-853a-17f98a323b13>; Adam M. Hamel, *Older and Pregnant Employees Have COVID-19 Workplace Protections*, MONDAQ (Aug. 11, 2020), <https://www.mondaq.com/unitedstates/discrimination-disability-sexual-harassment/975006/older-and-pregnant-employees-have-covid-19->

would run afoul of the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act, the Pregnancy Discrimination Act, and/or the Americans with Disabilities Act (ADA).⁷²

The Equal Employment Opportunity Commission (EEOC) does encourage employers to give all employees the option to request an accommodation.⁷³ Specifically for older employees, the EEOC allows employers to give extra flexibility to those over age 65 “even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.”⁷⁴ The key is for it to be each employee’s choice to request an accommodation.

C. *When is Remote Work a Reasonable Accommodation?*

While employers cannot attempt to protect older, pregnant, or disabled employees by barring them from the workplace, employers may be *obligated* to allow remote work as a reasonable accommodation. The ADA requires employers to provide accommodations to enable otherwise-qualified individuals with disabilities to complete the essential functions of their job, except when an accommodation would cause an undue hardship to the employer.⁷⁵

workplace-protections; *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EQUAL EMP’T OPPORTUNITY COMM’N (Sept. 8, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited Jan. 23, 2021); Isaac Mamaysky, *Ask the EEOC: Key Takeaways for Employers from the March 27th Webinar*, WESTCHESTER CTY. BAR ASS’N: COVID-19 (CORONAVIRUS) PUBL’NS (Mar. 29, 2020), <https://www.wcbany.org/docDownload/1582121>.

⁷² See Return-to-Work, *supra* note 72.

⁷³ *What You Should Know About COVID-19 and the ADA*, *supra* note 72.

⁷⁴ *Id.* (“The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19. Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison. Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.”)

⁷⁵ See, e.g., *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, EQUAL EMP’T OPPORTUNITY COMM’N (Oct. 17, 2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_2_.

In an insightful article published in the University of Pennsylvania's Regulatory Review, Brandy Wagstaff and Jacob Quasius explain that, prior to the pandemic, courts often denied remote work requests based on the rationale that an employee could not perform the essential functions of the job from home.⁷⁶ They found that courts "deferred heavily to employer concerns about telework [and placed] substantial weight on the importance of employee-supervisor relationships and face-to-face interactions with clients, customers, and colleagues."⁷⁷

Of course, these decisions came down at a time when most judges—arguably not the most tech-savvy crowd—had never worked from home themselves nor personally experienced the technological breakthroughs that have allowed a seamless transition to the virtual courtroom.⁷⁸ Now that judges are more experienced in remote work, they may take a very different view towards allowing it as a reasonable accommodation.⁷⁹

Wagstaff and Quasius make the following prediction for the post-pandemic workplace:

[E]mployers who argue that telework accommodations create undue hardships will face a more difficult hurdle when those employers successfully implemented telework during the pandemic and retain the infrastructure to support telework. Employees, therefore, may be more likely to succeed post-pandemic in persuading a court that telework accommodations are reasonable under EEOC guidelines.⁸⁰

Employment law practitioners foresee the same trend.⁸¹ As a Reed Smith publication explains, "Employers will likely also see a rise in claims

⁷⁶ Brandy L. Wagstaff & Jacob Quasius, *The ADA, Telework, and the Post-Pandemic Workplace*, REG. REV. (Sept. 7, 2020), <https://www.theregreview.org/2020/09/07/wagstaff-quasius-ada-telework-post-pandemic-workplace/>.

⁷⁷ *Id.*

⁷⁸ Steven Lerner, *Virtual Courtrooms Prove to be Both Curse and Blessing*, LAW360 (Jan. 8, 2021), <https://www.law360.com/access-to-justice/articles/1339460/virtual-courtrooms-prove-to-be-both-curse-and-blessing> (The spokesman for the New York State Unified Court System told Law360: "While early on there were some technological issues, more of a lack of familiarity with Skype or more recently Microsoft Teams, which we migrated to, now judges, attorneys and litigants have become used to virtual proceedings").

⁷⁹ *Id.* (A principal court management consultant with the National Center for State Courts told Law360 she "doesn't think courts have slowed down, saying many court systems in states such as Florida, Arizona, Illinois and Texas may have actually had more hearings during the pandemic").

⁸⁰ Wagstaff et al., *supra* note 77.

⁸¹ Lori Armstrong Halber & Leora Grushka, *Employers Beware: Post-Pandemic Litigation Traps*, *Employment Law Watch* (May 28, 2020),

brought by individuals who allege that their employers failed to provide them an accommodation based on a condition that makes them highly susceptible to contracting COVID-19, or at a higher risk of severe illness if infected.”⁸² The attorneys go on: “This will be especially true given that many employees have been teleworking for the last two months and have demonstrated that they can perform the essential functions of their jobs from the safety of their home.”⁸³

Likewise, the EEOC advises that COVID-related remote work can serve as a trial period to show that a particular employee with a disability successfully performed the essential functions of the job remotely—and, the EEOC advises, employers “should consider any new requests in light of this information.”⁸⁴

For all these reasons, the traditional arguments used to deny remote work as a reasonable accommodation might not hold up following our collective experience of working from home. When an employee has choice about where they work, defending the rejection of a remote work accommodation becomes moot.

D. When Employees are Afraid to Come In

A related consideration arises when employees are afraid to come to the workplace due to COVID. If the fear stems from a disability, then we go back to the ADA considerations discussed above. Another angle is that the Occupational Safety and Health Administration (OSHA) creates a right to refuse work to prevent imminent danger of death or serious injury.⁸⁵ In this

<https://www.employmentlawwatch.com/2020/05/articles/employment-us/employers-beware-post-pandemic-litigation-traps/>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *What You Should Know About COVID-19 and the ADA*, *supra* note 72 (“Assuming all the requirements for . . . a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request . . . [T]he period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.”)

⁸⁵ See *Workers’ Right to Refuse Dangerous Work*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/right-to-refuse.html> (last visited Dec. 5, 2020) [hereinafter “Right to Refuse Dangerous Work”]; Rachel S. Arnov-Richman, *Is there an Individual Right to Remote Work? A Private Law Analysis 2* (Univ. of Fla. Levin Coll. of Law Research Paper No. 20-46, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727532; Allen Smith, *What to Do When Scared Workers Don’t Report to Work Due to COVID-19*, SOC’Y FOR HUMAN RES. MGMT (Apr. 20, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-when-scared-workers-do-not-report-to-work.aspx> (stating that employee must have a “specific fear of infection that is based on fact—not just a generalized fear of contracting COVID-19 infection in the workplace” and “[t]he

case, OSHA protects employees against retaliation for staying home, but it does not create any ongoing right to remote work.⁸⁶

The consensus among practitioners is that, outside of the reasonable accommodation context, employers have no legal obligation to allow scared employees to work remotely.⁸⁷ However, where remote work is possible, this is likely among the situations in which the legal answer should not dictate the human resources outcome.⁸⁸

From the standpoint of employee relations, employee happiness, and workplace morale, employers would be well-served to allow employees to work from home when they are scared to come in.⁸⁹ Moreover, certain employers have made national headlines by terminating employees who refused to work because they were afraid.⁹⁰ Those employers might not have violated a law, but they still faced significant fallout from the decision. As two HR experts write in the Harvard Business Review: "Employers' attention or inattention to all aspects of their employees' well-being during this chapter will have reputational consequences for many years to come."⁹¹

employer cannot address the employee's specific fear in a manner designed to ensure a safe working environment").

⁸⁶ See Right to Refuse Dangerous Work, *supra* note 86.

⁸⁷ Allen Smith, *When is Fear a Protected Reason for Not Coming to Work?*, SOC'Y FOR HUMAN RES. MGMT (May 26, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-when-is-fear-a-protected-reason.aspx> ("[D]isciplining or firing employees who refuse to come in out of a generalized fear likely is permissible in many circumstances . . . Employers usually are not required to allow employees to continue to work remotely if the employer can demonstrate that it has complied with all appropriate measures to reduce the risk of exposure in the workplace."); *What You Should Know About COVID-19 and the ADA*, *supra* note 72 (explaining that employees are not entitled to accommodations to protect family members with disabilities, but nothing stops an employer from offering additional flexibilities beyond what the law requires).

⁸⁸ Gurchiek, *supra* note 38; Lin Gensing-Pophal, *When Dealing with Sick Leave, It's a Whole New World*, HR DAILY ADVISOR (May 27, 2020), <https://hrdailyadvisor.blr.com/2020/05/27/when-dealing-with-sick-leave-its-a-whole-new-world>.

⁸⁹ *Id.*

⁹⁰ Jack Healey, *Workers Fearful of the Coronavirus Are Getting Fired and Losing Their Benefits*, N.Y. TIMES (Jun 10, 2020), <https://www.nytimes.com/2020/06/04/us/virus-unemployment-fired.html>; *How To Convince Your Boss To Let Everyone Work From Home During The Coronavirus*, FAST CO. (Mar. 20, 2020), <https://www.fastcompany.com/90480183/how-to-convince-your-boss-to-let-everyone-work-from-home>.

⁹¹ Sarah Clayton & Anthea Hoyle, *Help Your Employees Manage Their Reentry Anxiety*, HARV. BUS. REV. (Jun. 24, 2020), <https://hbr.org/2020/06/help-your-employees-manage-their-reentry-anxiety>.

E. Objective Policies and Disparate Impact

As we have discussed, state and federal anti-discrimination laws dictate that employees cannot be treated differently based on protected characteristics such as pregnancy, disability, and age. To comply with these laws, employers should have clear, objective reasons for allowing some employees to stay home and requiring others to come in, especially where employers give employees in similar job roles different remote work options.⁹² As a law firm publication explains:

[E]mployers who allow some but not all of their employees to work remotely—whether as a result of COVID-19 or for other reasons—need to be sensitive to the potential for claims under Title VII of the Civil Rights Act of 1964, which can arise from perceived discriminatory application of decisions regarding who is and is not permitted to work from home. In an effort to avoid these potential claims, employers should make decisions about who can work from home on a department or position basis, rather than on an individual employee basis, and document the reasons for any such decisions.⁹³

What are some other examples of objective criteria on which to base remote work decisions? In addition to determining that only certain job roles or departments are eligible to work remotely, employers may decide that all employees who have been with the employer for a certain number of years can work remotely, or the highest performers can work remotely.⁹⁴

⁹² See Julie Wenner & Lauran Hollender, *Legal and Practical Considerations for Remote Employees*, LOWENSTEIN SANDLER (2019), <https://www.lowenstein.com/media/5216/q3-2019-crf-news-legal-and-practical-considerations-for-remote-employees-jwerner-lhollender.pdf> (“In addition, an employer who offers remote working opportunities to some employees, must be careful to offer those opportunities fairly to all. For example, an employer who offers remote work access to working mothers should offer the same to similarly situated working fathers or risk allegations of unlawful discrimination.”); Rita Zeidner, *Coronavirus Makes Work from Home the New Normal*, SOC’Y FOR HUMAN RES. MGMT (Mar. 21, 2020), <https://www.shrm.org/hr-today/news/all-things-work/pages/remote-work-has-become-the-new-normal.aspx>.

⁹³ Hugo deBeaubien & W. Jan Pietruszka, *Client Alert: Employer Considerations for Remote Workers During and After COVID-19*, JD SUPRA (Jun. 8, 2020), <https://www.jdsupra.com/legalnews/client-alert-employer-considerations-47389>.

⁹⁴ While remote work decision-making is a fairly new area of law on which little has been written, we can draw analogies from the more commonly explored topic of employee separations, which entail the same legal obligation to not treat employees differently based on protected characteristics. Extrapolating from the one context to the other, we can identify examples of objective criteria on which employers can based remote work decisions. See, e.g., Allen Smith, *How Do You Decide Who Stays and Who Goes?*, SOC’Y FOR HUMAN RES. MGMT (Nov. 12, 2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/layoffs-selection-criteria.aspx>.

Regarding the final approach, employers certainly have latitude to give privileges to high-performing employees, but employers should bear in mind that performance-based decisions can be subjective and thus lead to legal challenges.⁹⁵ One practitioner explains that when employers rely on performance-based criteria they should minimize subjectivity by looking at factors like sales targets and other objective performance metrics rather than managers' opinions.⁹⁶

Another key consideration concerns disparate impact, which arises when neutral policies have a disproportionately negative impact on a protected group.⁹⁷ For example, if an employer has objective remote work policies but all the older employees must stay home while all the younger employees can choose to come to the office, then the employer may need to revisit its approach.⁹⁸

A related consideration applies to the treatment of employees who choose to work from home. If an employer's remote workforce is "primarily comprised of women caring for children at home or disabled employees who have requested to work from home to accommodate their disability," and those employees are not given the same compensation or other opportunities as employees who work from the office, then it raises disparate impact concerns.⁹⁹ As we have already discussed using the well-known Yahoo! example, one of the challenges of having a mix of in-person and remote employees is the risk of having two separate corporate cultures emerge in one company. This means that, in addition to looking at compensation, employers should be especially mindful of remote employees receiving the same benefits as in-person employees in

⁹⁵ *Id.* ("The more objective the selection criteria, the more defensible they are if later challenged in court Seniority-based criteria are typically easier to defend than subjective performance-based criteria If an employer relies on performance-based criteria in selecting who will be laid off, it should minimize the level of subjectivity. For example, performance-based criteria that account for objective sales targets or other objective performance metrics are easier to defend in court than performance-based criteria that consider only managers' opinions.").

⁹⁶ *Id.*

⁹⁷ See *Enforcement Guidance on Pregnancy Discrimination and Related Issues*, EQUAL EMP'T OPPORTUNITY COMM'N (Jun. 25, 2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#:~:text=2.-,Disparate%20Impact,and%20consistent%20with%20business%20necessity> (discussion of disparate impact in pregnancy context); *What Are Disparate Impact And Disparate Treatment?*, SOC'Y FOR HUMAN RES. MGMT ([2020]), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disparateimpactdisparatetreatment.aspx> (last visited December 5, 2020).

⁹⁸ See Wenrer et al., *supra* note 93; Zeidner, *supra* note 93.

⁹⁹ See Wenrer et al., *supra* note 93.

terms of training, opportunities for development and promotion, inclusion in workplace culture, and similar considerations.¹⁰⁰

F. Breach of Contract

To this point, we have discussed the so-called “public law” or statutory bases that weigh in favor of allowing employees to choose where they work. Another important consideration is that contracted employees (those who are not at-will) may have a contractual right to a particular work arrangement.¹⁰¹ Depending on the details of a particular employment agreement, an employer-mandated change to work location could amount to breach of contract.¹⁰²

For example, in the Canadian case of *Hagholm v. Coreio*, the plaintiff-employee had been allowed to work from home three days a week for many years.¹⁰³ When her company was sold, the new owners required her to come to the office every day.¹⁰⁴ Under Canadian law, the court found that the employee had a contractual right to remote work and it was a constructive dismissal for the employer to unilaterally change the terms of her contract.¹⁰⁵ Notably, the court came to this conclusion even though the remote arrangement was not a written term of her contract, but rather implied after so many years of the practice.¹⁰⁶ An American court could certainly apply similar reasoning.

¹⁰⁰ See Wenrer et al., *supra* note 93 (“Remote employees who perform the same work as on-site employees are arguably entitled to be treated the same when it comes to the terms and conditions of employment. Companies should ensure that remote workers are being exposed to the same opportunities for training, mentoring, and advancement as others to avoid claims of discrimination. Equal pay laws require that employees who are performing the same work be paid the same.”)

¹⁰¹ See Arnow-Richman, *supra* note 86; see also Charles Wynn-Evans & Emma Byford, *The Future of Remote and Homeworking*, LEXOLOGY (Nov. 5, 2020), <https://www.lexology.com/library/detail.aspx?g=4e1b97c2-ea8a-45fa-9916-06df09b2f138> (analyzing the issue under UK law); Stephen Shaddock, *Working Remotely or “Remotely Working”? What Every Employer Should Know (And Do)*, MONDAQ (Feb. 7, 2019), <https://www.mondaq.com/canada/employee-rights-labour-relations/778852/working-remotely-or-remotely-working-what-every-employer-should-know-and-do> (analyzing the issue under Canadian law).

¹⁰² See Arnow-Richman, *supra* note 86.

¹⁰³ See *Hagholm v. Coreio Inc.*, 2017 ONSC 7713, para. 6 (Can.); see also Shaddock, *supra* note 102; Julia Bell, *Breach of Telecommute Agreement Resulted in Constructive Dismissal: Hagholm v. Coreio Inc.*, 2017 ONSC 7713, varied 2018 ONCA 633, EMP’T LAW ALL. (Nov. 26, 2018), <https://www.ela.law/firms/ropergreyell/articles/breach-of-telecommute-agreement-resulted-in-constructive-dismissal-hagholm-v-coreio-inc-2017-onsc-7713-varied-2018-onca-633>.

¹⁰⁴ *Hagholm*, 2017 ONSC 7713 at para. 9.

¹⁰⁵ *Id.* at para. 78.

¹⁰⁶ *Id.* at para. 77.

Considering the reverse of this, it is not uncommon for employment agreements to guarantee an employee a specific office or a particular type of office.¹⁰⁷ Likewise, as we see in *Hagholm*, a years-long practice could also be deemed an implied term of the contract. If an employee has a contractual right to a particular office arrangement, and the employer subsequently decides that the employee must work remotely, then it certainly raises a colorable breach of contract argument.

As a practical matter, this consideration only applies to a small minority of employees who are contracted rather than at-will. As Professor Rachel Arnow-Richman explains in the ABA Journal of Labor and Employment Law: “Most employees are at will: they have no contractual rights to continued employment, let alone to particular working conditions. If an employer does not accept a remote arrangement, the employee’s recourse is to quit. It is a bitter pill”¹⁰⁸—and, we might add, likely one that has negative human resources consequences and ripple effects on the morale of other employees.¹⁰⁹

G. Geographic Considerations

We have now discussed the employment law implications of who owns the choice regarding where employees work. Certain other considerations apply to remote employees regardless of who makes the decision of where they work. Chief among them is that, when employees work from home for a prolonged period, both employees and employers become subject to the employment laws of the states in which employees live.¹¹⁰

Let us consider a business that is based in New York and has employees who live in Connecticut and New Jersey. When those employees only worked from the office, the business was subject to New York employment laws, but when those employees work from home, the business becomes subject to Connecticut and New Jersey employment laws as well. Now let us imagine this business also has a D.C. office with employees who live in Maryland and

¹⁰⁷ See, e.g., Letter from Peter Frank, Chairman, Atl. Express Transp. Grp., to Domenic Gatto, President & CEO, Atl. Express Transp. Grp. (Mar. 2, 2005), https://www.sec.gov/Archives/edgar/data/1035423/000104746905005558/a2153097zex-10_4.htm (“Executive shall continue to occupy the same corner office which he has occupied during the Term of the Prior Agreement”).

¹⁰⁸ Arnow-Richman, *supra* note 86.

¹⁰⁹ See Clayton, *supra* note 92; Gurchiek, *supra* note 38.

¹¹⁰ See Ian Wahrenbrock & Julia Judish, *Pandemic Work-From-Home Arrangements Have Tax and Employment Law Consequences*, PILLSBURY ALERT (Nov. 30, 2020), <https://www.pillsburylaw.com/en/news-and-insights/Remote-Work-Tax-Employment-Concerns.html>; *6 compliance considerations for remote employees*, WOLTERS KLUWER (Sept. 1, 2020), <https://www.wolterskluwer.com/en/expert-insights/6-compliance-considerations-for-remote-employees>.

Virginia. The employer, which was once subject to two states' employment laws, is now subject to six states' employment laws.¹¹¹

State employment laws differ in significant ways, so employers may have new obligations and employees may have new rights and entitlements in a wide range of areas, including the following:

1. *Minimum Wage and Overtime Obligations*: The applicability of new state laws may require salary increases for employees if their home state has a higher minimum wage and different overtime requirements than the state where the employer is located. State minimum wage laws often differ and may have significant implications for employee compensation.¹¹²
2. *Family, Medical, Pregnancy, and COVID Leave Entitlements*: Employees may be eligible for different types of leave in their home state than in the state where the employer is located. From new COVID leave laws to existing family and pregnancy leave, employees' home states may have more expansive leave entitlements than the employer's home state.¹¹³
3. *Expense and Technology Reimbursements*: Certain states require employers to compensate employees for internet, phone service, and other equipment used in furtherance of their work. Employers should also be aware of a baseline requirement under federal law to reimburse non-exempt employees whose business expenses put their salary below minimum wage. This becomes especially relevant since minimum wage obligations may change depending on the state from which an employee works.¹¹⁴

¹¹¹ See Wahrenbrock, *supra* note 111.

¹¹² See generally *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LABOR WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/flsa> (last visited Apr. 24, 2021); *State Minimum Wage Laws*, U.S. DEP'T OF LABOR (Oct. 1, 2020), <https://www.dol.gov/agencies/whd/minimum-wage/state>; DeBeaubien, *supra* note 94; *New York State's Minimum Wage, Business Responsibilities Under the Law*, N.Y. STATE, <https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage> (last visited Jan. 10, 2021) (While the federal minimum wage is \$7.25 per hour, "[t]he Minimum Wage Act . . . requires that all employees in New York State receive at least \$12.50 an hour beginning December 31, 2020. . . . Rates will increase each year until they reach \$15.00 per hour") (emphasis omitted).

¹¹³ *Family Medical Leave*, NAT'L CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> (last visited December 5, 2020).

¹¹⁴ See *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/flsa/pandemic#q11>; *Navigating Expense Reimbursement for "Work From Home" Employees*, MCGUIREWOODS (Mar. 30, 2020), <https://www.mcguirewoods.com/client-resources/Alerts/2020/3/navigating-expense->

4. *Expanded Unemployment Insurance and Workers Compensation Coverage:* The employer's unemployment and workers compensation coverages should both apply in the state where employees are located.¹¹⁵
5. *Corporate Registration Obligations:* When employers have employees working in new states, those states may have corporate law requirements for the employer to register as a foreign entity, with corresponding annual filing obligations, among other requirements.¹¹⁶
6. *New Tax Obligations:* When employees work from their home state, those employees may create a new tax nexus, leading to new tax obligations for the employer.¹¹⁷

reimbursement-for-work-from-home-employees (“Employees may be incurring necessary expenses for tools and equipment incidental to their working remotely, such as personal cell phone and computer usage, high-speed internet access, use of telecommunications and timekeeping applications, printer consumables like ink or toner cartridges and paper, and day-to-day office supplies and related equipment that are typically provided by the employer and used by the employee when not working remotely (i.e., pens, pads, paperclips and staples). For instance, an employee working from home who uses his or her personal cell phone to make and receive work-related calls, or personal printer paper and ink for business-related correspondence, may need to be separately reimbursed for these types of expenses, depending on the jurisdiction.”); Carter Norfleet & Shareef Farag, *FAQs: Expense Reimbursement Amidst the New Work-From-Home Normal*, LEXOLOGY (Aug. 24, 2020), <https://www.lexology.com/library/detail.aspx?g=4f55a3c6-96c5-44ea-8fc8-25384680c882>.

¹¹⁵ Stephen Miller, *Out of State Remote Work Creates Tax Headaches for Employers*, SOC’Y FOR HUMAN RES. MGMT. (Jun. 16, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/out-of-state-remote-work-creates-tax-headaches.aspx> (“[States] generally require that the employer register for and obtain workers’ compensation insurance in the state where the employee is performing the services Failure to do so may expose the employer to liability, including penalties for noncompliance with the state’s workers’ compensation laws. . . . For remote workers employed by an out-of-state business, a state where the employee is working ‘generally requires that the employer register for and pay the unemployment insurance premiums for the employee through the state unemployment insurance program where the employee is performing the services’ Failure to do so may expose the employer to liability, including penalties for noncompliance with the state’s unemployment insurance laws.”)

¹¹⁶ See Wahrenbrock, *supra* note 111.

¹¹⁷ See Miller, *supra* note 116 (“When an employee is working outside of the state or states where the employer operates, it ‘creates physical nexus, subjecting the employer to the tax regimes of that jurisdiction’ Employers could be subject to state income taxes, gross receipts taxes, and sales and use taxes Tax requirements imposed at the city or county level could come into play.”); Mike LaSusa, *Employers Fret Compliance Struggles Amid Virus, Report Says*, LAW360 (Nov. 18, 2020), https://www.law360.com/employment/articles/1329241?cn_pk=8c844b15-ce5f-415e-82d6-11c76497408e&utm_source=newsletter&utm_medium=email&utm_campaign=custom; Multi-State Laws Comparison Tool, SOC’Y FOR HUMAN RES. MGMT.,

While a comparison of state employment laws could easily become the topic of its own article, the key takeaway is that many previously single-state employers have now become multi-state employers, and many employers that previously operated in just a few states now operate in many more states.¹¹⁸ Employers should thus be conscious of their obligation to comply with all the different employment laws of the states in which their remote employees are located. For their part, employees should be conscious of potential new rights and entitlements in their home states, including new rights to paid leave and higher minimum wage, among others.

CONCLUSION

I was recently on a Zoom call when my toddlers “busted down the door,” as they like to say. This was not the kind of call where I needed to shoo the kids away, so I picked them up and introduced them to my colleagues, probably turning a little red in the process. At that point, the group set aside the formal agenda and spent a few minutes discussing our families. By the end of that meeting, we felt much closer than we ever had while sitting together in person for countless hours prior to the pandemic.

“For those with the skills to work remotely,” goes an argument in the Harvard Business Review, “the crisis has turbocharged an unparalleled shift toward more flexible work and being able to live *one life* that better blends work and home.”¹¹⁹ To many, that is exactly the appeal of remote work.¹²⁰

And yet, we should also appreciate that the *last* thing some employees want is to “better blend work and home.”¹²¹ Many employees prefer to go to the office every day, make a clear separation between their personal and

<https://www.hrconnection.com/Home/tabid/5246186/language/en-US/Default.aspx>;

Wahrenbrock, *supra* note 111; 6 *Compliance Considerations*, *supra* note 111.

¹¹⁸ See Wahrenbrock, *supra* note 111; 6 *Compliance Considerations*, *supra* note 111.

¹¹⁹ Frankiewicz et al., *supra* note 5.

¹²⁰ See Castle, *supra* note 4 (“It was easy enough for the working world to pretend our home lives didn’t exist when we were all going into the office, but now that most people who can work from home are being asked to do so, it’s become painfully obvious that there’s a disconnect between our expectations of employees and their bandwidth as human beings. . . . If we want to continue supporting diverse teams now and after this pandemic is over, then we need to embrace the fact that people have responsibilities beyond their job titles, and that those responsibilities, however chubby their cheeks may be, influence stress levels, work hours, and, yes, even our business meetings sometimes. There’s also an unscientific good that comes from an interrupted call, whether it’s my coworker’s 8-year-old reading from her joke book or my cat walking across my computer for the umpteenth time, and that’s not something we should throw away because we’re trying to conduct ‘business as usual.’ . . . So please, put your kid on. I would love to hear a joke.”).

¹²¹ Kniffin, *supra* note 35.

professional lives, and then leave work *at work* when they go home—never introducing their kids to their coworkers in the process.¹²²

Of course, there is no right or wrong answer here, but merely different preferences and inclinations, which play out in remote work decisions just as they do in every other area of human resources and employment law. What are the implications of these differing preferences? As one practitioner aptly put it:

I've been representing companies regarding employment law matters for almost 13 years. Based on this experience, I want to share an observation. It's a relatively obvious, simple, and practical one. Yet, I believe it will help many employers if they take it to heart. So, here it is: Happy employees seldom make legal trouble for their employers!¹²³

As it happens, extensive research shows that happy employees are also the most productive.¹²⁴ At its core, this is what makes choice so important. People are different, and those differences influence where they prefer to spend their days and how successful they are in those settings. As employers make some significant decisions about the future of their workforces, they would be well-served to keep the goal of employee happiness as a beacon—both for its own sake and for its corresponding legal and business benefits.

¹²² *Id.* (“[S]egmentors’ tend to enjoy work and perform better when they are able to keep a clear boundary between work and non-work while ‘integrators’ tend to prefer toggling between different activities and are less stressed by the commingling of work and non-work boundaries. Awareness of such variation is particularly valuable when [work from home] is required.”); Elizabeth Grace Saunders, *How to Leave Work at Work*, HARV. BUS. REV. (Feb. 3, 2020), <https://hbr.org/2020/02/how-to-leave-work-at-work>.

¹²³ Horton, *supra* note 71.

¹²⁴ See ACHOR, *supra* note 66; Hickman et al., *supra* note 15.