Reconsidering the "Full-Time Face-Time Norm" After COVID-19

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Michelle Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 **Wash. U. J. L. & Pub. Pol'y** 203 (2021).

There are plenty of legal rules that were originally born from faulty reasoning and that somehow ended up becoming firmly entrenched despite their flaws. One hopes that among the many changes it has brought, COVID-19 will cause courts and other legal authorities to revisit well-established legal rules, the shortcomings of which have been exposed during the pandemic. Professor Michelle Travis discusses one of these areas in her forthcoming article *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*.

Travis takes aim at what she calls the “full-time face-time norm,” a term she coined fifteen years ago. The phrase describes “the judicial presumption that work is defined by long hours, rigid schedules, and uninterrupted, in-person performance at a centralized workspace.” (P. 203.) This presumption appears repeatedly in reasonable accommodation cases under the Americans with Disabilities Act (ADA). Courts often use some variation of the phrase “attendance is an essential function” almost as boilerplate when explaining why a plaintiff is not entitled to a reasonable accommodation such as telecommuting or a flexible work schedule. One also sees this “full-time face-time norm” appear in Title VII disparate impact cases involving female employees who also have primary caregiving responsibilities. In these cases, courts often treat an employer’s practice of requiring full-time face-time attendance as a basic component of a job, rather than the type of “particular employment practice” that is subject to challenge as part of a disparate impact claim.

As Travis discusses, this approach is flawed from a purely legal perspective. For example, the fact that courts treat regular in-person attendance as an “essential function” of a job is significant because employers are not required to accommodate an employee with a disability by eliminating an essential function. But as ADA regulations make clear, an “essential function” is a fundamental “task or “duty,” like emptying the trash, making deliveries, or counseling a client. Requiring an employee to be in the office from 9 to 5 every day is an employment practice or requirement, not a “task,” “duty,” or “function.” The effect of the misinterpretation is to shield employers from the ADA’s reasonable accommodation requirement, which might otherwise require an employer to allow for telecommuting or flexible work schedules.

This has been the approach courts have taken almost since the ADA became effective in 1992. The fact that Congress did not revisit the issue when it amended the statute in 2008 suggested that, sadly, the “full-time face-time norm” would remain the norm. Likewise, the assumption that “full-time face-time” is a basic component of employment has become embedded in Title VII caselaw.

And then came the pandemic. Travis reviews how COVID-19 forced employers to jettison old workplace practices in order to adjust to a world in which regular full-time face-time work was (at least temporarily) potentially dangerous. She observes that “[t]he successful shift of millions of employees into remote and flexible work arrangements due to COVID-19 has rendered indefensible the judicial treatment of full-time face-time requirements as ‘essential job functions’ under the ADA.” (P. 218.) She cites statistics capturing not just the number of employees who have worked from home during the pandemic, but statistics that seem to rebut some of the most common arguments against permitting telecommuting, flexible work schedules, and similar working arrangements.

For example, one of the most common objections to telecommuting is that it will result in a lack of productivity. Yet,

Travis describes one study, among many, in which “two-thirds of managers reported that employees increase their productivity when working from home, and eighty-six percent of employees reported being most productive when working alone.” (P. 219.) Indeed, one of the more interesting aspects of the article is the extent to which the data that Travis relates involving the workplace in the COVID-19 world undercuts the traditional arguments against treating telecommuting and similar arrangements as reasonable accommodations.

Travis reports that “employees are filing more claims against employers alleging failure to accommodate their disabilities than any other COVID-related claim.” (P. 225.) As these claims make their way through the courts, judges will have an opportunity to revisit the full-time face-time norm. While there are certainly jobs for which traditional full-time face-time attendance is necessary, the pandemic has demonstrated to millions of employers and employees alike that rigid adherence to past practices and policies is not necessarily essential to a productive workforce. Title VII’s disparate impact theory and the ADA’s reasonable accommodation requirement are designed, in part, to force employers to re-evaluate whether past practices and policies are truly essential. Travis’ article provides the sort of data-informed legal and policy arguments that one would hope would cause courts to consider their own past approaches when it comes to the full-time face-time norm.

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